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## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **20 CFR Parts 651, 653, 655, and 658**

#### **Wage and Hour Division**

#### **29 CFR Part 501**

**[DOL Docket No. ETA-2023-0003]**

**RIN 1205-AC12**

### **Improving Protections for Workers in Temporary Agricultural Employment in the United States**

**AGENCY:** Employment and Training Administration and Wage and Hour Division, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor (Department or DOL) proposes to amend its regulations governing the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of these nonimmigrant workers. The revisions proposed in this notice of proposed rulemaking (NPRM or proposed rule) focus on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators.

The Department's proposals to strengthen protections and improve compliance are aimed at ensuring that the Department can better fulfill its statutory responsibility under 8 U.S.C. 1188(a)(1) to certify that (1) there are not sufficient workers who are able, willing, and qualified,

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and who will be available at the time and place needed, to perform the labor or services involved in the petition; and (2) the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. The proposed changes include stronger protections for workers who advocate for better wages or working conditions on behalf of themselves and their coworkers, including certain protections for organizing and engaging in concerted activity for the purpose of mutual aid and protection, as well as a new definition of the existing term "terminated for cause" that is intended to ensure that any termination for cause is just and fair. The proposed changes also would require disclosure of additional information about individuals and entities involved in the recruitment of foreign workers and those who manage or supervise workers at a place of employment or own or operate a place of employment included in the *H-2A Application for Temporary Employment Certification* (H-2A Application), which would enhance transparency in the foreign labor recruitment chain and the Department's ability to monitor program compliance everywhere that work is performed. The proposed changes also include expedited debarment procedures and revised procedures for applying orders of debarment to successors in interest to debarred employers, agents, and attorneys, both of which would permit the Department to more effectively and expeditiously hold bad actors accountable for violations. In addition, the proposed changes would codify the Department's test to determine if two ostensibly different employers are in fact a single employer for purposes of assessing temporary or seasonal need and for program compliance. The changes proposed in this NPRM also would enhance worker protections and the enforcement capabilities of the Department's Wage and Hour Division (WHD) by clarifying and revising various regulatory provisions that have been subject to

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misinterpretation, including prohibitions on passport withholding and pay disclosure requirements. The proposed changes also would revise the H-2A program regulations and Wagner-Peyser Act regulations to strengthen protections for workers in the event the employer must delay the start date due to unforeseeable conditions like travel delays or crop conditions at the time work is supposed to begin, and to clarify and strengthen the discontinuation of services regulation. Other changes include additional transportation safety requirements and additional disclosures of terms and conditions of employment to agricultural workers.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments electronically by the following method:

*Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.

*Instructions:* Include the agency's name and docket number ETA-2023-0003 in your comments. All comments received will become a matter of public record and will be posted without change to <https://www.regulations.gov>. Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding 20 CFR parts 651, 653, and 658, contact Kimberly Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, Department of Labor, Room C-4526, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-3980 (this is not a toll-free number). For further information regarding 20 CFR part 655, contact Brian Pasternak,

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Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). For further information regarding 29 CFR part 501, contact Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-5627.

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## I. Acronyms and Abbreviations

|           |  |
|-----------|--|
| AEWR      | Adverse effect wage rate                   |
| AIE       | Area(s) of intended employment             |
| ALJ       | Administrative Law Judge                   |
| AOWL      | Agricultural Online Wage Library           |
| ARB       | Administrative Review Board                |
| ARIMA     | Autoregressive integrated moving average   |
| BALCA     | Board of Alien Labor Certification Appeals |
| BLS       | Bureau of Labor Statistics                 |
| CBA       | Collective bargaining agreement            |
| CDC       | Centers for Disease Control and Prevention |
| CFR       | Code of Federal Regulations                |
| CO        | Certifying Officer                         |
| CY        | Calendar year                              |
| DBA       | Doing Business As                          |
| DHS       | Department of Homeland Security            |
| DOJ       | Department of Justice                      |
| DOL       | Department of Labor                        |
| DOT       | Department of Transportation               |
| EEOC      | Equal Employment Opportunity Commission    |
| E.O.      | Executive Order                            |
| ES        | Employment Service                         |
| ES system | Employment Service system                  |
| ETA       | Employment and Training Administration     |
| FEIN      | Federal Employer Identification Number     |
| FLS       | Farm Labor Survey                          |
| FLSA      | Fair Labor Standards Act                   |
| FR        | Federal Register                           |

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|           |  |
|-----------|--|
| FY        | Fiscal year  |
| GAO       | Government Accountability Office                           |
| GHTSA     | Governors Highway Safety Association                       |
| GVWR      | Gross vehicle weight rating                                |
| H-2ALC    | H-2A labor contractor                                      |
| HR        | Human resources  |
| ICR       | Information Collection Request                             |
| INA       | Immigration and Nationality Act                            |
| IRCA      | Immigration Reform and Control Act of 1986                 |
| MSFW      | Migrant or seasonal farmworker                             |
| MSPA      | Migrant and Seasonal Agricultural Worker Protection Act    |
| NAICS     | North American Industry Classification System              |
| NGO       | Nongovernmental organization                               |
| NHTSA     | National Highway Traffic Safety Administration             |
| NLRA      | National Labor Relations Act                               |
| NLRB      | National Labor Relations Board                             |
| NMA       | National Monitor Advocate                                  |
| NOD       | Notice of Deficiency                                       |
| NPC       | National Processing Center                                 |
| NPRM      | Notice of proposed rulemaking                              |
| OALJ      | Office of Administrative Law Judges                        |
| OEWS      | Occupational Employment and Wage Statistics                |
| OFLC      | Office of Foreign Labor Certification                      |
| OIG       | Office of Inspector General                                |
| OIRA      | Office of Information and Regulatory Affairs               |
| OMB       | Office of Management and Budget                            |
| OSHA      | Occupational Safety and Health Administration              |
| PRA       | Paperwork Reduction Act                                    |
| Pub. L.   | Public Law   |
| PY        | Program year   |
| RFA       | Regulatory Flexibility Act                                 |
| RIN       | Regulation Identifier Number                               |
| SBA       | Small Business Administration                              |
| Sec.      | Section of a Public Law                                    |
| Secretary | Secretary of Labor   |
| SOC       | Standard Occupational Classification                       |
| Stat.     | U.S. Statutes at Large                                     |
| SWA       | State workforce agency                                     |
| TVPA      | Victims of Trafficking and Violence Protection Act of 2000 |
| UMRA      | Unfunded Mandates Reform Act of 1995                       |
| U.S.      | United States  |
| U.S.C.    | United States Code   |
| USDA      | U.S. Department of Agriculture                             |

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VSL Value of a statistical life  
WHD Wage and Hour Division

## **II. Background and Overview**

### **A. Legal Authority**

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an “H-2A” nonimmigrant visa classification for a worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.” 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.<sup>1</sup> Permanent, year-round job opportunities cannot be classified as temporary or seasonal. 2022 H-2A Final Rule, 87 FR 61660, 61684 (Oct. 12, 2022); *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(a) (the INA permits only “agricultural labor or services . . . of a temporary or seasonal nature” to be performed under the H-2A visa category).

The H-2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services only where the Secretary of Labor (Secretary) certifies that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (2) the employment of the foreign worker in such labor or services will not adversely affect the wages and working

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<sup>1</sup> For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

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conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1).<sup>2</sup> The INA prohibits the Secretary from issuing this certification—known as a “temporary agricultural labor certification”—unless both of the above-referenced conditions are met. The INA further prohibits the Secretary from issuing a temporary agricultural labor certification if any of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers’ compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to the Employment and Training Administration’s (ETA) Office of Foreign Labor Certification (OFLC). *See* Secretary’s Order 06-2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010). In addition, the Secretary has delegated to WHD the responsibility under 8 U.S.C. 1188(g)(2) to assure employer compliance with the terms and conditions of employment under the H-2A program. *See* Secretary’s Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014). Pursuant to the INA and implementing regulations promulgated by DOL and the Department of Homeland Security (DHS), DOL evaluates an employer’s need for agricultural labor or services to determine whether it is seasonal or temporary during the review of an H-2A Application. 20 CFR 655.161(a); 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv).

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<sup>2</sup> Following certification by DOL, the employer must file an H-2A petition (defined at 20 CFR 655.103(b) as the USCIS Form I-129, Petition for a Nonimmigrant Worker, with H Supplement or successor form and/or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2A nonimmigrant workers) with USCIS, requesting one or more workers not to exceed the total listed on the temporary labor certification. Generally, USCIS must approve this petition before the worker(s) can be considered eligible for an H-2A visa or for H-2A nonimmigrant status.



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## **B. Current Regulatory Framework**

Since 1987, the Department has operated the H-2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H-2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501. The majority of the Department's current regulations governing the H-2A program were published in 2010 and many were strengthened in a final rule the Department published in October 2022.<sup>3</sup> The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the H-2A regulations, with modifications, in 2015.<sup>4</sup> The provisions governing the employment of workers in the herding and production of livestock on the range are codified at 20 CFR 655.200 through 655.235.<sup>5</sup>

The Department protects against adverse effect on the wages of workers in the United States similarly employed, in part, by requiring at § 655.120(a) that an employer offer, advertise in its recruitment, and pay a wage that is the highest of the adverse effect wage rate (AEWR), the

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<sup>3</sup> Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010) (2010 H-2A Final Rule); Final Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 FR 61660 (Oct. 12, 2022) (2022 H-2A Final Rule).

<sup>4</sup> Final Rule, *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*, 80 FR 62958 (Oct. 16, 2015) (2015 H-2A Herder Final Rule).

<sup>5</sup> Consistent with a court-approved settlement agreement in *Hispanic Affairs Project, et al. v. Scalia et al.*, No. 15-cv-1562 (D.D.C.), the Department recently rescinded 20 CFR 655.215(b)(2). Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H-2A Program*, 86 FR 71373 (Dec. 16, 2021).

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prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. If an updated AEW for the occupational classification and geographic area is published during the work contract and becomes the highest applicable wage rate, the employer must pay at least the updated AEW upon the effective date of the updated AEW, as published in the *Federal Register*. § 655.120(b)(3). In accordance with § 655.120(b)(2) and (3), the Department publishes the updated AEW at least once annually in the *Federal Register*. One *Federal Register* notice provides annual adjustments to the AEWs for the field and livestock workers (combined) occupational grouping based on the U.S. Department of Agriculture's (USDA) publication of the Farm Labor Reports (better known as the Farm Labor Survey, or FLS), effective on or about January 1, and a second *Federal Register* notice will provide annual adjustments to the AEWs for all other non-range occupations based on the Department's Bureau of Labor Statistics' (BLS) publication of the Occupational Employment and Wage Statistics (OEWS) survey, effective on or about July 1.<sup>6</sup> Each notice specifies the effective date of the new AEWs, which, in recent notices, has been not more than 14 calendar days after publication.

OFLC currently requires disclosure of information about the identity of employers, agents, and attorneys, the places where work will be performed, and the employer's use of a foreign labor recruiter through the provision of agreements with recruiters when requested by the certifying officer (CO), which is necessary for the Department to assess the nature of the

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<sup>6</sup> 2022 H-2A Final Rule; Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 88 FR 12760 (Feb. 28, 2023) (2023 AEW Final Rule).

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employer's job opportunity, monitor program compliance, and protect program integrity. See § 655.135(k); Form ETA-9142A; Form ETA-790A; Form ETA-790A, *Addendum B*. For example, employers must identify in the H-2A Application and job order all places of employment, provide the Department a copy of agreements with foreign labor recruiters that expressly prohibit unlawful fees (upon request by the CO), and provide identifying information like the Federal Employer Identification Number (FEIN) and Doing Business As (DBA) name on the Form ETA-9142A, Form ETA-790A, and Form ETA-790A, *Addendum B*. OFLC may provide any information received while processing H-2A applications, or in the course of conducting program integrity measures to WHD and to any other Federal agency with authority to enforce compliance with program requirements and combat fraud and abuse. § 655.130(f); 29 CFR 501.2 (providing that WHD and OFLC may share information with each other and with other agencies as appropriate for investigative or enforcement purposes). For example, the Department may refer certain discrimination complaints to the Department of Justice (DOJ) Civil Rights Division, Immigrant and Employee Rights Section, under § 655.185, or refer information related to debarred employers or to employers' fraudulent or willful misrepresentations to DHS under §§ 655.182 and 655.184.

Under § 655.145, an employer may request to amend its application to increase the number of workers or to make minor changes to the period of employment. In addition, an employer may request modifications to its job order under § 655.121(e)(2) before submitting its H-2A Application. Current § 655.145(b) permits the employer to submit a request to the CO to delay the start date of need when the delay is due to unforeseen circumstances and the employer's crops or commodities will be in jeopardy prior to expiration of an additional

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recruitment period. The employer's request to the CO must explain the circumstances necessitating the request and the employer must include with the request a written assurance that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences. The regulations do not permit amendments to an application after the CO issues a Final Determination. An employer that experiences changed circumstances after certification is required to submit a new and substantially similar application and job order.

The regulations implementing the Wagner-Peyser Act establish the Agricultural Recruitment System (ARS), through which employers can recruit U.S. workers for agricultural employment opportunities, and which prospective H-2A employers must use to recruit U.S. workers as a condition of receiving a temporary labor certification. Among other things, these regulations require employers to provide notice of delayed start dates and provide protections for workers in cases where the employer's start date is delayed. The ARS uses the term "anticipated" in relation to start dates and provides a process close to the start date the employer identified in the job order through which the employer, the State workforce agency (SWA), and referred farmworkers communicate regarding the actual start date of work. See § 653.501(c)(1)(iv)(D), (c)(3)(i) and (iv), (c)(5), and (d)(4). These regulations currently require an employer to notify the SWA of start date changes at least 10 business days before the originally anticipated start date and require the SWA to notify farmworkers that they should contact the SWA between 9 and 5 business days before the anticipated start date to verify the actual start date of work. § 653.501(c)(5) and (d)(4). If an employer fails to timely notify the SWA of a start date change (i.e., at least 10 business days before the anticipated first date identified in the job order),

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beginning on the first date of need, it must pay eligible workers the specified hourly rate of pay as stated on the clearance order, or if the pay is piece-rate, the higher of the Federal or State minimum wage for the first week or offer alternative work to each farmworker who followed the procedure to contact the SWA for updated start date information. *See* § 653.501(c)(3)(i) and (c)(5). Under the Department's H-2A regulations at § 655.145(b), if an employer requests a start date delay after workers have departed for the place of employment, the employer must assure the CO that it will provide housing and subsistence to all workers who are already traveling to the place of employment, without cost to the workers, until work commences. If an employer fails to comply with its obligations, the SWA may notify WHD for possible enforcement as provided in § 653.501(c)(5), the SWA may pursue discontinuation of services under part 658, subpart F, or the Department may, either upon referral of the SWA or upon its own initiative, pursue revocation of the labor certification under the procedures at § 655.181, or debarment of the employer under the procedures at § 655.182 or 29 CFR 501.20.

The regulations also currently permit the Department to debar an employer, successor-in-interest to that employer, attorney, or agent from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or 29 CFR part 501 if the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, improperly laid off or displaced. 20 CFR 655.182(a); 29 CFR 501.20(a). The Department provides the employer with a notice of debarment in these cases and also provides an opportunity to appeal these determinations using the procedures at 20 CFR 655.182(f) and 29 CFR 501.20(e) and 501.33. Similarly, the Wagner-Peyser Act regulations at 20 CFR parts 653

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and 658 currently require the SWA to discontinue services if it determines an employer has committed one of several violations enumerated at 20 CFR 658.501(a)(1) through (7), such as misrepresentation of the terms and conditions of employment specified on job orders or failure to comply fully with assurances made on job orders.

As noted above, the Department recently published the 2022 H-2A Final Rule, which strengthened worker protections in the H-2A program, clarified the obligations of joint employers and the existing prohibitions on fees related to foreign labor recruitment, authorized debarment of agents and attorneys for their own misconduct, enhanced surety bond obligations and related enforcement authorization, modernized the prevailing wage determination process, enhanced regulation of H-2A labor contractors (H-2ALCs), and provided additional safeguards related to employer-provided housing and wage obligations. 87 FR 61660 (Oct. 12, 2022). In response to the NPRM published prior to the 2022 H-2A Final Rule, the Department received many comments suggesting changes that were beyond the scope of that rulemaking, such as suggestions relating to increased enforcement and transparency regarding the foreign labor recruitment process, increased worker protections, revisions to the definition of employer, stronger integrity provisions to account for complex business organizations and for methods used to circumvent the regulations, strengthening provisions related to piece rate pay, and suggestions to revise the Wagner-Peyser Act regulations to ensure stronger protections for workers in the event of harmful last-minute start date delays.

### **C. Need for Rulemaking**

The Department proposes important provisions in this NPRM that will further strengthen protections for agricultural workers and enhance the Department's enforcement capabilities,

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thereby permitting more effective enforcement against fraud and program violations. The Department has determined the proposed revisions will help prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not financially gain from their violations or contribute to economic and workforce instability by circumventing the law, both of which would adversely affect the wages and working conditions of workers in the United States similarly employed, and undermines the Department's ability to determine whether there are, in fact, insufficient U.S. workers for proposed H-2A jobs. It is the policy of the Department to maintain robust protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Department's Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of wages and working conditions for workers in the United States. In addition, these agencies make criminal referrals to the Department's Office of Inspector General (OIG) in appropriate circumstances, such as when the agencies encounter visa-related fraud. The Department has determined through program experience, recent litigation, challenges in enforcement, comments on prior rulemaking, and reports from various stakeholders that the proposals in this NPRM are necessary to strengthen protections for agricultural workers, ensure that employers, agents, attorneys, and labor recruiters comply with the law, and enhance program integrity by improving the Department's ability to monitor compliance and investigate and

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pursue remedies from program violators. The recent surge in use of the H-2A program further underscores the need to strengthen protections for this vulnerable population.<sup>7</sup>

The proposed rule aims to address some of the comments that were beyond the scope of the 2022 H-2A Final Rule and concerns expressed by various stakeholders during that rulemaking. It also seeks to respond to recent court decisions and program experience indicating a need to enhance the Department's ability to enforce regulations related to foreign labor recruitment, and to improve accountability for successors-in-interest and employers who use various methods to attempt to evade the law and regulatory requirements, and to enhance worker protections for a vulnerable workforce, as explained further in the sections that follow.<sup>8</sup>

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<sup>7</sup> See, e.g., Office of Foreign Labor Certification, Performance Data, <https://www.dol.gov/agencies/eta/foreign-labor/performance> (providing disclosure data for the H-2A labor certification program since FY 2008).

<sup>8</sup> The Department's enforcement experience demonstrates that workers in agriculture, particularly H-2A workers, remain highly vulnerable to workplace abuses. In FY 2022, WHD conducted 420 investigations of employers using the H-2A program, resulting in more than \$3.6 million assessed in back wages and more than \$6.3 assessed in civil money penalties. Recent investigations have demonstrated that H-2A workers continue to be vulnerable to human trafficking; see, e.g., Press Release, U.S. Dep't of Just., *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering conspiracy Involving the Forced Labor of Mexican Workers* (Sept. 27, 2022), <https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced>; Jessica Looman, *U.S. Dep't of Lab. Blog: Exposing the Brutality of Human Trafficking* (Jan. 13, 2022), <https://blog.dol.gov/2022/01/13/exposing-the-brutality-of-human-trafficking>. H-2A workers continue to be vulnerable to retaliation when asserting their rights or engaging in self advocacy; see, e.g., Press Release, U.S. Dep't of Lab., *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots* (Oct. 28, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20211028-0>; Press Release, U.S. Dep't of Lab., *U.S. Labor Department Obtains Order Stopping Arizona Agricultural Employer from Abusing Workers, Exposing them to Workplace Dangers* (Oct. 28, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221028-0>. Additionally, recent



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Section D below provides an overview of major proposed changes, followed by an in-depth section-by-section discussion of all proposed changes. The Department is soliciting public comment on all aspects of this proposed rule but has suggested in each section the types of comments that would be most useful to the Department when considering which provisions to include, exclude, or revise in the final rule. Generally, the Department is most interested in 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. The Department is particularly interested in comments that suggest ways the Department can use this rulemaking to better protect the rights and liberties, health and safety, and wages and working conditions of agricultural workers and best safeguard the integrity of the H-2A program, while continuing to ensure that responsible employers have access to willing and available agricultural workers and are not unfairly disadvantaged by employers that exploit workers and attempt to evade the law.

## **D. Summary of Major Provisions of this Proposed Rule**

### **1. Protections for workers who advocate for better working conditions and labor organizing activities**

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vehicle crashes involving agricultural workers demonstrate the need for transportation reform; *see, e.g.*, Press Release, U.S. Dep't of Lab., *U.S. Department of Labor Urges Greater Focus on Safety by Employers, Workers as Deaths, Injuries in Agricultural Transportation Incidents Rises Sharply* (Sept. 20, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220920-0>.

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The Department proposes revisions to § 655.135 that will provide stronger protections for workers protected by the H-2A program to advocate for better working conditions on behalf of themselves and their coworkers and prevent employers from suppressing this activity. As detailed in Section IV, the Department believes that these proposed protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). These protections will significantly bolster the Department's efforts to prevent such adverse effect because when H-2A workers and other workers protected under the H-2A program cannot advocate and negotiate with employers on their own behalf, employers are able to impose exploitative working conditions that also leave H-2A workers vulnerable to other abuses, and this unfairly deprives similarly employed agricultural workers of jobs with better working conditions. Specifically, the Department proposes to broaden § 655.135(h), which prohibits unfair treatment, by expanding and explicitly protecting certain activities workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation. For those workers engaged in agriculture as defined and applied in 29 U.S.C. 203(f), who are exempt from the protections of the National Labor Relations Act (NLRA), 29 U.S.C. 151 et seq., the Department also proposes in § 655.135(h) to include some protections that the Department believes will safeguard collective action. The Department also proposes to add new provisions at § 655.135(m) to ensure employers do not interfere with efforts by vulnerable workers under the H-2A program to advocate for better working conditions by including a number of requirements that would advance worker voice and empowerment and further protect the rights proposed under § 655.135(h), and at § 655.135(n) to permit workers to

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invite or accept guests to worker housing and provide labor organizations a narrow right of access to worker housing, as explained in detail below.

## **2. Clarification of justifiable termination for cause**

The Department proposes to define “termination for cause” at § 655.122(n) by proposing six criteria that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable, which are intended to promote the integrity and regularity of any such processes. These proposed changes will help to ensure employers do not arbitrarily and unjustly terminate workers, thereby stripping them of essential rights to which they would otherwise be entitled, and will assist the Department in determining whether an individual worker was terminated for pretextual reasons.

## **3. Immediate effective date for updated AEWRs**

The Department proposes to revise § 655.120(b)(2) to designate the effective date of updated AEWRs as the date of publication in the *Federal Register*, and to revise paragraph (b)(3) to state that the employer is obligated to pay the updated AEWR immediately upon publication of the new AEWR in the *Federal Register*. This change is intended to help ensure workers are paid at least the updated AEWR, as soon as it is published, for all work they perform, and thereby help to ensure the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

## **4. Enhanced transparency for job opportunity and foreign labor recruitment**

The Department proposes new disclosure requirements to enhance transparency in the foreign worker recruitment chain and bolster the Department's capacity to protect vulnerable agricultural workers from exploitation and abuse, as explained more fully below. The

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Department proposes a new § 655.137, *Disclosure of Foreign Worker Recruitment* and a new § 655.135(p), *Foreign worker recruitment*, that are similar to the regulations governing disclosure of foreign worker recruitment in the H-2B program. The proposed provisions would require an employer and its attorney or agent, as applicable, 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. The proposed provisions also would require the employer to disclose the identity (i.e., name and, if applicable, identification number) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2A workers. As explained more fully below, the Department proposes to gather the additional recruitment chain information when the employer files its H-2A Application and will require the employer to submit a proposed Form ETA-9142A, *Appendix D*, that mirrors the Form ETA-9142B, *Appendix C*. Consistent with current practice in the H-2B program, proposed § 655.137(d) provides for the Department's public disclosure of the names of the agents and foreign labor recruiters used by employers. These additional disclosures of information about the recruitment chain are necessary for the Department to carry out its enforcement obligations, protect vulnerable agricultural workers and program integrity, and ensure equitable administration of the H-2A program for law abiding employers.

The Department also proposes to require the employer to provide the full name, date of birth, address, telephone number, and email address for the owner(s) of each employer, any person or entity who is an operator of the place(s) of employment (including the fixed-site

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agricultural business that contracts with the H-2ALC), and any person who manages or supervises the H-2A workers and workers in corresponding employment under the H-2A Application. The Department proposes to revise the Form ETA-9142A to require, where applicable, additional information about prior trade or DBA names the employer has used in the most recent 3-year period preceding its filing of the H-2A Application. The Department proposes conforming changes to §§ 655.130 and 655.167 to clarify that the employer would be required to continue to update the information required by the above paragraphs until the end of the work contract period, including extensions thereto, and retain this information post-certification and produce it upon request by the Department. The Department believes the proposed disclosure requirements will increase transparency in the international recruitment chain, aid the Department in assessing the nature of the job opportunity and the employer's need, enhance the Department's ability to enforce the prohibition against recruitment-related fees and to pursue remedies from program violators, assist the Department in identifying potential successors in interest to debarred employers, and better protect agricultural workers from abuse and exploitation in the United States and abroad.

## **5. Enhanced transparency and protections for agricultural workers**

### *a. Disclosure of minimum productivity standards, applicable wage rates, and overtime opportunities*

The Department proposes to revise § 655.122(l) to require employers to disclose any minimum productivity standards they will impose as a condition of job retention, regardless of whether the employer pays on a piece rate or hourly basis. This proposal is intended to help ensure that agricultural workers are fully apprised of the material terms and conditions of

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employment, including any productivity standards that may serve as a basis for termination for cause. Proposed changes at § 655.122(n) would prohibit the employer from terminating a worker for failure to meet a minimum productivity standard if the employer did not disclose the standard in accordance with § 655.122(l). An existing regulatory provision, § 655.122(b), would require that any such minimum productivity standard be bona fide and normal and accepted among non-H-2A employers in the same or comparable similar occupations and crops.

The Department also proposes to revise § 655.120(a) and § 655.122(l) to require employers to offer and advertise on the job order any applicable prevailing piece rate, the highest applicable hourly wage rate, and any other rate the employer intends to pay, and to pay workers the highest of these wage rates, as calculated at the time work is performed. A new proposed § 655.122(l)(4) would explicitly require the employer to specify in the job order any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours will be paid. These proposals are intended to help ensure that agricultural workers are fully apprised of the material terms and conditions of employment, including any productivity standards that may serve as a basis for termination for cause, and to aid the Department in its administration and enforcement of the H-2A program.

*b. Enhanced protections for workers through the Employment Service system (ES system)*

The Department proposes revisions to the Wagner-Peyser Act implementing regulations at 20 CFR 653.501 to clarify an employer's obligations in the event of a delayed start date and to make conforming revisions to the H-2A regulations at 20 CFR 655.145 and a new § 655.175 to clarify pre-certification H-2A Application amendments and employer obligations in the event of

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post-certification changes to the start date. As noted above, the current regulations require an employer to provide notice to the ES Office holding the job order of delayed start dates and impose obligations on employers that fail to provide the requisite notice, but do not require employers to notify workers directly of any such delay.

The Department proposes revisions to part 658, subpart F, and related definitions at § 651.10, regarding the discontinuation of Wagner-Peyser Act Employment Service (ES) services to employers. The Department proposes to clarify and expand the scope of entities whose ES services can be discontinued to also include agents, farm labor contractors, joint employers, and successors in interest. The Department also proposes revisions to clarify the bases for discontinuation at § 658.501, and to clarify and streamline the discontinuation procedures at § 658.502 through 658.504, including the notice requirements for SWAs, evidentiary requirements for employers, when and how employers may request a hearing, and procedures for requesting reinstatement. These changes are designed to increase the reach and utility of the discontinuation of services regulations, which SWAs have underutilized in recent years. These proposed changes are described in more detail below.

*c. Enhanced transportation safety requirements*

The Department proposes to revise § 655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation, which would reduce the hazards associated with agricultural worker transportation, thus making these jobs more attractive to workers in the United States. Specifically, as explained in detail below, the Department proposes to revise § 655.122(h)(4) to prohibit an employer from operating any employer-provided transportation that is required by the U.S. Department of Transportation

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(DOT) highway safety regulations to be manufactured with seat belts unless all passengers and the driver are properly restrained by seat belts meeting standards established by DOT.

Essentially, if the vehicle is manufactured with seat belts, the proposed rule would require the employer to retain and maintain those seat belts in good working order and ensure that each worker is wearing a seat belt before the vehicle is operated.

*d. Protection against passport and other immigration document withholding*

The Department proposes a new § 655.135(o) that would directly prohibit an employer from holding or confiscating a worker's passport, visa, or other immigration or government identification documents, independent of the employer's compliance with the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. 106-386 (2000), 18 U.S.C. 1592(a), which is required under the current H-2A regulations. The proposal is intended to better protect workers from potential labor trafficking, as explained below.

*e. Protections in the event of a minor delay in the start of work*

The Department proposes a new § 655.175 that addresses post-certification changes currently addressed at § 655.145(b) and proposes new obligations and procedures in the event an employer must briefly delay the start of work due to unforeseen circumstances that jeopardize crops or commodities prior to the expiration of an additional recruitment period. Proposed § 655.175 limits minor delays to 14 calendar days or less and would require an employer to notify each worker and the SWA of any delay in the start date of work. Consistent with § 653.501(c), proposed § 655.175 includes new compensation obligations that would require the employer to pay workers the applicable wage rate for each day work is delayed, for a period of



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up to 14 calendar days, starting with the certified start date, if the employer fails to provide adequate notice of the delay.

## **6. Enhanced integrity and enforcement capabilities**

### *a. Reduced submission periods for appeal requests for debarment matters and submittal of rebuttal evidence to OFLC*

To help protect and uphold program integrity, and to further protect workers in the United States, the Department proposes to increase the speed with which debarments become effective by decreasing the time for parties to submit rebuttal evidence to OFLC, the time for parties to appeal Notices of Debarment to the Office of Administrative Law Judges (OALJ), and the time for parties to appeal debarment decisions to the ARB from the OALJ. This would lead to faster final agency adjudications and thereby better protect and uphold program integrity and agricultural workers by more efficiently and effectively preventing H-2A program violators from accessing the program. As explained more fully below, the Department proposes to amend § 655.182(f)(1) and (2) by reducing the period to file rebuttal evidence from 30 calendar days to 14 calendar days, unless the employer requests an extension of the allowable rebuttal period, in writing, and demonstrates good and substantial cause necessitating an extension. For the same reasons, the Department also proposes to shorten the time to appeal the OFLC Administrator's Notice of Debarment, in lieu of submitting rebuttal evidence; to shorten the time to appeal the OFLC Administrator's final determination, after review of rebuttal evidence; to shorten the time for all parties to request review of OFLC debarments by the ARB from 30 days to 14 calendar days; to shorten the time to request a hearing with the OALJ on any WHD determination involving debarment from 30 calendar days to 14 calendar days; and also to shorten the time for

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all parties to request review by the ARB of an OALJ determination involving debarment from 30 days to 14 calendar days. Determinations by the WHD Administrator that do not include debarment, but only include, for example, an assessment of civil money penalties or the payment of back wages, would retain a 30-calendar-day timeframe for appeal to the OALJ and to the ARB.

*b. Enhancements to the Department's ability to apply orders of debarment against successors-in-interest*

The Department proposes a new § 655.104 regarding successors in interest, that would clarify the liability of successors in interest for debarment purposes and streamline the Department's procedures to deny labor certifications filed by or on behalf of successors in interest to debarred employers, agents, and attorneys. The Department proposes conforming revisions to §§ 655.103(b), 655.181, and 655.182 and 29 CFR 501.20. These proposed revisions are intended to better reflect the liability of successors in interest under the well-established successorship doctrine, and to better ensure that debarred entities do not circumvent the effects of debarment.

*c. Defining the single employer test for assessing temporary need, or for enforcement of contractual obligations*

The Department proposes to define the term *single employer* at a new § 655.103(e) and proposes factors to determine if multiple nominally separate employers are acting as one. Defining the term would codify the Department's long-standing practice of using the single employer test (sometimes referred to as an "integrated employer" test), or similar analysis, to determine if separate employers are a single employer for purposes of assessing seasonal or

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temporary need, or for enforcement of contractual obligations. In relation to seasonal or temporary need, the Department has received applications for temporary labor certification that purport to be for job opportunities with different employers when, in reality, the workers hired under these certifications are employed by companies so intertwined that they are operating as a de facto single employer in one area of intended employment for a period of need that is not truly temporary or seasonal. In its enforcement experience, the Department has increasingly encountered H-2A employers that employ H-2A workers under one corporate entity and domestic workers under another, creating the appearance that the H-2A employer has no non-H-2A workers in corresponding employment when actually, the corporate entities are so intertwined that all the H-2A workers are employed by a single H-2A employer, and the non-H-2A workers are engaged in corresponding employment. Some employers have attempted to use these arrangements to avoid the obligation to offer workers in corresponding employment the terms and conditions offered to H-2A workers, including the required wage rate. Codifying the definition of single employer will prevent employers from using their corporate structures to circumvent statutory and regulatory requirements.

### **III. Discussion of Proposed Revisions to Employment Service Regulations**

#### **A. Introduction**

In this proposed rule, the Department proposes to revise the ES regulations that implement the Wagner-Peyser Act of 1933. These regulations include the provision of ES services with a particular emphasis on migrant or seasonal farmworkers (MSFWs), as well as provisions governing the discontinuation of ES services to employers. The proposed rule will update the language and content of the regulations to, among other things, improve and

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strengthen the regulations governing discontinuation of ES services to employers, including the applicable bases and procedures. In some areas, these proposals establish entirely new responsibilities and procedures; in other areas, the proposals clarify and update requirements already established. The proposed revisions make important changes to the following components of the ES system: definitions, requirements for processing clearance orders, and the discontinuation of ES services provided to employers.

The Wagner-Peyser Act of 1933 provided the Department the authority to establish a national ES system to improve the functioning of the nation's labor markets by bringing together individuals seeking employment with employers seeking workers. Section 3(a) of the Act sets forth the basic responsibilities of the Department, which include assisting in coordinating the State public employment service offices throughout the country and in increasing their usefulness by prescribing standards for efficiency, promoting uniformity in procedures, and maintaining a system of clearing labor between the States.

To that end, the ES system provides labor exchange services to its participants and has undergone numerous changes to align its activities with broader national workforce development policies and statutory requirements. The Workforce Innovation and Opportunity Act, passed in 2014, expanded upon the previous workforce reforms in the Workforce Investment Act of 1998 and, among other things, identified the ES system as a core program in the One-Stop local delivery system, also called the American Job Center network.

In 1974, the case *National Ass'n for the Advancement of Colored People (NAACP), Western Region, et al. v. Brennan et al.*, No. 2010-72, 1974 WL 229 (D.D.C. Aug. 13, 1974) resulted in a detailed court order mandating various Federal and State actions consistent with

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applicable law (referred to as the Judge Richey Court Order, or Richey Order). The Richey Order required the Department to implement and maintain a Federal and State monitoring and advocacy system and set forth requirements to ensure the delivery of ES services, benefits, and protections to MSFWs on a non-discriminatory basis, and to provide such services in a manner that is qualitatively equivalent and quantitatively proportionate to those provided to non-farmworkers. In 1977 and 1980, consistent with its authority under the Wagner-Peyser Act, the Department published regulations at 20 CFR parts 651, 653, and 658 to implement the requirements of the Richey Order. Part 653 sets forth standards and procedures for providing services to MSFWs and provides regulations governing the ARS, a system for interstate and intrastate agricultural job recruitment. Part 658 sets forth standards and procedures for the administrative handling of complaints alleging violations of ES regulations and of employment-related laws, the discontinuation of services provided by the ES system to employers, the review and assessment of State agency compliance with ES regulations, and the Federal application of remedial action to State agencies.

Note that on April 20, 2022, the Department issued an NPRM regarding Wagner-Peyser Act staffing (Staffing NPRM). 87 FR 23700 (Apr. 20, 2022). The Staffing NPRM included proposed changes to several sections in 20 CFR parts 653 and 658 that govern the provision of ES services to MSFWs. As relevant here, in the Staffing NPRM, the Department proposed changes to 20 CFR 653.501(b)(4) and (c)(3) (ES office and SWA requirements for processing clearance orders); § 658.501(a)(4), (b), and (c); § 658.502(a) and (b) (notification requirements for discontinuation of ES services); and § 658.504(a) and (b) (procedures for reinstatement of ES services). 87 FR at 23717, 23722, 23736, 23740-23741. In this proposed rule, the Department

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has proposed further changes to these provisions, which in some instances conflict with changes proposed in the Staffing NPRM. Because the Department has not issued a final Staffing Rule, the Department recognizes that the proposed changes in this rulemaking may generate questions within the regulated community about how the Department ultimately proposes to revise these provisions, including how the proposed changes in this rulemaking affect the proposed changes in the Staffing NPRM, and what the Department might do in finalizing the changes proposed in the Staffing NPRM. Where this NPRM proposes changes that conflict or intersect with changes proposed in the Staffing NPRM, the Department will be using this proposed rule as the operative rulemaking proceeding to provide notice and an opportunity to comment on the proposed changes to the provisions referenced above. Consistent with this approach, the Department does not intend to finalize changes to the above referenced provisions in the Staffing NPRM as part of that rulemaking proceeding. Any changes to the above referenced provisions will be made through this rulemaking. The Department has concluded that the proposed changes to these provisions are better suited for this rulemaking because they are meant to strengthen protections for agricultural workers and, therefore, better align with the overall purpose of this rulemaking. Further, the Department has concluded that this is the most transparent approach to address the overlap, and is the approach that best minimizes confusion within the regulated community while ensuring the public the full opportunity to receive notice and provide comments on the proposed changes.

## **B. Discussion of Proposed Revisions to 20 CFR Part 651**

Part 651 (§ 651.10) sets forth definitions for parts 652, 653, 654, and 658. The Department proposes to add or revise the following definitions primarily to clarify aspects of its

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discontinuation of Wagner-Peyser Act ES regulation at 20 CFR part 658, including new provisions that it proposes to add in this rulemaking. Where appropriate, as discussed below, the Department has sought to align these new definitions with the same or similar definitions at 20 CFR 655.103.

The Department proposes to add a definition to § 651.10 for *agent* as an entity authorized to act on behalf of employers with respect to ES clearance system activities. The Department has observed that individuals and entities meeting the proposed definition of *agent* often engage the ES clearance system by submitting clearance orders on behalf of *employers*, as defined in part 651, and control many aspects of *employers'* recruitment activities relating to clearance orders. Adding this proposed definition clarifies that *agents* (which include attorneys) are among the entities subject to discontinuation of services as a result of the proposed changes to part 658. Additionally, because an employer's agent for purposes of the ES clearance system is often the same agent that an employer uses for purposes of the H-2A labor certification process, the Department proposes a definition of *agent* at § 651.10 that aligns with the definition of agent in § 655.103.

The Department proposes to add definitions to § 651.10 for *criteria clearance order* and *non-criteria clearance order* because they are terms that are currently used in the ES regulations but were previously undefined. Adding the definitions clarifies that *criteria clearance orders* are those placed in connection with an H-2A Application filed pursuant to part 655, subpart B, while *non-criteria clearance orders* are those not placed in connection with an H-2A Application. By defining these terms, it will be clearer which orders must comply with the requirements at part

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653, subpart F, and part 655, subpart B, and which orders do not have to comply with the requirements at part 655, subpart B.

The Department proposes to add to § 651.10 a definition for *discontinuation of services* because it is referenced throughout the ES regulations and is the subject of part 658, subpart F, but was previously undefined. The proposed definition explains what services would be unavailable pursuant to the process described in part 658, subpart F, and the entities subject to discontinuation. Under the proposed *discontinuation of services*, the scope of services to which discontinuation applies includes any Wagner-Peyser Act ES service provided by the ES to employers pursuant to parts 652 and 653. The scope of individuals and entities to whom discontinuation applies includes *employers*, as defined in part 651, and *agents, farm labor contractors, joint employers, and successors in interest*, as proposed to be defined in part 651.

The Department proposes to revise the definition of *employment-related laws* to clarify that the term also includes the regulations that implement *employment-related laws* in addition to the laws themselves. Revising the definition clarifies its meaning and scope for ES staff who observe or process complaints relating to violations of employment-related laws, such as outreach workers, complaint system representatives, and those who conduct field checks.

The Department proposes to add to § 651.10 a definition for *farm labor contractor* as an entity, excluding agricultural employers, agricultural associations, or employees of agricultural employers or agricultural associations, that agrees to recruit, solicit, hire, employ, furnish, or transport an MSFW. The Department proposes to add this definition to § 651.10 because the term is used throughout the ES regulations, most notably in part 653, subpart F, which recognizes that *farm labor contractors* use the ES clearance system, but it has never been



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defined. Adding this proposed definition also clarifies the entities subject to discontinuation of services as a result of the proposed changes to part 658. As with the term *agent*, because many farm labor contractors that use the ES clearance system also seek temporary labor certifications from OFLC as H-2ALCs under part 655, subpart B, the Department proposes a definition of *farm labor contractor* that both aligns with the definition of *H-2A labor contractor* found at 20 CFR 655.103 and with the definition of *farm labor contractor* and *farm labor contracting activity* found at 29 U.S.C. 1802 and 29 CFR 500.20 to maintain consistency between Departmental program areas.

The Department recognizes that joint employment relationships are common in agriculture, and that joint employers are required to comply with the requirements in part 653, subpart F, while filing a joint application for temporary labor certification under 20 CFR part 655, subpart B. *See* § 655.131. The Department therefore proposes to add a definition for *joint employer* to § 651.10 to clarify how the concept will be applied in the ES system and to clarify the entities subject to discontinuation of services as a result of the proposed changes to part 658. The proposed definition is also intended to ensure consistency with recent changes to the Department's H-2A regulation, 87 FR 61660, 61793-61794 (Oct. 12, 2022), and as with the definitions of *agent* and *farm labor contractor*, the proposed definition is modeled on the definition of joint employment at 20 CFR 655.103 because of the connection between the ES system and H-2A labor certification program.

The Department proposes to add to § 651.10 a definition for *successor in interest* that describes the inexhaustive factors that SWAs should use to determine if an entity is a successor in interest to another entity. The proposed definition allows SWAs and stakeholders to better

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understand which entities may be subject to discontinuation as a result of the proposed changes to part 658. To maintain consistency between the regulations governing the ES system and the regulations governing the H-2A labor certification program, the Department proposes to adapt the definition of successor in interest as proposed in § 655.104.

The Department proposes to add a definition for *week* to clarify that a week, as used in parts 652, 653, 654, and 658, means 7 consecutive calendar days. Adding the definition allows for SWAs and employers to calculate time periods used in the ES regulations uniformly, including for wage calculations and other time-related procedures.

### **C. Discussion of Proposed Revisions to 20 CFR Part 653**

Part 653 sets forth the principal regulations of the ES concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable fashion and in a way “that meets their unique needs.” 20 CFR 653.100(a). Part 653 also describes requirements for participation in the ARS. Subpart F provides the requirements SWAs and employers must follow when employers seek access to the ARS by submitting clearance orders for temporary or seasonal farmwork. Section 653.501 provides the responsibilities of ES Offices and SWAs when they review clearance orders submitted by employers, and the process by which they place approved clearance orders into intra- and interstate clearance. Once the order is approved and placed into clearance, ES Offices and SWAs recruit and refer workers for the position described on the clearance order.

The Department proposes to add a fourth paragraph to § 653.501(b), at § 653.501(b)(4), which would require ES staff to consult the OFLC and WHD H-2A and H-2B debarment lists,

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and an ETA Office of Workforce Investment discontinuation of services list, before placing a job order into intrastate or interstate clearance. The Department further proposes a new paragraph (b)(4)(i), which states that SWAs must initiate discontinuation of ES services if the employer seeking placement of a clearance order is on a debarment list, and new paragraph (b)(4)(ii), which states that SWAs must not approve clearance orders from employers whose ES services have been discontinued by any State. Finally, the Department proposes a new paragraph (b)(4)(iii) to make clear that the provisions in paragraph (b)(4) would apply to all entities subject to discontinuation under part 658, subpart F, and not just to employers as defined in § 651.10.

The Department's mission is to promote the welfare of workers. Regarding consultation with the H-2A and H-2B debarment lists, the proposed additions are intended to further that mission by ensuring that ES offices do not place U.S. workers with employers who are presently barred from employing nonimmigrant workers via the H-2A and H-2B visa programs. This requirement, and the proposed addition to § 658.501(a)(4), would protect workers by ensuring that the ES system is not used to place a worker with an employer that has failed to comply with its obligation(s) as an employer of foreign workers. As with the H-2A program, employers participating in the H-2B program must first file job orders through the SWA's labor exchange and therefore must comply with ES requirements. As discussed more fully below in the discussion of the proposed changes to § 658.501(a)(4), the proposed inclusion of H-2B programs also recognizes that employers seeking nonimmigrant workers may improperly misclassify H-2A agricultural work as H-2B non-agricultural work. The proposed addition seeks to protect workers who use the ES system from employers who engage in improper misclassification, and to maintain a fair labor system for employers who seek temporary labor certification via the proper

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channels. Additionally, the H-2A regulations at 20 CFR 655.182 and 29 CFR 501.20, and the H-2B regulations at 20 CFR 655.73 and 29 CFR 503.24, describe the violations that may result in an employer's debarment from receiving future labor certifications under those programs. The potential reasons for debarment include serious violations that could affect worker safety, for example "[a] single heinous act showing such flagrant disregard for the law" that future compliance with program requirements cannot reasonably be expected (§ 655.182(d)(1)(x)). Such reasons also include an employer's substantial failure to comply with regulatory requirements, including an employer's failure to pay or provide the required wages or working conditions, an employer's failure to comply with its obligations to recruit U.S. workers, or an employer's failure to cooperate with required audits or investigations. In the Department's view, the employer subject to debarment should also be excluded from participation in the ES system. The Department does not want the ES system to facilitate placement of U.S. workers with employers whom the Department has determined should not be permitted to employ nonimmigrant workers through its H-2A and H-2B programs, particularly where the U.S. workers may perform similar work and, thus, be subject to the same or similar violations giving rise to the employer's debarment.

Regarding consultation with the proposed Office of Workforce Investment discontinuation of services list, as discussed below, the effect of a final decision to discontinue services to an employer would be to prohibit that employer from receiving any services from the ES system, not just from offices in the State that discontinued services. The Department recognizes that SWAs need a mechanism to ensure that they are not providing services, including the processing and placement of clearance orders, to entities whose services have been

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discontinued, and that any such mechanism should be straightforward for the SWAs to use for it to be effective. The Department believes that maintaining a list of discontinued entities—like the debarment lists maintained by OFLC and WHD—that SWAs could access when reviewing clearance orders is the most straightforward approach to effectuate this goal. In order to avoid unnecessary burden, SWAs and ES offices would consult the Office of Workforce Investment discontinuation of services list and would not provide ES services to any employers on the list, without having to go through the steps described in part 658, subpart F, to discontinue services to the same employer in their specific State. The Department also notes that the proposed changes in part 658, subpart F, discussed below, address the entities subject to discontinuation. Proposed § 658.503(e) would mandate that if the SWA discontinues services to an employer, the employer, which includes successors in interest, cannot participate in or receive Wagner-Peyser Act ES services provided by the ES to employers pursuant to parts 652 and 653; therefore, no SWA would be able to process any future job orders from the employer or a successor in interest, unless services are reinstated under § 658.504.

Section 653.501(c)(3) lists the assurances that each clearance order must include before it can be placed into clearance. Paragraph (c)(3)(i) currently requires that the clearance order include an assurance that the employer will provide workers referred through the clearance system the number of hours of work, as indicated on the clearance order, for the week beginning with the anticipated date of need unless the employer notifies the order-holding office of a change to the anticipated start date at least 10 business days prior to the original start date, and states that the SWA must make a record of the notification and must attempt to inform referred workers of the change. Section 653.501(c)(3)(iv) currently requires that the clearance order

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include an assurance that the employer filing the order will promptly notify the order-holding office or SWA that crops are maturing faster or slower than expected or of other events that change the terms of employment. Section 653.501(c)(5) currently provides that if the employer fails to provide the required notice, the employer is obligated to provide eligible (pursuant to paragraph (d)(4) of this section) workers referred through the clearance system the first week's pay at the rate stated on the clearance order or find alternative work, if such alternative work is included in the clearance order. For criteria clearance orders, any alternative work provided to U.S. workers referred through the ARS will be agricultural work, in order to comply with the H-2A program requirements for work offered on such orders. For non-criteria orders, because the order is placed through the ARS, it is anticipated that alternative work provided in these situations also will be agricultural work.

The Department has determined these requirements do not provide adequate notice to workers placed on the clearance order when the terms of their employment change and do not adequately protect workers from the potential consequences of those changes. The current notification requirement, which inadvertently incorporates a requirement on the SWA into the employer assurances, is not sufficient to prevent unnecessary delay because it requires that notification occur in two steps—first from the employer to the SWA, and then from the SWA to the workers. Additionally, given the transient nature of temporary and seasonal farmwork, coupled with increased housing, transportation, and food costs in recent years, the requirement that employers provide 1 week's pay if they fail to satisfy the notification requirement does not sufficiently protect workers from resulting financial hardship. The Department proposes several

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changes to address these concerns by improving notice and wage protections for workers hired under ARS clearance orders.

Specifically, the Department proposes to revise § 653.501(c) to require that, in the event the employer's date of need changes from the date the employer indicated on the clearance order, the employer must notify the SWA and all workers placed on the clearance order of the change at least 10 business days before the original start date. The proposed revisions clarify that notification is only to workers placed on the clearance order, and not to workers who were referred but not hired. The proposed revisions recognize that employers, rather than the SWA or the order holding office, are in the best position to contact and notify workers placed on the order of changes to the date of need because the employer has already contracted to employ the workers and should have up-to-date contact information for each worker. The requirement to document this outreach is a minimally burdensome means to allow the SWA to assess compliance with this assurance. This proposed change will increase the likelihood that workers will receive timely notification of any change to the start date and that employers maintain accurate records of notices they provide. To ensure consistent protections for workers in the United States who apply to the employer directly, as well as to H-2A workers and workers in corresponding employment who may be impacted by a delayed start date of work, the Department proposes conforming protections at a new § 655.175 of the H-2A program regulations.

The Department further proposes that employers that fail to comply with these notice requirements must provide housing and subsistence to all workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work

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commences, and must pay all workers placed on the clearance order the applicable wages for each day work is delayed for a period of up to 2 weeks, starting with the originally anticipated date of need. The Department's proposal to require the provision of housing and subsistence would align the protections U.S. workers placed on non-criteria clearance orders receive with protections workers on criteria clearance orders receive under current § 655.145(b) and proposed § 655.175(b). The Department does not anticipate that requiring the provision of housing will burden employers as they are required to have their housing ready and inspected prior to the start date.

The Department's proposal to expand the period during which employers must pay the applicable wage to 2 weeks, from the current 1-week period, will better protect agricultural workers from financial hardship they are likely to experience should they travel or otherwise rely on the job opportunity articulated on the clearance order and find that work is not available to them. Providing up to 2 weeks of wages provides a safety net for workers to support themselves when work is not available. The Department believes 1 week of wages is insufficient to protect workers from the financial hardships associated with a delayed starting date when such delays were not communicated, particularly if a worker traveled for the job. In lieu of paying the 2 weeks' worth of wages, if the employer fails to comply with the notice requirements, employers can provide such workers alternative work if such alternative work is listed on the clearance order. The Department has determined that this alternative effectively addresses the hardship concern by providing the worker a source of income while continuing to allow the employer flexibility to adjust their anticipated start date.



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To accomplish these changes, the Department proposes several specific revisions. The Department proposes to revise § 653.501(c)(3)(i) to remove the requirement that the SWA must make a record of the notification and attempt to inform referred workers of the change in the date of need. The current language improperly incorporates a SWA requirement into the employer assurances, and, as discussed below, the Department proposes to shift these responsibilities to the employer which, as discussed below, the Department has determined is better situated to make timely contact with workers. The Department also proposes to move language in this paragraph regarding the employer's notice to the order-holding office to § 653.501(c)(3)(iv), which contains other instructions the employer must follow when giving notice of changed terms and conditions of the opportunity. The proposed regulation at § 653.501(c)(3)(i) would maintain that the employer's notice must comply with paragraph (c)(3)(iv), which would more clearly explain the employer's assurance to comply with the full notice requirements.

The Department proposes to make additional revisions to paragraph (c)(3)(iv). First, the Department proposes to remove a redundancy in the first sentence, which currently states that the employer must expeditiously notify the order-holding office or SWA immediately. Because immediate notice is expeditious, the use of the word "expeditiously" is not necessary. Second, the Department proposes that the assurance on the clearance order require that when there is a change to the start date of need, the employer, rather than the order-holding office or SWA, notify the office or SWA and each worker placed on the order. When there is a change in the date of need it is imperative that workers placed on the order be notified as quickly as possible to allow the worker to change any travel arrangements and otherwise remain informed about the opportunity. As noted above, the Department has determined that the employer, which has

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already contracted or communicated with the worker, is better positioned to make timely contact with workers and therefore proposes that the employer agree to do so as a condition of the participation in the ARS. Third, the Department, in this assurance and in paragraph (c)(5), proposes to require notification to workers placed on the order rather than eligible workers referred from the order. The Department proposes this change because the obligation to provide housing and subsistence to workers who are already traveling to the place of employment, and to pay wages for up to 2 weeks or provide alternative work is relevant only to workers who were actually placed with the employer rather than to workers referred to the employer through the ARS. Additionally, under current paragraph (c)(5), the obligation to pay or provide alternative work is for eligible workers, meaning those referred workers who contact the ES Office to verify the date of need pursuant to paragraph (d)(4). As discussed below, the Department proposes to remove paragraph (d)(4), which includes this verification requirement. With the proposed change to have employers notify workers of any change in their start date, the requirement that referred workers verify their start date with the ES Office is no longer necessary. Finally, the Department proposes to include the requirement to provide housing and subsistence to all workers who are already traveling to the place of employment, without cost to the workers, until work commences and to pay up to 2 weeks of wages or find alternative work from paragraph (c)(5), as the Department proposes to amend it, in the assurance. This change will make this obligation clear to the employer at the time they complete and sign the clearance order.

The Department also proposes several changes to paragraph (c)(5). First, the Department proposes to specify that the employer must provide notice to the worker placed under the clearance order, which will align this paragraph with paragraph (c)(3)(iv) and the proposed

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changes to the assurance described therein. For the same reason, the Department proposes to remove language stating employers must pay only workers who are eligible pursuant to paragraph (d)(4).

The Department proposes to further revise paragraph (c)(5) to clarify that the employer would be required to provide housing and subsistence to all workers who are already traveling to the place of employment, without cost to the workers, until work commences and to pay the specified hourly rate of pay on the clearance order, or if the pay listed on the clearance order is a piece-rate, the higher of the Federal or State minimum wage, or if applicable, any prevailing wage.<sup>9</sup> If the order is a criteria clearance order the employer would be required to pay the rate of pay under part 655, subpart B. These proposed edits would align the wage requirement in this paragraph with proposed wage requirements in part 655, subpart B, as applicable. The Department further proposes to require that employers, if they fail to provide the required notice at least 10 business days before the original date of need, must pay the required wage for up to 2 weeks instead of the 1 week currently required. The Department proposes this change because, as discussed above, the Department believes 1 week of wages is not sufficient to ensure workers do not experience the financial hardship that would come with being unable to start work on time, particularly if these workers have traveled for the job.

The Department proposes to revise paragraph (c)(5) to clarify that any alternative work must be in the approved clearance order to help ensure employers do not require workers to

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<sup>9</sup> For requirements on costs for workers traveling from abroad, including in the event of a minor delay, see § 655.122 and the discussion of proposed § 655.175 in Section IV.E.

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perform work at sites not approved by the SWA and, for criteria clearance orders, the Department. The Department proposes to add language to clearly instruct the SWA to process violations of these requirements as apparent violations, which § 658.419 describes as violations that SWAs, ES office staff, or outreach staff observe or of which they have information, and which staff must document and refer for further action. The Department proposes these changes because SWAs have identified many apparent violations where employers caused workers to work at worksites that were not approved in their clearance orders. In some recent cases, the workers were not properly trained and were caused to perform dangerous tasks, which presented serious health and safety risks. It is critically important that all worksites are known and approved by the SWA and, as appropriate, the Department, to avoid workplace injuries, improper wage payments related to performance of non-agricultural work, and potential human trafficking.

Finally, the Department proposes to remove paragraphs (d)(4), (7), and (8) in their entirety because, with the proposed change to have employers notify workers of any change in the start date, the requirement that the applicant holding office notify workers of any changes is no longer relevant or necessary.

#### **D. Discussion of Proposed Revisions to 20 CFR Part 658, Subpart F**

This subpart sets forth the regulations governing the discontinuation of Wagner-Peyser Act ES services to employers. In 1977, the Department published regulations at 20 CFR part 658 governing the monitoring of all ES activities and enforcement of ES regulations. Subpart F provided procedures for discontinuation of services where a State agency, through its director, determined that an employer violated ES regulations. Under subpart F, where a complaint

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alleging an employer violated ES regulations could not be resolved or, in the absence of a complaint, where the State had reason to believe an employer violated ES regulations and could not informally resolve the matter, the State would refer it to the State director for formal investigation. Where the director issued a formal, written determination that an employer violated ES regulations, the determination would include a notification that the State would initiate discontinuation procedures in 30 days unless the employer provided sufficient evidence that it did not violate the ES regulations or had corrected the violation. If the matter was not resolved in 30 days, the State would then notify the employer in writing that it would terminate ES services in 15 days unless the employer requested a hearing or provided sufficient evidence that it did not violate ES regulations. Where the employer did neither, the State would discontinue ES services to the employer until the employer provided sufficient evidence that it did not violate ES regulations or that it corrected the violation.

In 1980, the Department published regulations to clarify and streamline the discontinuation provisions. In addition to violations of ES regulations, the Department set forth several, specific bases for discontinuation (e.g., where the employer is found to have misrepresented the terms and conditions of a job order, or found by an enforcement agency to have violated an employment-related law). The Department also revised the discontinuation procedures to include (1) a notice of intent to discontinue services, (2) an opportunity for employer to respond and/or request a hearing, (3) a final determination, and (4) an opportunity to request reinstatement or a hearing.

The Department proposes revisions throughout this subpart to further clarify the bases and process for discontinuing services because the Department has observed a need for greater

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clarity among SWAs about the circumstances under which they must discontinue services to employers and the specific requirements they must follow to do so. As discussed below, in the Department's view, SWAs do not utilize the discontinuation process to the fullest extent because of uncertainty regarding the process and requirements to discontinue services.

In this subpart, the Department also proposes to reorganize regulations to more accurately group subjects and to more logically arrange procedural steps, including when and how employers may request a hearing. Finally, the Department proposes to clarify what ES services would be unavailable after discontinuation and the entities subject to discontinuation.

The existing regulations in this subpart require SWAs to discontinue services to employers who meet any of the bases for discontinuation detailed at § 658.501(a), by utilizing the procedures outlined in §§ 658.501 through 658.504. However, the Department has observed hesitancy among SWAs to utilize the existing discontinuation provisions, and SWAs have shared information with the Department that they do not fully understand the requirements to discontinue services to employers and have sought instructions and Departmental review of notifications to employers. The Department's data suggests that this lack of clarity is limiting the SWA's use of discontinuation. For example, a SWA is required to discontinue services if an employer fails to fully comply with assurances made on clearance orders. These assurances include compliance with housing standards, wage payment, contract disclosure, recordkeeping, and other common areas of employer noncompliance. As reported in the National Monitor Advocate's (NMA) Annual Report on Services to MSFWs for program year (PY) 2020, the most recent year for which data is available, Form ETA-5148 (Services to Migrant and Seasonal Farmworkers Reports) documents that SWAs processed 598 ES-related complaints against

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employers involving non-MSFWs and 94 ES-related complaints against employers involving MSFWs. Of the 2,581 total complaints received, which include ES and non-ES related complaints involving MSFWs and non-MSFWs, SWAs processed, 950 complaints related to wages, 270 complaints involved discrimination, 173 complaints involved health and safety, and 88 complaints involved housing, in addition to other categories. Also, in PY 2020, SWAs reported that they processed 453 apparent violations, as described at § 658.419, including 218 wage-related issues, 175 health and safety related issues, and 51 housing-related issues, in addition to other categories. Despite the number of complaints and apparent violations in these areas, SWAs reported that they discontinued services to only 17 employers in PY 2020. While not every complaint or apparent violation will result in discontinuation of services, the low number of discontinuations relative to the number of complaints and violations may suggest that enhanced clarity in the bases and procedures for discontinuation is needed, and could aid SWAs in better utilizing the discontinuation provisions to hold employers accountable and protect workers from additional violations.

Similarly, SWAs must initiate discontinuation of services when the Department or a SWA receives notification from an appropriate enforcement agency of a final determination that includes a violation of an employment-related law. Applicable enforcement agencies may include any State, Federal, or local agencies that enforce employment-related laws, for example the Department's Occupational Safety and Health Administration (OSHA), WHD, the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), State or local departments of health, and other related agencies. WHD public enforcement data documents thousands of investigations between PY 2012 and PY 2019 that involve employers

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who used the ES to place criteria clearance orders and violated employment-related laws.

However, between PY 2012 to 2019, SWAs reported that they only discontinued services twice (once in PY 2016 and once in PY 2019). Again, the glaring disparity between the number of violations found by WHD and the actual discontinuation of services by the SWAs during the same time period may suggest that the SWAs would benefit from clarifying revisions to the ES regulations governing the discontinuation process.

The Department believes that the increase in discontinuation of services in PY 2020 is likely attributable to the NMA's increased training of SWA staff in this area of the regulation and not due to an increase in the number of employers meeting the conditions for discontinuation of services. While this training provided needed clarity to the SWAs, and therefore produced results, the Department sees the need for additional clarity and support for SWAs to discontinue services and mitigate the possibility of misunderstanding or incorrectly utilizing the discontinuation provisions. As noted above, in recent years, SWAs have shared information with the Department that they do not fully understand the requirements to discontinue services to employers and have sought instructions and Departmental review of notifications to employers. In the Department's review, the Department identified that SWAs have made errors regarding citing applicable bases to discontinue services under § 658.501(a), describing necessary facts to justify the discontinuation, and notifying employers of their right to a hearing. These issues contributed to several instances where SWA were not successful in discontinuing services to employers even though the SWAs believed they had a sufficient basis to discontinue services. The Department believes that revising the regulations, as described below, provides SWAs the needed additional clarity to better implement the discontinuation provisions and would allow



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ETA, including its regional offices, to better monitor and support SWAs to ensure they initiate discontinuation of services as required by the regulations. This would improve worker protection by preventing noncompliant employers from using the ES service to obtain workers (including H-2A workers, as employers seeking to use the H-2A visa program must first file a clearance order through the ES) which, in turn, aids the Department in ensuring a fair labor exchange system for compliant employers, and meeting its statutory obligations to maintain and increase the usefulness of the ES system. Additionally, the proposed clarifications and improvements to the discontinuation procedures provide greater certainty to employers seeking to provide information to SWAs in response to a notice of intent to discontinue, or seeking to reinstate services, and protect employers' interests by ensuring that they receive informative and timely determinations from SWAs. Specific proposed changes are discussed below.

The Department proposes to revise § 658.500, which describes the scope and purpose of subpart F, to add language consistent with proposed revisions to § 658.503 that discontinued services include services otherwise available under parts 652 and 653. This revision clarifies the scope of services discontinued to include the labor exchange services—such as recruitment, career, and labor market information services—available to employers under part 652.

The Department also proposes to add paragraph (b) to § 658.500, which would explain that for purposes of this subpart, employer refers to *employers*, as defined at § 651.10, and *agents, farm labor contractors, joint employers, and successors in interest*, as proposed to be defined at § 651.10. Proposed paragraph (b) would therefore describe which entities may experience discontinuation of services. Each of these entities may engage in the ES clearance system by creating or submitting clearance orders, or by managing or utilizing workers placed on

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ES clearance orders. *Agents* and *farm labor contractors* often engage the ES clearance system by submitting clearance orders and controlling many aspects of recruitment activities relating to clearance orders. *Joint employers* may utilize workers placed on clearance orders in the same or similar manner as the *employer*, defined at § 651.10, with whom they jointly employ those workers. A *successor in interest* may have reincorporated itself from an *employer* whose ES services have been discontinued into another business entity that maintains the same operations or interests, allowing that entity to undermine the effect of the discontinuation of the original entity in contravention of the purpose of the discontinuation regulation. The proposed revisions are meant to clarify and expand the entities who engage the ES clearance system and are, thus, subject to discontinuation. Specifically, this change makes it clear that agents, farm labor contractors, joint employers, and any successor in interest to an agent, farm labor contractor, or joint employer, are subject to discontinuation of services. This proposed change addresses a limitation of the current regulation, allowing SWAs to take action that will better protect workers.

Finally, as the proposed *agents*, *farm labor contractors*, *joint employers*, and *successors in interest* also seek temporary labor certifications from OFLC under part 655, subpart B, adding these entities here brings the discontinuation regulation in line with the existing H-2A regulations, which permit the debarment of agents, farm labor contractors, joint employers, and successors in interest, as well as fixed-site H-2A employers, and agricultural associations.

Section 658.501 describes eight bases for which SWA officials must initiate discontinuation of services to employers. The Department proposes several edits to paragraphs

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(a)(1) through (a)(7) except paragraph (a)(3), including a substantive revision to paragraph (a)(4).

In paragraph (a)(1), the Department proposes to state that SWA officials must discontinue services to employers who submit and refuse to correct or withdraw job orders containing terms and conditions contrary to *employment-related laws*. The existing regulation contains the terms *alter* and *specifications*. The Department proposes to change “alter” to “correct” to more clearly articulate that the employer must specifically correct the noncompliant condition rather than simply changing the condition, which might not result in correction of the noncompliance. This change would also clarify which action will lead to the initiation of the discontinuation process. The Department proposes to change “specifications” to “terms and conditions” to align the language in paragraph (a)(1) with the language used in § 653.501, and proposes to change this term in the corresponding provision at § 658.502(a)(1) to conform to this proposed change to § 658.501(a)(1).

The Department proposes to reorganize paragraph (a)(2) for clarity by moving the language regarding withdrawal of job orders that do not contain required assurances to earlier in the sentence. The Department also proposes to remove language in paragraph (a)(2) that currently limits this basis for discontinuation to only those assurances involving *employment-related laws*. The Department proposes to remove this language because employers must provide all assurances described at § 653.501(c)(3), which include more than the assurance to comply with *employment-related laws*. The Department has determined that a failure to provide any required assurance should be grounds for discontinuation because each assurance is necessary to

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ensure workers referred on clearance orders are fully apprised of and protected by the assurances if placed on the order.

The Department proposes to amend paragraph (a)(4) to add that SWA officials must initiate procedures for discontinuation of services for employers who are currently debarred from participating in the Department's H-2A or H-2B foreign labor certification programs. The Department recognizes that many employers who use the ARS also seek temporary labor certifications from OFLC under part 655, subpart B. These employers may attempt to recruit workers through non-criteria orders in the ARS if they are prohibited from using the H-2A program as a result of their debarment. In its experience OFLC has seen many instances where employers who should file H-2B applications because they are seeking to employ workers in non-agricultural occupations instead inappropriately file H-2A applications. Similarly, in its enforcement experience WHD has seen employers that have mischaracterized the nature of their labor needs on their applications for labor certification to obtain labor certification to hire workers from one program to work in job opportunities that are appropriately classified in the other program. Failure to utilize the appropriate H-2 program results in the posting of inaccurate job orders, thereby undermining the labor market test. It also deprives workers of the specific protections available to them under each of the respective programs, such as the right to housing free of cost under the H-2A program. Likewise, it harms law-abiding employers as their competitors gain an unfair advantage by offering fewer benefits to their workforce or by avoiding the H-2B visa cap to which other employers must adhere. In light of these experiences, the Department has determined that it is appropriate for SWAs to initiate discontinuation proceedings against entities debarred from participation in the H-2A or H-2B temporary labor

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certification programs to protect workers seeking employment through the ES system and to maintain a fair system for law-abiding employers. The Department notes that § 655.73 currently prohibits employers debarred from the H-2B program from participating in any of the Department's other foreign labor programs, including the H-2A program; this proposal reinforces that prohibition.

The Department proposes this requirement to protect workers who use the ARS by ensuring that ES offices do not place U.S. workers with employers during any such period of debarment. Debarment is a serious sanction that results from substantial violations of a material term or condition of the employer's temporary labor certification, and that is imposed only after an employer has exhausted or forfeited an opportunity to respond to the proposed action as well as substantial appeals procedures. These may include violations related to worker safety, failure to provide required wages or working conditions, failure to comply with recruitment requirements or participate in required investigations or audits, or failure to pay required fees. Entities that have committed such violations should be excluded from participation in the ES, and the Department's proposal will better protect U.S. workers by ensuring that they will not be placed with debarred employers that have substantially violated a material term or condition of their temporary labor certification. The proposed changes would also ensure that law-abiding employers have greater access to ES services and are better able to recruit available U.S. workers for jobs because SWAs would spend less time and resources serving noncompliant employers, and law-abiding employers would receive referrals of qualified U.S. workers that might otherwise go to noncompliant employers.

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The Department invites comments on this proposed basis for discontinuation and the inclusion of employers debarred from participation in the H-2B program. In addition, the Department is considering whether to expand this provision to require SWAs to initiate discontinuation proceedings against employers that have been debarred from any of the Department's other foreign labor certification programs—the H-1B, CW-1 and PERM programs. The Department invites comments on whether to expand this provision to all of the foreign labor certification programs, or to some but not all of the other foreign labor certification programs, the scope of employers to whom this may apply, and the effect(s) of expanding this provision.

The Department proposes to amend § 658.501(a)(5) by adding that this basis for discontinuing services includes employers who are found to have violated ES regulations pursuant to § 658.411 or § 658.419. This edit is intended to clarify that ES violations may be found as a result of apparent violations, which are described at § 658.419.

The requirement to accept qualified workers referred through the clearance system applies only to criteria clearance orders filed pursuant to § 655.121; therefore, the Department proposes to amend paragraph (a)(6) by clarifying that discontinuation on the basis of failure to accept qualified workers would be appropriate only for employers placing criteria clearance orders. For non-criteria clearance orders, the regulations at part 653, subpart F, do not require employers to hire all qualified workers referred through the ES, so this basis for discontinuation would not apply.

In paragraph (a)(7), the Department proposes to remove the words *in the conduct of*, which are currently present but do not add meaning and are therefore extraneous and unnecessary.

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Current § 658.501(b) explains the circumstances and procedures for immediate discontinuation of services. The Department proposes to move paragraph (b) to §§ 658.502 and 658.503 to clarify that existing paragraph (b) is not an independent basis for discontinuation and to better align it with the discontinuation procedures in §§ 658.502 and 658.503. Additional proposed changes are discussed below.

The Department is redesignating current § 658.501(c), which recognizes the unique interplay between the ES and H visa programs, to § 658.501(b), with revisions. The proposed new § 658.501(b) explains what a SWA must do when it has learned that an employer participating in the ES system may not have complied with the terms of its temporary labor certification under, for example, the H-2A and H-2B programs. The current regulation states that SWA officials must engage in the *procedures* for discontinuation of services to employers pursuant to paragraphs (a)(1) through (8) of this section. The Department proposes to clarify that SWA officials must determine whether the SWA must *initiate* discontinuation of services pursuant to 658.501(a). The proposed change clarifies that SWAs cannot proceed with discontinuation procedures based solely on information that an employer *may* have violated the terms of its temporary labor certification. Rather, SWAs must take that information and look to paragraph (a) to determine whether one of the bases for discontinuation applies. Once a SWA determines that one of the bases for discontinuation under paragraph (a) does apply, then the SWA *must* initiate discontinuation of services. Finally, as the proposed paragraph (b) would apply to both currently active and previous labor certifications, the Department invites comments on whether it would be appropriate to limit the scope of previous labor certifications or potential violations of a labor certification to a particular time period.

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Section 658.502 describes the notification and procedural requirements a SWA must follow when it intends to discontinue services to an employer. The Department proposes several changes throughout § 658.502 to clarify and streamline these requirements. First, the Department proposes to revise the section heading to state that it relates to notification to employers of the SWA's intent to discontinue services. This change clarifies that this section relates only to initial notices proposing discontinuation and not to the final notices described in § 658.503. The Department also proposes to add introductory language to the beginning of paragraph (a) to clarify that these procedures apply where the SWA determines that there is an applicable basis for discontinuation of services under § 658.501(a). The Department proposes additional revisions to paragraph (a) to clarify that the initial notices must provide the reasons for proposing discontinuation and must state that the SWA intends to discontinue services in accordance with this section. The proposed language removes the reference to part 654, to which discontinuation of services does not apply. These proposed revisions are intended to address issues SWAs encountered in PY 2020 and 2021 in initiating discontinuation of services, including insufficient notification to employers of the applicable bases for discontinuation and insufficient factual detail in the notices to support the applicable bases. The Department notes that if more than one basis under paragraph (a) applies, the SWA must initiate discontinuation under all applicable bases.

Paragraphs (a)(1) through (7) of § 658.502 provide specific notification requirements for each of the corresponding bases for discontinuation outlined in § 658.501(a)(1) through (7). The Department proposes to remove language in § 658.502(a)(1) through (7) that describes the applicable bases for discontinuation and instead cross-reference the applicable citations for



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clarity. For example, the Department proposes to revise § 658.502(a)(1) to state that the paragraph applies where the proposed discontinuation is based on § 658.501(a)(1). This would replace current language that describes § 658.501(a)(1) and more clearly and succinctly direct the SWA to § 658.501(a)(1) as the applicable basis.

The Department also proposes to remove language in § 658.502(a)(1) through (7) that provides employers the opportunity for a pre-discontinuation hearing. In response to a SWA's notice of intent to discontinue services, the existing language provides an employer the opportunity to submit evidence contesting the proposed discontinuation and/or to request a hearing pursuant to § 658.417. The proposed revisions will better align the hearing procedures for discontinuation of services at part 658, subpart F, with the hearing procedures for the ES Complaint System at §§ 658.411(d) and 658.417, which allow for a hearing by a *State hearing official* only after the SWA issues a final decision on a complaint. As currently written, the discontinuation proceedings at § 658.502(a)(1) through (3) and (5) through (7) allow for a hearing under § 658.417 without the SWA ever issuing a final determination under § 658.503. This prevents SWAs from uniformly issuing final determinations in all discontinuation proceedings. Additionally, it inadvertently allows employers to bypass a formal decision from the SWA anytime they request a hearing and, because State administrative hearings may take several months to complete, inadvertently prolongs any formal determinations. The Department believes that removing the opportunity for a pre-discontinuation hearing - while maintaining the opportunity for employers to submit evidence contesting the proposed discontinuation under § 658.502 and the opportunity for a post-discontinuation hearing in § 658.504 - allows SWAs to expeditiously and fairly resolve discontinuation proceedings while providing sufficient due

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process to employers. The proposed change allows for a more complete record than would result from an immediate appeal of a notice from the SWA proposing discontinuation. This proposed change also better aligns with the ES Complaint System regulations which do not contemplate pre-determination hearings. Moreover, as discussed above, the 1977 discontinuation regulations only allowed for pre-discontinuation hearings and, in an effort to clarify and streamline the discontinuation provisions, the 1980 regulations allowed for both a pre- and post-discontinuation hearing pursuant to § 658.417. In doing so, the pre-discontinuation hearing currently available under § 658.502 is no different than the post-discontinuation hearing available under § 658.504. Removing the identical pre-discontinuation hearing allows for a more efficient process without removing due process protections for employers and ensures that post-discontinuation hearings are decided on a more complete record.

Finally, in § 658.502(a)(1) through (7), the Department proposes changing the language that SWAs must notify employers that all *employment services* will be terminated to state that all *ES services* will be terminated. The proposed language clarifies that the services at issue are specific to the ES.

In addition to the changes described above, the Department proposes revisions to paragraphs (a)(1) through (7) to provide greater detail and specificity regarding the type of information that SWAs must provide to employers when proposing to discontinue services. The proposed changes ensure that SWAs adequately explain their reasons for proposing discontinuation, and that employers have sufficient factual detail to respond to the proposed discontinuation. In these paragraphs, the Department also proposes small changes for clarity, including rewording sentences so they use the active voice.

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In paragraph (a)(2), the Department proposes to add language explaining that SWAs must specify the assurances involved and must explain how the employer refused to provide the assurances. The proposed edits ensure that SWAs describe the basic facts that led them to initiate discontinuation of services so employers understand the scope of the alleged violation and have sufficient information to respond. The Department also proposes a revision to clause (ii) to align this paragraph with the proposed changes to § 658.501(a)(2), discussed above, regarding the scope of the required assurances.

In paragraph (a)(3), to provide clearer direction to SWAs and better notice to entities receiving a notice, the Department proposes to add language stating that SWAs must specify the terms and conditions the employer misrepresented or the assurances with which the employer did not fully comply, and explain how the employer misrepresented the terms or conditions or failed to comply with assurances on the job order. In clause (iii), the Department proposes removing the requirement that employers provide *resolution of a complaint which is satisfactory to a complainant referred by the ES*, replacing it with the requirement that an employer provide *adequate evidence that it has resolved the misrepresentation of terms and conditions of employment or noncompliance with assurance*. Evidence is adequate if the SWA could reasonably conclude that the employer has resolved the misrepresentation or noncompliance. The proposed change removes unnecessary and out-of-place language regarding ES complaints, which are addressed in paragraph (a)(5), and better aligns § 658.502(a)(3) with proposed § 658.501(a)(3). The Department also proposes combining clauses (iii) and (iv) to make clear that employers need to provide the information in (iii) and (iv) together.

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In paragraph (a)(4), the Department proposes to add language that SWAs must provide evidence of the final determination by an enforcement agency of a violation of an *employment-related law* or debarment with the notice of intent to discontinue services. For purposes of discontinuation, a final determination is a decision by an enforcement agency, such as WHD, OSHA, or other Federal, State, or local agency responsible for enforcing employment-related laws, that has become operative under applicable law. For final determinations, the Department proposes adding language clarifying that the SWA must specify—as discussed in the final determination or debarment—the enforcement agency's findings of facts and conclusions of law as to the employment-related law violation(s). For final debarment orders, the Department proposes adding language requiring the SWA to specify the time period for which the employer is debarred from participating in one of the Department's foreign labor certification programs. These proposed revisions ensure the SWA has confirmed that a final determination or debarment exists and that the employer has sufficient information regarding the final determination at issue to respond.

The Department proposes revisions to § 658.502(a)(4)(i) through (iii) to clarify and explain the evidence and assurances that employer may provide to avoid discontinuation of services. In clause (i), the Department proposes to remove existing language stating that the employer may provide evidence that the enforcement agency reversed its ruling and that the employer did not violate employment-related laws; and to replace it with language stating that the employer may provide evidence that the determination at issue is not final because, for example, it has been stayed pending appeal, overturned, or reversed. The proposed change clarifies that employers may contest the finality of the determination under paragraph (a)(4) and

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clarifies that SWAs may not discontinue services where a determination is not, in fact, final. The Department proposes a new clause (ii) which requires employers to submit evidence that their period of debarment is no longer in effect and that they have taken all actions required by the enforcement agency as a consequence of the violation. If the proposed discontinuation is based only on a final determination of a violation of an employment related law, then evidence that the debarment is no longer in effect is not needed; similarly if the proposed discontinuation is based on a debarment then evidence that the employer has taken necessary remedial actions is not necessary. The proposed addition in clause (ii)(A) is necessary to address employer responses to debarment or disqualification. The proposed clause (ii)(B) incorporates existing language and is meant to more clearly encompass any and all actions required by final determination but does not substantively change what an employer has to show under current § 658.502(a)(4)(ii).

In paragraph (a)(5), the Department proposes additional language to clarify that the SWA must specify which ES regulation the employer has violated and must provide basic facts to explain the violation. The proposed language ensures that SWAs provide sufficient factual detail regarding the ES violation at issue so the employer can respond.

The Department proposes to revise § 658.502(a)(6) to explain that SWAs must state that the job order at issue was filed pursuant to § 655.121 and specify the name of each worker who was referred and not accepted. The proposed revision is consistent with the proposed change to § 658.501(a)(6) and ensures that SWAs provide sufficient factual detail regarding the workers at issue so the employer can respond. In clause (a)(6)(iii), the Department proposes changing *and* to *or* to decouple clause (iii) from the assurances required in existing clause (iv), as it is not necessary for employers that did not violate the requirement to provide assurances of future

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compliance. The Department proposes a new clause (iv), to add an option for the employer to show that it was not required to accept the referred workers, because the time period under 20 CFR 655.135(d) had lapsed, and a new clause (v), to add an option for the employer to show that, after initial refusal, it subsequently accepted and offered the job to the referred workers or to show that it has provided all appropriate relief imposed as a result of the refusal. It is necessary to update this paragraph because the current regulation does not provide for the scenario where an employer subsequently offers employment to qualified workers after first refusing, as the current clause (i) is intended to capture scenarios where an employer accepted qualified workers and did not refuse them as found by the SWA. It is also possible that SWAs may attempt to resolve apparent violations involving failure to hire qualified U.S. workers referred through the ES, resulting in employers hiring those individuals. Finally, the Department proposes to move existing clause (a)(6)(iv) to (vi) to maintain the requirement that the employer provide assurances that qualified workers referred in the future will be accepted; and adds new language to clarify the assurance that is required depending on whether the period described in 20 CFR 655.135(d) has lapsed, as after the end of the period the employer would no longer be required to accept referred workers on the particular clearance order involved. This change provides a means of ensuring future compliance with the requirement that the employer submitting criteria clearance orders hires all qualified workers referred to the order.

In paragraph (a)(7), the Department proposes clarifying edits that provide clearer direction to the SWA but that do not change the regulation's meaning, including rephrasing sentences and changing the pronoun used for employers to *it* instead of *he/she*.

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The Department proposes to add a new paragraph (a)(8) to explain information the SWA must include in its notice to an employer proposing to discontinue services where the decision is based on § 658.501(a)(8) (repeatedly causes the initiation of discontinuation of services). The Department proposes that the SWA must list and provide basic facts explaining the prior instances where the employer has repeatedly caused initiation of discontinuation proceedings to provide notice of the basis for the SWA's action to facilitate their response. The SWA must notify the employer that all ES services will be terminated unless the employer within that time provides adequate evidence that the SWA's initiation of discontinuation in prior proceedings was unfounded. The proposed (a)(8) replaces existing paragraph (c), which discusses discontinuation based on § 658.501(a)(8) but does not include clear direction to the SWA and does not provide sufficient notice to employers to allow them to respond.

The Department proposes to remove existing § 658.502(b) and (d) because these paragraphs pertain to the employer's pre-determination opportunity to request a hearing. As described above, the Department proposes to eliminate the opportunity for an employer to request a hearing until after the SWA has provided its final notice on discontinuation of services to the employer.

The Department proposes a new § 658.502(b) to explain the circumstances that warrant immediate discontinuation of services. The proposed addition replaces existing § 658.501(b), in part, and states that SWA officials must discontinue services immediately, in accordance with § 658.503, without providing the notice of intent and opportunity to respond described in this section, if an employer has met any of the bases for discontinuation of services under § 658.501(a) and, in the judgment of the State Administrator, exhaustion of the administrative

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procedures set forth in this section would cause substantial harm to workers. The existing § 658.501(b) states that SWA officials *may* discontinue services immediately in these circumstances, whereas the proposed new § 658.502(b) states that SWAs *must* discontinue services immediately. Additionally, existing § 658.501(b) allows for discontinuation when there would be substantial harm to a *significant number* of workers, whereas proposed new § 658.502(b) requires immediate discontinuation when there would be substantial harm to workers. The proposed changes recognize that immediate discontinuation is warranted where the harm at issue would involve only one or a small number of workers, and that where such harm would occur SWAs must be required to initiate discontinuation to prevent the harm from actually occurring to workers. Finally, this proposed paragraph clarifies that immediate discontinuation is appropriate only when a basis under proposed § 658.501 exists *and* the SWA determines that substantial harm would occur; risk of substantial harm alone is not enough for a SWA to immediately discontinue services.

Section 658.503 describes the procedural requirements a SWA must follow when issuing a final determination regarding discontinuation of services to an employer. The Department proposes to revise paragraph (a) to require that within 20 working days of receipt of the employer's response to the SWA's notification under § 658.502, or at least 20 working days after the SWA's notification is received by the employer if the SWA does not receive a response, the SWA must notify the employer of its final determination. When the SWA sends its notification, it must do so in a manner that allows the SWA to track receipt of the notification, such as certified mail. If the SWA determines that the employer did not provide a satisfactory response in accordance with § 658.502 the SWA's notification must specify the reasons for its



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determination, state that the discontinuation of services is effective 20 working days from the date of the notification, state that the employer may request reinstatement or a hearing pursuant to § 658.504, and state that a request for a hearing stays the discontinuation pending the outcome of the hearing. The Department is proposing this stay pending appeal and the 20-working-day period to ensure that employers are provided an opportunity to challenge the SWA's determination before losing access to all ES services. Staying the effect of discontinuation during the pendency of an appeal is appropriate to allow for full adjudication and resolution of any issues related to the SWA's findings before they become final and binding on the employer and the ES system, mitigating the risk that an employer is erroneously deprived of access to services, similar to the procedures in § 658.502. Additionally, placing the effective date at the end of the 20-day period, rather than at the issuance of the notification, avoids depriving appealing employers of ES services for a short period of time prior to their request for hearing. This also makes for a more efficient process for SWAs and ETA, as these agencies would otherwise expend time and resources to effectuate a discontinuation that may be premature—if the employer requests a hearing a short time later, agencies would need to use additional resources to then stay the discontinuation they just effectuated. To facilitate implementation and maintenance of the proposed Office of Workforce Investment discontinuation of services list, discussed above, the SWA must also notify the ETA Office of Workforce Investment of any final determination to discontinue ES services, including any decision on appeal upholding a SWA's determination to discontinue services.

The proposed § 658.503(a) removes language regarding pre-discontinuation hearings to correspond with proposed changes to § 658.502. The Department believes that this timeline for

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SWAs is appropriate because an expeditious resolution of the matter both minimizes the uncertainty an employer faces when a SWA has proposed to discontinue services, and it allows the SWA to deny services to employers that have engaged in impermissible conduct. The effect of an adverse final determination would be, among other things, to protect workers from being placed with those employers and would prevent the employer from seeking a temporary labor certification under part 655, subpart B, of this title. Because of the potential consequences to both employers and workers, the Department has determined that an expeditious process would be necessary.

The Department proposes to add a new § 658.503(b) to explain the procedures for immediate discontinuation of services and to incorporate them into the general discontinuation procedures at § 658.503. The proposed new paragraph (b) replaces existing § 658.501(b), in part, and states that the SWA must notify the employer in writing that its services are discontinued as of the date of the notice. The notification must also state that the employer may request reinstatement or a hearing pursuant to § 658.504, and that a request for a hearing relating to immediate discontinuation does not stay the discontinuation pending the outcome of the hearing. The proposed new § 658.503(b) adds that SWA must specify the facts supporting the applicable basis for discontinuation under § 658.501(a) and the reasons that exhaustion of the administrative procedures would cause substantial harm to workers. The proposed addition ensures that employers have sufficient information regarding the SWA's rationale for immediate discontinuation, and makes clear that employers have recourse to the State administrative hearing process or reinstatement process if a SWA immediately discontinues services. While discontinuation under a determination issued under § 658.503(a) is delayed until the employer's

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time to appeal the determination has ended, the Department thinks that the circumstances justifying a notice of immediate discontinuation also justify that the discontinuation be effective immediately, irrespective of the employer's opportunity to appeal, and that it remain in effect unless the employer is reinstated or the determination is overturned. Immediate discontinuation is reserved for those situations where the State Administrator determines that substantial harm to workers will occur if action is not immediately taken. For example, State Administrators may determine that immediate discontinuation is justified when they receive information evidencing that employers have made threats or have perpetrated violence against workers, or that involve other substantial harm like human trafficking and other significant health and safety issues. SWA quarterly ETA Form-5148 reports evidence that SWAs processed 36 complaints and four apparent violations involving sexual harassment, coercion, or assault, as well as two complaints and six apparent violations involving trafficking in PY 2020.<sup>10</sup> Additionally, over the last several years, the Department has received information evidencing that employers have made threats of physical violence against workers. In two cases, employers were recorded on video threatening workers with firearms. Delaying the effective date of the discontinuation would undermine the protection that the immediate discontinuation procedure is designed to provide. While the Department recognizes the burden that employers may face if they do not have access to any ES services pending an appeal of an immediate discontinuation, the Department thinks that this burden is outweighed by the interest in protecting workers from harmful, potentially dangerous

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<sup>10</sup> See Appendix IV LEARS 5148 Report Part 1 National Data for PY 2020, <https://www.dol.gov/sites/dolgov/files/ETA/mas/pdfs/APPENDIX%20IV%20LEARS%205148%20REPORT%20PART%201%20NATIONAL%20DATA.xlsx>

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situations. The Department notes that in lieu of an appeal, an employer subject to immediate discontinuation of services can request reinstatement from the SWA, and that the proposed 20-day timeframe for the SWA to respond to such a request may provide for timely and efficient resolution of an immediate discontinuation. Finally, as with proposed § 658.503(a), to facilitate implementation and maintenance of the proposed Office of Workforce Investment discontinuation of services list, discussed above, the SWA must also notify the ETA Office of Workforce Investment of any final determination to discontinue ES services.

The Department proposes to move current § 658.503(b), which requires the SWA to notify the relevant ETA regional office if services are discontinued to an employer subject to Federal Contractor Job Listing Requirements, to proposed new paragraph (c) and to make minor edits to use active voice and to improve clarity, which do not change the meaning of the requirement. The Department proposes to add paragraph (d) to require SWAs to notify the complainant of the employer's discontinuation of services, if the discontinuation of services is based on a complaint filed pursuant to § 658.411. This requirement would align with section § 658.411(b)(2) and (d).

The Department proposes to add a new paragraph (e) to explain the effect discontinuation of services has on employers. The proposed new paragraph explains that employers that experience discontinuation of services may not use any ES activities described in parts 652 and 653, and that SWAs must remove the employer's active job orders from the clearance system and must not process any future job orders from the employer for as long as services are discontinued. An employer's loss of access to ES services applies in all locations throughout the

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country where such services may be available. If the effect of the discontinuation were limited to just the State that discontinued services, it would frustrate the purpose of discontinuation.

This proposed new paragraph responds to common questions the Department receives regarding the effect of discontinuation of services on current and future job orders and, as with proposed revisions to § 658.500, clarifies that the scope of services discontinued to include those ES services available to employers under part 652. Proposed § 658.501(b) would require SWA officials to notify the OFLC National Processing Center (NPC) when an ES office or SWA has information that an employer may not have complied with the terms of its temporary labor certification, under, for example the H-2A and H-2B programs. Therefore, in addition to closing the employer's active clearance orders so that the employer will not receive additional U.S. worker referrals, the NPC would be aware of the alleged noncompliance so that it may investigate and apply appropriate actions to the foreign labor certification. The Department is interested in comments on the effect on both workers and employers of removing active job orders, particularly criteria orders. The Department proposes new paragraph (f) to explain that SWAs must continue to provide the full range of ES and other appropriate services to workers whose employers' services have been discontinued. The proposed new paragraph makes it clear that discontinuation of services to employers does not, and should not, negatively affect workers. SWAs must continue to provide necessary support to workers, including outreach to MSFWs, access to the ES and Employment-Related Law Complaint System, and all available ES services.

Section 658.504 describes the procedural requirements for seeking reinstatement of ES services, which can be done either by requesting that the SWA reconsider its decision or by requesting a hearing. The Department proposes to restructure this section to more clearly explain

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how services may be reinstated, the timeframes in which the employers and SWA must act, and the circumstances under which services must be reinstated.

The Department proposes to revise paragraph (a) to make clear that employers have two avenues with which to seek reinstatement of services—via a hearing within 20 working days of the discontinuation or a written request to the SWA at any time following the discontinuation. An employer cannot, however, simultaneously appeal a discontinuation and submit a written request to the SWA for reinstatement. The revised paragraph (a) adds the new requirement that an employer who requests a hearing following discontinuation do so within 20 working days of the date of discontinuation. These avenues are available under the current regulation, but the Department has added a requirement that the employer file an appeal within 20 working days of the SWA's final determination because both the employer and the State have an interest in timely and efficient adjudication of disputes.

The Department proposes to revise § 658.504(b) to explain the circumstances and procedures under which SWAs must reinstate services when an employer submits a written request for reinstatement. The Department proposes new paragraph (b)(1), which retains the current 20-day timeline in existing paragraph (b) within which the SWA must notify the employer whether it grants or denies the employer's reinstatement request. The proposed paragraph (b)(1) also requires that if the SWA denies the request, the SWA must specify the reasons for the denial and must notify the employer that it may request a hearing, in accordance with proposed paragraph (c), within 20 working days.

The Department proposes to move current paragraph (a)(2), which describes the evidence necessary for reinstatement, to proposed paragraph (b)(2) to align with the overall restructuring

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of the section. The Department also proposes to remove the word *any* to require that the employer show evidence that all applicable specific policies, procedures, or conditions responsible for the previous discontinuation are corrected, instead of *any* policies, procedures, or conditions responsible for the previous discontinuation. The Department is concerned that the current language could permit reinstatement despite an employer not correcting all relevant policies, procedures, or conditions, which would be inconsistent with the purpose of discontinuation. Finally, the Department also proposes to change the pronoun used for employers to *it* instead of *his/her*.

The Department proposes to revise § 658.504(c) to explain the circumstances and procedures under which SWAs must reinstate services when an employer submits a timely, written request for a hearing. The proposed revisions maintain the procedures in existing paragraphs (a)(1), (c), and (d), but have reorganized them into the same paragraph for clarity. Finally, the Department proposes to replace the abbreviated term “Federal ALJ” in the existing regulation with “Federal Administrative Law Judge,” commonly abbreviated as ALJ.

The Department proposes a new paragraph (d) to require that SWAs notify the ETA Office of Workforce Investment of any determination to reinstate ES services, or any decision on appeal upholding a SWA's determination to discontinue services, within 10 working days of the date of issuance of the determination. As discussed above, the Department believes that prompt notification to the Office of Workforce Investment will facilitate implementation and maintenance of the proposed Office of Workforce Investment discontinuation of services list and will ensure that employers whose services have been reinstated may promptly access ES services.

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## **IV. Discussion of Proposed Revisions to 20 CFR Part 655, Subpart B**

### **A. Introductory Sections**

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

The Department proposes to define a new term “single employer” to codify and clarify its long-standing approach to determining if multiple nominally separate employers are operating as one employer for the purposes of the H-2A program. The Department has encountered numerous instances over at least the last decade where it appears separate entities are using their corporate structure—intentionally or otherwise—to bypass statutory and regulatory requirements to receive a temporary labor certification, or to circumvent regulations aimed at protecting workers in the United States. *See, e.g., Lancaster Truck Line*, 2014-TLC-00004, at \*3, \*5 (BALCA Nov. 26, 2013) (employer was “frank about separating the legal entities of his operation” from his father’s operation to “comply with the H-2A program’s seasonal permitting restrictions” and the ALJ held the attempt to divide work did not demonstrate temporary need).

OFLC regularly receives and reviews applications for temporary labor certification that appear to be for job opportunities with different employers when in reality the workers hired under these certifications are employed by companies so intertwined that they are operating as a single employer in one area of intended employment for a period of need that is not temporary or seasonal. The Department has also increasingly encountered H-2A employers that employ H-2A workers under one corporate entity and non-H-2A workers under another, creating the appearance that the H-2A employer has no workers in corresponding employment when actually,



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the corporate entities are intertwined and all the H-2A workers are employed by a single H-2A employer, and the non-H-2A workers are engaged in corresponding employment. Employers may attempt to use these schemes to evade requirements of the H-2A program, such as paying workers in corresponding employment the required wage rate or abiding by the housing and transportation requirements of the H-2A program.

OFLC currently uses, and has used for more than a decade, some form of a “single employer” test to determine if nominally separate employers should be considered as one entity for purposes of assessing temporary or seasonal need (discussed further below under *Temporary or Seasonal Need*). However, because this test is not incorporated into the Department’s regulations, it has been criticized and inconsistently applied by the Board of Alien Labor Certification Appeals (BALCA). *Compare Mid-State Farms, LLC*, 2021-TLC-00115, at \*16, \*25-27 (BALCA Apr. 16, 2021) (noting that the “single employer test” has not been subject to public comment, and thus using the “joint employer test” instead) (more discussion below) *with K.S. Datthyn Farms, LLC*, 2019-TLC-00086, at \*4-6 (BALCA Oct. 7, 2019) (applying the single employer test to determine that two H-2A applicants for temporary labor certification were one single employer with a single labor need). Relying on Federal and BALCA case law, WHD currently also applies the “single employer” test to determine the H-2A employer’s compliance with program requirements.

The Department’s proposal to add a definition of “single employer,” which would explicitly permit the use of the single employer test when reviewing applications for temporary labor certification and for purposes of enforcement, is meant to codify the Department’s long-

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standing practice. Doing so would prevent employers from using their corporate structures to circumvent regulatory requirements and would provide notice and clarity to the stakeholder community regarding the Department's single employer analysis. A clearly articulated definition also could serve to deter employers from utilizing practices that appear to circumvent the obligations of H-2A employers by making explicit the obligations of the single employer. This section discusses (1) the single employer definition the Department proposes to add to a new subordinate paragraph (e) within § 655.103, including the factors the Department will consider when determining whether two or more entities satisfy this definition; (2) the use of the single employer test by OFLC when analyzing whether an employer has a temporary or seasonal need; and (3) the use of the single employer test in enforcement of contractual obligations.

*a. Definition*

As noted, the Department already applies a "single employer" test (sometimes referred to as an "integrated employer" test) under the H-2A program in certain contexts. OFLC currently uses this test to determine if multiple nominally separate employers should be considered as one entity for the purposes of determining whether an applicant for labor certification has a temporary or seasonal need, and WHD uses this test to determine whether H-2A employers complied with program requirements. This test originated with the NLRB and has been adopted by courts and Federal agencies under a wide variety of statutes. *See S. Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, AFL-CIO*, 425 U.S. 800, 802-803 (1975). As the Second Circuit has explained, the single employer test may be used to determine liability for employment-related violations, as well as to determine employer coverage, and the policy

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underlying the doctrine is “fairness . . . where two nominally independent entities do not act under an arm’s length relationship.” *Murray v. Miner*, 74 F.3d 402, 404 n.1, 405 (2d Cir. 1996).

Consistent with judicial and administrative precedent, the Department has typically looked to four factors to determine whether the entities at issue should be considered a single employer for purposes of temporary need and compliance: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership/financial control. *See, e.g., Sugar Loaf Cattle Co.*, 2016-TLC-00033, at \*6 (BALCA Apr. 6, 2016) (citing to *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1141 (D.C. Cir. 2015)). The proposed definition would incorporate the four factors noted above and, as under current practice, the Department would consider the totality of the circumstances surrounding the relationship among the entities, and no one factor would be determinative in the analysis.<sup>11</sup>

The Department’s main concern in determining whether two or more entities are operating as one is preventing employers from utilizing their corporate structure(s) to circumvent the program’s statutory and regulatory requirements. As such, the Department’s focus when examining whether two or more entities are a single employer is both the relationship between the entities themselves and each entity’s use of the H-2A program. *See Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1227 (10th Cir. 2014) (in a Title VII case, the court noted that “the single employer test focuses on the relationship between the potential employers

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<sup>11</sup> *See also* Travis Hollifield, *Integrated Employer/Enterprise Doctrine in Labor & Employment Cases*, THE FEDERAL LAWYER, December 2017, at 56, 58, <http://www.fedbar.org/wp-content/uploads/2017/12/Labor-and-Empl-pdf-1.pdf>.

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themselves”). The Department emphasizes again that no one factor is determinative as to whether entities are acting as one.

Regarding the “common management” factor, the “relevant inquiry is whether there is ‘overall control of critical matters at the policy level.’” *K.S. Datthyn Farms, LLC*, 2019-TLC-00086, at \*6 (citations omitted) (quoting *Spurlino Materials*, 805 F.3d at 1142). Shared day-to-day management may also indicate common management. *Spurlino Materials*, 805 F.3d at 1142. For example, where the same president, treasurer, and chief operating officer oversee the actions of multiple entities and resolve disputes, this suggests a common management between entities. *Pepperco-USA, Inc.*, 2015-TLC-00015, at \*30-31 (BALCA Feb. 23, 2015).

Regarding the “interrelation between operations” factor, the Department may look to whether the entities operate at arm’s length. *Id.* It may examine whether companies share products or services, costs, worksites, worker housing, insurance, software, or if they share a website, supplies, or equipment. *See, e.g., id.; Sugar Loaf Cattle Co.*, 2016-TLC-00033, at \*6-7 (finding an interrelation of operations in part because the work locations were “fundamentally at the same place”); *David J. Woestehoff*, 2021-TLC-00112, at \*11 (BALCA Apr. 2, 2021) (comparing employers’ housing locations and worksites to analyze their relationship).

Regarding the “centralized control of labor relations” factor, for example, the Department may look to whether the persons who have the authority to set employment terms and ensure compliance with the H-2A program are the same. *K.S. Datthyn Farms*, 2019-TLC-00086, at \*5 (noting that the same manager signed different H-2A applications and this was a “fundamental labor practice [], at the core of employer-employee relations for any business”).

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Finally, regarding “common ownership and financial control,” the Department may look to the corporate structure and who owns the entities, whether it be, for example, a parent company or individuals. *See Pepperco-USA, Inc.*, 2015-TLC-00015, at \*30-31 (two nominally distinct entities were owned by one parent company). It may also explore whether the owners of the entities at issue are related in some way. *See, e.g., JSF Enters.*, 2015-TLC-00009, at \*13 (BALCA Jan. 22, 2015) (entities owned in varying degrees by members of the same family); *Larry Ulmer*, 2015-TLC-00003, at \*3 (BALCA Nov. 4, 2014) (two companies with similar names were owned by father and son); *Lancaster Truck Line*, 2014-TLC-00004, at \*2-3 (father and son sought to separate a business in an attempt to meet seasonal need requirements); *see also Overlook Harvesting Co.*, 2021-TLC-00205, at \*13 (BALCA Sept. 9, 2021) (the marital relationships between two companies’ owners suggested shared control).

These examples of analysis and lines of inquiry related to each of the factors are not exhaustive.

*b. Temporary or Seasonal Need*

OFLC’s COs will use the single employer test to determine if an employer’s need is truly temporary or seasonal. Section 101(a)(15)(H)(ii)(a) of the INA permits only “agricultural labor or services . . . of a temporary or seasonal nature” to be performed under the H-2A visa category. 8 U.S.C. 1101(a)(15)(H)(ii)(a). Thus, as part of the Department’s adjudication of applications for temporary agricultural labor certification, the Department assesses on a case-by-case basis whether the employer has established a temporary or seasonal need for the agricultural work to be performed. *See* 20 CFR 655.103(d), 655.161(a).

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As noted above, some nominally distinct employers have intertwined agricultural operations such that when they apply for H-2A workers it appears that two or more separate entities are each requesting a different temporary labor certification. However, in reality, the workers on these certifications are employed by a single enterprise in the same area of intended employment and in the same job opportunity for longer than the attested period of need on any one application. For example, if Employer A has a need for two Agricultural Equipment Operators from February to December, and Employer B has a need for two Agricultural Equipment Operators from December to February at the same worksite, this may reflect a single year-round need for Agricultural Equipment Operators. *See, e.g., Katie Heger, 2014-TLC-00001, at \*6 (BALCA Nov. 12, 2013) (“Considering that the [two entities] appear to function as a single business entity and have identified sequential dates of need for the same work, their ‘temporary’ needs merge into a single year-round need for equipment operators.”)*. In these situations, the two nominally separate employers may be applying for certification for, and advertising for, one continuous, sometimes permanent, job opportunity, which calls into question whether either employer has a temporary or seasonal need.

This situation arises only when employers are filing multiple applications for the same or similar job opportunities in the same area of intended employment, such that the combined period of need is continuous or permanent. Applications for job opportunities in different occupations, involving different duties and requirements, or opportunities in different areas of intended employment may not demonstrate one singular continuous need for workers, regardless of whether the two employers would satisfy the single employer test. Furthermore, if the periods of need of two or more entities reflect the same, or similar, need for labor, this is also not

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necessarily problematic because the need is not continuous. For example, Employer A has a need from January to April, and Employer B has a need from February to April—the two employers may be a single employer, but the need for workers, assuming the required labor levels are far above necessary for ongoing operations, may still be seasonal.

Even if employers have genuine business needs for dividing their business and then separately applying for H-2A workers, this approach to filing labor certification applications is still problematic. It undermines the statutorily required labor market test and the Department's ability to protect workers in the United States as each application, standing alone, does not fully convey the potential job opportunity to any applicant—for example, the job opportunity could be for 12 total months rather than 6 months with one employer, and 6 months with only a nominally separate entity. It is possible that a U.S. worker would be interested in a job that could last a year, or even permanently, rather than only 6 months. More importantly, it is a statutory requirement that the H-2A work be of a temporary or seasonal nature, and therefore employers submitting an application for temporary labor certification are required to establish that they have a temporary or seasonal need for agricultural labor. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 20 CFR 655.103(d), 655.161. Permitting employers with a permanent need to simply divide their business so that multiple entities can establish a temporary or seasonal need, and thereby obtain a labor certification, would violate the statute. *See, e.g., Intergrow East, Inc.*, 2019-TLC-00073, at \*5 (BALCA Sept. 11, 2019) (“An employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application . . . .”) (citations omitted). An employer need not be willful in its attempt to circumvent program requirements to

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nevertheless engage in a business practice that inhibits the Department's ability to protect workers and carry out its statutory mandate.

To address these situations, for years OFLC has used an informal, fact-focused method of inquiry, involving a comparison of case information (e.g., owner and manager names, locations, recruitment information, and other operational similarities across applications). In approximately 2015, OFLC began to frame its single employer analysis using the NLRB's single employer test (see above under *Definition*) to improve consistency and transparency and to address more complex business structures (e.g., corporate organizations) filing H-2A applications through nominally different employers. See *Pepperco-USA, Inc.*, 2015-TLC-00015, at \*4-5. Historically, BALCA has affirmed many OFLC denials that either explicitly used the single employer test or used a similar analysis. See, e.g., *K.S. Datthyn Farms, LLC*, 2019-TLC-00086, at \*4-6 (affirming the CO and applying the four-part NLRA and Title VII integrated employer test to determine that two H-2A applicants for temporary labor certification were one integrated employer with a single labor need); *JSF Enters.*, 2015-TLC-00009, at \*12 (affirming the CO and finding that “[t]he four entities . . . fill the same need on a year round basis because of the interlocking nature of the businesses and regardless of the distinction in crops each harvests [sic]”); *Altendorf Transp., Inc.*, 2013-TLC-00026, at \*8 (BALCA Mar. 28, 2013) (affirming the CO and noting that Employer's argument “does not overcome the interlocking nature of the business organizations . . . . The Employer has the burden of persuasion to demonstrate it and [the other entity] are truly independent entities.”); *D & G Frey Crawfish, LLC*, 2012-TLC-00099, at \*2, \*4 (BALCA Oct. 19, 2012) (affirming the CO and stating that “[Employer's] ability to separate her



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operation into two entities does not enable her to hire temporary H-2A workers to fulfill her permanent need . . .”).

However, in more recent decisions, BALCA has sometimes rejected the single employer test, noting that it had not been promulgated through notice and comment rulemaking. *See Mid-State Farms, LLC*, 2021-TLC-00115, at \*16 (“This court can find no published instance where the ‘Single Employer Test’ has been debated openly, subjected to public comment or accepted as official Department policy.”); *Crop Transp., LLC*, 2018-TLC-00027, at \*6 n.6 (BALCA Oct. 19, 2018) (noting that the single employer test “is lamentable” because of its “awkward fit to immigration practice and its ambiguity. . . . It would be helpful . . . if meaningful regulatory criteria were promulgated through notice and comment procedures as to when ETA will consider two nominally separate entities as a single applicant for purposes of temporary labor certifications under the Act.”).

In response to these concerns some ALJs have applied the “joint employer” test to analyze temporary need because a definition of “joint employment” is included in the regulations. *See, e.g., Mid-State Farms, LLC*, 2021-TLC-00115, at \*26; *Overlook Harvesting Co.*, 2021-TLC-00205, at \*10. Joint employment generally is “where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency.” 20 CFR 655.103(b). Joint employment thus takes into consideration the relationship between the employer and the employees, while the single employer test focuses on the relationship between the nominally distinct employers. *See Knitter*, 758 F.3d at 1227 (“Unlike the joint employer test, which focuses on the relationship between an employee and its two potential employers, the single employer test focuses on the relationship between the

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potential employers themselves.”). Finally, joint employment assumes that the entities are separate while the single employer test asks whether “two nominally separate entities should in fact be treated as an integrated enterprise.” *Id.* at 1226-27 (quoting *Bristol v. Bd. of Cnty. Comm'rs*, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc)).

Determining whether two entities are joint employers, contrary to BALCA's assertion in *Mid-State Farms, LLC*, is unhelpful when assessing temporary or seasonal need where, for example, an employer splits their business between two seemingly separate entities to circumvent the requirement to establish a temporary or seasonal need. *See Overlook Harvesting Co.*, 2021-TLC-00205, at \*10 (noting modified “joint employer” test to analyze temporary or seasonal need was problematic because two related companies could “manipulate [their] seasonal need” under this test by splitting one, potentially year-long, season into two seasons with one company working one season, and the other working the other). In those situations, employees are generally not employed by both nominally distinct employers at the same time, though there may be overlap between the periods of need, making the analysis of joint employment largely inapplicable. In assessing temporary or seasonal need, the focus of the Department's analysis is not on the relationship between the employer and the employees, but rather between the employers themselves.

In light of the conflicting BALCA case law, and to codify its long-standing practice, the Department proposes to incorporate the single employer definition into the regulations and also notes that COs will use the definition to analyze the temporary or seasonal need of nominally separate entities.

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The Department emphasizes that joint employment can still be useful in analyzing temporary or seasonal need in the H-2A program, and this proposal is not meant to eliminate or undermine appropriate use of the joint employment test. For example, there may be a situation where an employer applies for workers from January to April and then hires an H-2ALC or subcontractor for the months of May to December. It is possible that this subcontracting (or even a parent and subsidiary) relationship could be joint employment as defined in the regulations. If such an employer-applicant hires workers from January to April, and then jointly employs workers in the same occupation in the same area of intended employment from May to December, this employer-applicant would have a year-round need and would therefore be unable to establish the required temporary need for the H-2A program. The use of the single employer test in temporary or seasonal need analysis will cover situations where employees are *not* jointly employed.

Should a CO suspect that an employer-applicant has a true need that stretches longer than their stated need because it is a single employer together with another entity, the COs may issue a Notice of Deficiency (NOD) to clarify the status of said entities. To analyze whether two entities are a single employer, COs may request, via NOD, information necessary for this determination, including, but not limited to: (1) documents describing the corporate and/or management structure for the entities at issue; (2) the names of directors, officers and/or managers and their job descriptions; (3) incorporation documents; or (4) documents identifying whether the same individual(s) have ownership interest or control. The COs may additionally ask for explanation as to: (1) why the businesses may authorize the same person or persons to act on their behalf when signing contracts, or applications, etc.; (2) whether the businesses intermingle

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money or share resources; (3) whether workspaces are shared; and (4) whether the companies produce similar products or provide similar services. These lists of documentation or evidence are not exclusive, and the COs may request other information or documentation as necessary.

### *c. Enforcement*

The proposed definition of single employer also would explicitly provide that the Department may apply this test for purposes of enforcing an H-2A employer's contractual obligations. The Department has increasingly encountered H-2A employers that employ H-2A workers under one corporate entity and non-H-2A workers under another, such that it appears that the H-2A employer has no non-H-2A workers in corresponding employment when in reality, the companies are so intertwined that all the workers are employed by a single employer, and the non-H-2A workers are employed in corresponding employment.

As noted above, and consistent with BALCA and Federal case law, WHD already applies the single employer test in certain circumstances to determine whether an H-2A employer has complied with its program obligations. Over the past several years, WHD has increasingly encountered employers employing temporary nonimmigrant workers that utilize multiple, seemingly distinct corporate entities under common ownership. In the H-2A context, these employers have divided their H-2A and non-H-2A workforces onto separate payrolls, such that it appears that the employer has no workers in corresponding employment, and paying the non-H-2A workers less than the H-2A workers. However, the H-2A and non-H-2A workers generally work alongside one another, performing the same work, under the same common group of managers, subject to the same personnel policies and operations. In these circumstances, to determine whether the H-2A employer listed on the H-2A Application employed the non-H-2A

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workers in corresponding employment, the common law test for joint employment may not be a useful inquiry because the interrelation of operations makes it difficult to determine the relationship between each distinct corporate entity and the workers. The single employer test is a more useful inquiry because it focuses on the relationship between the corporate entities to determine whether they are so intertwined as to constitute a single, integrated employer, such that it is appropriate and “fair” to treat them as one for enforcement purposes. Absent application of the single employer test, this burgeoning business practice might be used—whether intentionally or not—to deprive domestic workers of the protections of the H-2A program by superficially circumventing an employment relationship with the H-2A employer as described herein, contrary to the statute’s requirements. 8 U.S.C. 1188(a)(1).

While WHD already utilizes the single employer test, the Department believes that explicitly noting in the regulations the potential applicability of this test for purposes of enforcement, and the factors the Department will consider in applying this test, will provide clarity for internal and external stakeholders and also could deter employers from intentionally seeking to circumvent the H-2A program’s requirements in this manner. Just as the single employer test is not meant to displace the joint employer test when analyzing temporary or seasonal need, the Department does not propose to replace or supersede the definition of “joint employment” under the existing regulations for purposes of enforcement. Rather, depending upon the facts and circumstances of a given case, the Department may apply the single employer test, the joint employment test, or both in the alternative, to determine an H-2A employer’s compliance with program requirements.

*d. Conclusion*

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In conclusion, the Department proposes a new paragraph (e) to § 655.103 that grants the Department explicit authority to use the definition of “single employer” to determine if nominally separate employers should be considered one single employer for the purpose of determining the applicant’s temporary or seasonal need, or for purposes of enforcement. The Department believes that incorporating this single employer test into the regulations would allow for more consistent application of the temporary or seasonal need requirement and improve compliance with program obligations.

The Department recognizes that the adoption of the single employer definition as it relates to temporary need assessments may impact some businesses more than others. Regardless of the impact on certain employers, the Department believes proposing this regulatory text is necessary to ensure compliance with statutory and regulatory requirements and clarify the appropriate standard to assess the nature of the relationship between two or more entities. The Department welcomes comments on these proposed revisions, especially comments relating to the impact this may have on specific industries or types of employers.

## **2. Section 655.104, Successors in interest**

The Department proposes several revisions to its current regulations to clarify the liability of successors in interest and revise the procedures for applying debarment to successors in interest to a debarred employer, agent, or attorney. Since 2008, the Department’s H-2A regulations have made explicit that successors in interest to employers, agents, and attorneys may be held liable for the responsibilities and obligations of their predecessors, including debarment. As the Department explained in the preamble to the H-2A final rule issued in 2008, holding successors liable, particularly in the context of debarment, is necessary “to ensure that

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violators are not able to reincorporate to circumvent the effect of the debarment provisions,” and “to prevent persons or firms who were complicit in the cause of debarment from reconstituting themselves as a new entity to take over the debarred employer’s business.” 73 FR 77110, 77116, 77188 (Dec. 18, 2008) (2008 H-2A Final Rule). Despite these intentions, the Department’s current regulations governing debarment, as interpreted by the ARB and the BALCA, are insufficient to effectively prevent program violators from “circumvent[ing] the effect of the debarment” as the Department originally intended. *Id.* at 77110.

Specifically, under the Department’s current regulations and controlling administrative precedent, before OFLC may deny an H-2A Application filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney, the Department must first debar the successor in interest pursuant to the full procedures for debarring the original violating employer, agent, or attorney. *See Admin. v. Fernandez Farms*, ARB No. 2016-0097, 2019 WL 5089592, at \*2-4 (ARB Sept. 16, 2019) (holding that 29 CFR 501.31 requires WHD to issue a new notice of debarment to a successor before subjecting the successor to the original employer’s WHD order of debarment); *Gons Go, Inc.*, BALCA Nos. 2013-TLC-00051, -00055, -00063 (BALCA Sept. 25, 2013) (holding 20 CFR 655.182 requires OFLC to first debar a successor of a debarred employer, by completing the full debarment procedures in § 655.182, before it may deny the successor’s application for labor certification). These requirements are unnecessary under the principles of the successorship doctrine, and unduly burden the Department’s ability to apply debarment to successors in interest, thus allowing those known to have committed substantial H-2A violations to continue to participate in the H-2A program.

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Under the successorship doctrine, a putative successor in interest to a debarred employer, agent, or attorney is entitled to notice and an opportunity for hearing prior to denial of a future application only on the question of its status as a successor in interest. *See Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 180 (1973) (discussing due process rights of successors). The Department need not obtain a new order of debarment against the successor directly; that is the “whole point” of the successorship doctrine, that the liabilities of the predecessor attach to the successor. *Criswell v. Delta Air Lines*, 868 F.2d 1093, 1095 (9th Cir. 1989).

Accordingly, the Department proposes several revisions to its regulations to streamline the procedures by which it may apply a debarment of an employer, agent, or attorney to a successor in interest while affording putative successors due process. First, the Department proposes a new § 655.104, *Successors in interest*. Proposed paragraphs (a) and (b) are similar to the longstanding definition of “successors in interest,” currently in § 655.103(b), *Definitions*. However, proposed paragraph (a) omits language in the current regulation stating that liability of successors in interest arises where an employer, agent, or attorney “has ceased doing business or cannot be located for purposes of enforcement.” Instead, the Department proposes adding to proposed paragraph (b) a similar—but broader—definition of successors in interest. The new language in proposed paragraph (b) would specify that “[a] successor in interest includes 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 proposed revision recognizes that successorship law does not typically limit successor liability to scenarios where an entity has ceased doing business or cannot be located. The Department believes these revisions will more accurately



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capture successorship scenarios that may arise in the H-2A context. In the same vein, in proposed § 655.104(b) the Department proposes minor revisions to the current definition in § 655.103(b), regarding the nonexhaustive factors that the Department would use in determining successor status. The proposed revisions to the factors would provide that the personal involvement of the successor firm's supervisors and management in the violations underlying the debarment is one of several factors, rather than the "primary" factor, to be considered in cases of debarment. In its experience, the Department has found the current regulation's reliance on this factor as the "primary" factor to be unduly limiting, and in tension with the general principle in subordinate paragraph (i) of the definition of *successor in interest* that no one factor should be dispositive in determining successor status. 20 CFR § 655.103(b) (subordinate paragraph (i) of undesignated definition of "successor in interest"). The Department also proposes a corresponding revision to delete the definition of "successor in interest" from the *Definitions* at § 655.103(b).

Proposed § 655.104(c) explains that when an employer, agent, or attorney is debarred, any successor in interest to the debarred employer, agent, or attorney is also debarred. Accordingly, applications filed by or on behalf of a putative successor in interest to a debarred employer, agent, or attorney would be treated like applications filed by the debarred employer, attorney, or agent. Specifically, under this proposal, if the CO determines that such an application was filed during the debarment period, the CO would issue a NOD under § 655.142 or deny the application under § 655.164, depending upon the procedural status of the application. The NOD or denial would be based solely on the basis of the applying entity's successor status and would not address (nor would it waive) any other potential deficiencies in the application. If

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the CO determines that the entity is *not* a successor, the CO would resume with processing of the application under § 655.140. However, if the CO determines that the entity is a successor, the CO would deny the application without further review pursuant to § 655.164. As with any other certification denial, the putative successor could appeal the CO's determination under the appeal procedures at § 655.171; specifically here, the question of whether the entity is, in fact, a successor in interest to a debarred employer, agent, or attorney. However, such appeal would be limited to the entity's status as a successor given the narrow scope of the CO's determination under these provisions. Accordingly, should a reviewing ALJ conclude that the entity is not a successor, the application would require further consideration and thus the ALJ would remand the application to OFLC for further processing.

The Department proposes corresponding revisions to § 655.182, governing debarment, to state clearly that debarment of an employer, agent, or attorney applies to any successor in interest to that debarred employer, agent, or attorney. These proposed revisions would remove references to successors in interest from current paragraphs (a) and (b), would redesignate current paragraph (b) to (b)(1), and would include a new paragraph (b)(2) that reiterates the procedures for determining successor status as outlined in proposed § 655.104(c).

Similarly, proposed § 655.104(c) also would explain that the OFLC Administrator may revoke a certification that was issued, in error, to a successor in interest to a debarred employer, pursuant to § 655.181(a). The entity may appeal its successor status pursuant to § 655.171. The Department notes that it may revoke a certification issued, in error, to a debarred employer or to a successor of a debarred employer under its current revocation authorities, but the Department proposes revisions to the bases for revocation at § 655.181(a)(1), to clarify that fraud or

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misrepresentation in the application includes an application filed by a debarred employer (and, by extension, an application filed by a successor to a debarred employer). These proposed changes would simply clarify this existing authority. However, given the impact of revocation on both employers and workers, proposed § 655.104(c) and § 655.181(a)(1) would not explicitly contemplate revocation of a certification issued, in error, based on an application filed by a debarred agent or attorney, or by successors to a debarred agent or attorney, as distinct from a debarred employer or successor in interest to a debarred employer. The Department invites comment on whether revocation may be warranted in such circumstances.

Finally, the Department proposes corresponding revisions to the procedures governing WHD debarments under 29 CFR 501.20, including a new proposed paragraph (j) that explicitly addresses successors in interest. Under the successorship doctrine, as discussed above, and under this proposed rule, WHD would not be required to issue a notice of debarment to a successor in interest to a debarred employer, agent, or attorney; rather, debarment of the predecessor would apply equally to any successor in interest. However, as provided in proposed paragraph (j), as a matter of expediency WHD could, but would not be required to, name any known successors to an employer, agent, or attorney in a notice of debarment issued under § 501.20(a).

The Department has determined that these proposed revisions would better effectuate the intent of the Department's current successor in interest regulations, which are critically important to ensuring that program violators cannot circumvent a debarment. The proposed procedures would allow OFLC to apply a final order of debarment of an employer, agent, or attorney to any successor in interest to the debarred entity. The proposed procedures also would provide for sufficient due process to putative successors, as the proposed procedures would require OFLC to

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provide notice to the successor of the basis for the deficiency under § 655.141 or denial under § 655.164 (i.e., its status as a successor), and an opportunity for hearing on its successor status under § 655.171. The Department welcomes comments on these proposed revisions.

### **3. Section 655.190, Severability**

The Department proposes to add a severability clause to 20 CFR part 655, subpart B. This clause would explain that if any provision is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from the corresponding subpart or part and shall not affect the remainder thereof. The Department proposes to add this severability clause because generally, each provision within the H-2A regulations is capable of operating independently from one another, including where the Department has proposed multiple methods to strengthen worker protections and to enhance the Department's capabilities to conduct enforcement and monitor compliance. Further, the severability clause demonstrates the Department's intent that the remaining provisions of the regulations should continue in effect if any provision or provisions are held to be invalid or unenforceable. It is the Department's intent that the remaining provisions of the regulations should continue in effect if any provision or provisions are held to be invalid or unenforceable. It is of great importance to the Department and the regulated community that even if a portion of the H-2A regulations were held to be invalid or unenforceable that the larger program could operate consistent with the expectations of employers and workers.

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The Department seeks comments both on the substance and scope of this proposed severability clause and requests the public's views on any other issues related to severability, such as whether the rule in general includes provisions amenable to severability; whether specific parts of the rule could operate independently; whether the benefits of the rule would continue to justify the costs should particular provisions be severed; or whether individual provisions are essential to the entire rule's workability.

## **B. Prefiling Procedures**

### **1. Section 655.120(b), Offered Wage Rate**

Currently, § 655.120(b)(2) provides that the Department will update each AEWWR at least annually by publication in the *Federal Register*.<sup>12</sup> In addition, paragraph (b)(3) requires employers to adjust workers' pay, if necessary, so that the employer pays workers at least the updated AEWWR upon the effective date of the updated AEWWRs in the *Federal Register*. However, the present regulatory text does not address when the AEWWR published in a *Federal Register* notice becomes effective. The Department therefore proposes to revise paragraph (b)(2) and (b)(3) to designate the effective date of updated AEWWRs as the date of publication in the *Federal Register*.

The duty to pay an updated AEWWR where it is higher than the other wage sources is not a new requirement, nor is the requirement to pay an increased AEWWR immediately upon publication in the *Federal Register*. Between 1987 and January 2018, the Department required

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<sup>12</sup> Under 44 U.S.C. 1507, publication in the *Federal Register* provides legal notice of the new wage rates.

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employers participating in the H-2A program to offer and pay the highest of the AEW, the prevailing wage, any agreed-upon collective bargaining wage, or the Federal or State minimum wage at the time the work is performed effective upon the date of publication in the *Federal Register*.<sup>13</sup> Under more recent practice, however, when publishing the *Federal Register* notice containing updated AEWs, the Department has stated the effective date of the new AEWs in the notice and generally set the effective date of the new AEWs at no later than 14 calendar days from the publication of that notice.

In this rule, the Department proposes to revise paragraph (b)(2) to designate the effective date of updated AEWs as the date of publication in the *Federal Register*. For further clarity, the Department also proposes to revise paragraph (b)(3) to state that the employer is obligated to pay the updated AEW immediately upon the date of publication of the new AEW in the *Federal Register*. As noted above, the proposal to remove an effective date which differs from the publication date of the AEWs represents a return to longstanding prior practice. This change will also ensure that agricultural workers are paid at least the most current AEW when work is performed, which better aligns with the Department's mandate to prevent adverse effect on the wages of workers in the U.S. similarly employed. To eliminate any potential confusion among either employers or workers as to when the new AEW will need to be paid, the NPRM also

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<sup>13</sup> See, e.g., 1987 H-2A IFR, 52 FR 20496, 20521; Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; H-2A Program Handbook, 53 FR 22076, 22095 (June 13, 1988) ("Certified H-2A employers must agree, as a condition for receiving certification, to pay a higher AEW than the one in effect at the time an application is submitted in the event publication of the [higher] AEW coincides with the period of employment.").

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proposes to update the regulatory text, which is currently silent on this issue, to clearly state when the obligation to pay the new AEWRs begins.

While the Department recognizes that this proposal is a departure from more recent practice that allowed a wage adjustment period, the vast majority of employers will still have the opportunity to view and assess the impact of the new AEWR rates prior to their publication by the OFLC Administrator in the *Federal Register* on or around January 1.<sup>14</sup> Prior to that publication, USDA publishes its FLS in late November<sup>15</sup> showing the wage data findings that become the new AEWRs for the field and livestock workers (combined) occupational grouping. Similarly, BLS publishes its OEWS data in March, which contains the wage data that become the new AEWRs on or around July 1 for the small percentage of job opportunities that cannot be encompassed within the six Standard Occupational Classification (SOC) codes and titles in the FLS field and livestock workers (combined) reporting category. The Department will post a notice on the OFLC website when USDA publishes the FLS and when BLS publishes the OEWS data that will direct employers to the publicly available information. The Department recognizes that the employers of the small number of field and livestock workers (combined) job

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<sup>14</sup> See, e.g., 88 FR 12760, 12766 (the Department's program estimates indicate that 98 percent of H-2A job opportunities are classified within the six SOC titles and codes of the field and livestock workers (combined) occupational grouping).

<sup>15</sup> USDA's National Agricultural Statistics Service publishes the Farm Labor report on its website at [https://www.nass.usda.gov/Surveys/Guide\\_to\\_NASS\\_Surveys/Farm\\_Labor/](https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/). OEWS wages for each SOC code and geographic area are available using the Department's search tool or searchable spreadsheet that may be accessed at <https://flag.dol.gov>. BLS publishes OEWS data on its website at <https://www.bls.gov/oes/data-overview.htm>. An overview of the OEWS survey methodology may be accessed at [https://www.bls.gov/oes/current/oes\\_tec.htm](https://www.bls.gov/oes/current/oes_tec.htm). An explanation of the survey standards and estimation procedures can be found at <https://www.bls.gov/opub/hom/oes/pdf/oes.pdf>.

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opportunities in States or regions, or equivalent districts or territories, for which the FLS does not report a wage (e.g., Alaska and Puerto Rico) will not have similar direct access to information enabling them to predict the applicable AEW for planning purposes. However, as the Department noted in the 2010 H-2A Final Rule, “[as]...these wage adjustments may alter employer budgets for the season,” employers are encouraged “to include into their contingency planning certain flexibility to account for any possible wage adjustments.” 75 FR 6884, 6901 (Feb. 12, 2010). The Department believes these proposed revisions will clarify employer wage obligations and ensure that agricultural workers are paid at least the AEW in effect at the time the work is performed, without new or additional impact to most employers’ ability to budget and plan. The Department seeks comments on all aspects of this proposal.

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

The Department proposes revisions to §§ 655.120(a) and 655.122(l) to clarify that where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate, the employer must include the non-hourly wage rate on the job order along with the highest hourly rate. All potential wage rates must be listed on the job order notwithstanding the fact that it may not be possible to determine in advance which of these rates is the highest. Once work has been performed, the employer must then calculate and pay workers’ wages using the wage rate that will result in the highest wages for each worker in each pay period.

The Department’s current regulations at 20 CFR 655.120(a) and 655.122(l) require an employer to “offer, advertise in its recruitment, and pay” the highest of the AEW, prevailing



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wage rate, collective bargaining agreement (CBA) rate, or Federal or State minimum wage.

While seemingly straightforward, this requirement has been difficult to apply in practice. For instance, where there is an applicable prevailing piece rate, 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.

In such instances, OFLC currently only requires H-2A employers to list a wage offer that is at least equal to the highest applicable hourly wage—usually the AEW—on job orders, consistent with BALCA decisions dating from 2009 to 2011, which concluded that, under the regulations, OFLC cannot require employers to include an applicable prevailing piece rate on the job order where OFLC does not know at the certification stage whether the prevailing piece rate will be higher than the highest hourly wage. *See, e.g., Golden Harvest Farm*, 2011-TLC-00442, at \*3 (BALCA Aug. 17, 2011); *Dellamano & Assocs.*, 2010-TLC-00028, at \*5-7 (BALCA May 21, 2010); *Twin Star Farm*, 2009-TLC-00051, at \*4-5 (BALCA May 28, 2009). While this has been the Department's longstanding practice, the Department is concerned with the uncertainty this practice can generate as to which rate or rates an employer must include as the required wage in a job order and pay to H-2A workers and workers in corresponding employment. Moreover, because the prevailing piece rate is not included on the job order, in most such instances, WHD is not able to enforce the prevailing piece rate.

In other instances, such as when there is not a prevailing wage, employers may voluntarily elect to pay a piece rate or other non-hourly wage rate but fail to include such rates on the job order, potentially misrepresenting the offered wage rate and failing to meet their recruitment obligations.

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The Department proposes several changes to the existing regulations to address these issues. First, the Department proposes to retain the current list of wage rates in § 655.120(a), redesignated as § 655.120(a)(1)(i) through (v), and to add to this list, at paragraph (vi), “[a]ny other wage rate the employer intends to pay.” This proposed addition will clarify an employer’s obligation to include on the job order any wage rate it intends to pay that could end up being the highest applicable wage rate for some workers, in some pay periods. The Department also proposes to add at § 655.120(a)(2) an explicit requirement that, 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. Under this proposal, where one of the wage rates in paragraph (a)(1) is expressed as a piece rate and the others are expressed as hourly wage rates, the employer must list both the piece rate and the highest hourly wage rate on the job order. Where more than one of the wage rates in paragraph (a)(1) are expressed as non-hourly wage rates the employer would be required to list the highest applicable wage rate for each potential unit of pay on the job order.

Next, the Department proposes corresponding changes at § 655.122(l), including replacing the list of wage rates with a cross-reference to § 655.120(a)(1), removing the current language in § 655.122(l)(1) which would be made redundant by the changes to § 655.120(a), and making other technical edits. In addition, the Department proposes to remove the current language at § 655.122(l)(2)(i) and (ii), which requires an employer to supplement workers’ pay where a worker is paid by the piece and does not earn enough to meet the required hourly wage rate for each hour worked, but does not include an analogous requirement that an employer supplement workers’ pay when a worker who is paid by the hour does not earn enough to meet

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the applicable prevailing piece rate. The Department proposes to replace this language with a new provision at paragraph (1) explaining that 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. Because employers would be required to pay whichever wage rate will result in the highest wages in a particular pay period, supplementing workers' pay to ensure that the required hourly wage is met will no longer be necessary. Proposed new paragraph (2) explains that, where the wage rates set forth in § 655.120(a)(1) include both hourly and non-hourly wage rates, the employer must calculate each worker's wages in each pay period using the highest wage rate for each unit of pay and must pay the worker the highest of these wages for that pay period. Under this proposal, the employer is responsible for evaluating the different wage rates applicable in each pay period of the growing season, including any mid-season increases in wage rate(s) that might not be reflected in the job order. Proposed paragraphs (1) and (2) also make clear that the wages actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job order, so that, if there is a mid-season decrease in wage rate(s), the workers are still entitled to the higher wage rate(s) listed on the job order.

Under this proposal, where an employer includes multiple activities or tasks, each of which have different applicable wage rates, in a single job order, the employer must engage in the analysis set forth above with respect to each activity or task. For example, if a job order includes harvesting several varieties of apples, each with a different prevailing wage rate, the employer must list on the job order, for each variety, both the highest applicable hourly wage rate and the highest applicable wage rate for any other unit of pay, including any piece rates. The employer would then be responsible for evaluating, with respect to each activity or task

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performed in the pay period, which of the applicable wage rates would result in the highest wage for the worker for the work performed and to pay the worker the highest wage with respect to each activity or task performed.

The Department believes that these proposed changes would help ensure that employers' recruitment efforts reflect the correct applicable wage rates so as to more accurately determine whether there are U.S. workers who would be available and willing to accept the employment. They also would help ensure that H-2A workers and workers in corresponding employment are paid the wages to which they are entitled (i.e., the highest of the AEWR, prevailing hourly wage or piece rate, CBA rate, Federal minimum wage, State minimum wage, or any other wage rate the employer intends to pay). Because H-2A employers are already required to accurately track and record both hours worked and field tallies pursuant to § 655.122(j), the Department believes that employers should already have processes in place to accurately record information needed for compliance with the proposed changes to §§ 655.120(a) and 655.122(l), minimizing any additional administrative burden these proposed changes would place on employers.

The Department welcomes comments on this proposal. In particular, the Department is interested in examples of how this proposal would work in practice, whether there are circumstances, such as when an employer includes multiple activities or tasks in a single job order, where further clarification is needed on which wage rates must be listed in the job order and how to calculate the worker's wages, and whether corresponding changes to the recordkeeping requirements at § 655.122(j) and (k) or to the requirements for SWAs' review of job orders at part 653, subpart F, are needed. In addition, the Department seeks comments on whether the requirement to list the highest applicable wage rate for each unit of pay on job orders

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placed in connection with an H-2A application renders unnecessary the requirement at 20 CFR 653.501(c)(2)(i) that an employer that pays by the piece or other non-hourly unit calculate and submit an estimated hourly wage rate with the job order. Under the proposed rule, the job order in such cases should guarantee payment of the highest of the applicable hourly or non-hourly wage rates. The Department welcomes comment on whether the calculation of an estimated hourly wage would still be necessary to prevent adverse effect on similarly employed workers in the United States and/or on agricultural workers generally.

The Department is considering making similar revisions to the regulations at §§ 655.210(g) and 655.211, governing the rates of pay and contents of job orders for herding and range livestock production occupations, to require an employer to disclose all potentially applicable rates of pay in the job order. Under such a proposal, for example, an employer would be required to disclose on the job order both the monthly AEW and a State minimum hourly wage rate applicable to the job opportunity that could potentially result in higher earnings based on hours worked. As explained above, the Department believes that such disclosure would likely benefit potential applicants to better understand the potential earnings for a job opportunity, and would assist the Department with more efficient program administration and enforcement. The Department welcomes comment on whether it should include these similar revisions in any final rule.

The Department is also considering making similar revisions to the regulations at 20 CFR 653.501(c), governing the requirements for SWAs' review of clearance orders, to require an employer to disclose all potentially applicable rates of pay in a non-H-2A (or non-criteria) clearance order. Under such a proposal, an employer would be required to disclose on the

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clearance order the highest applicable hourly wage rate, if any (i.e., the highest of any applicable prevailing hourly wage rate, the Federal or State minimum wage, or an hourly wage rate the employer intends to pay), as well as any piece rate or other non-hourly wage rate applicable to the job opportunity that could potentially result in higher earnings, and to pay workers the highest of these rates. The Department believes that such disclosure would likely benefit potential applicants to better understand the potential earnings for a job opportunity, and that it would minimize confusion to require similar information for both criteria and non-criteria clearance orders. The Department welcomes comment on whether it should include these similar revisions in any final rule.

### **3. Section 655.122, Contents of Job Offers**

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

The Department proposes to revise § 655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation. The Department believes that existing vehicle safety standards provide important safeguards for workers, but that they are insufficient to adequately address transportation safety challenges. The inclusion of regulations related to seat belts would reduce the hazards associated with agricultural work, thus making these H-2A jobs more attractive to workers in the United States.

Studies have shown that seat belt use dramatically decreases occupant fatalities and injuries in the event of a vehicle crash. Seat belts reduce fatalities and serious injuries by keeping occupants inside the vehicle and close to their original seating position, gradually decelerating the occupant as the vehicle deforms, and prevents occupants from hitting the vehicle interior or

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other passengers.<sup>16</sup> DOT's National Highway Traffic Safety Administration (NHTSA), which regulates vehicle manufacturing standards and studies the efficacy of safety enhancements, began to require seat belts in at least some vehicles beginning in 1968, and identifies seat belt technology and usage as one of the most significant safety enhancements of the past 60 years. NHTSA estimates that using a seat belt in the front seat of a passenger car can reduce fatal injury by 45 percent and reduce moderate to critical injury by 50 percent.<sup>17</sup> The safety effect increases in a light truck, where seat belts reduce fatal injury by 60 percent and reduce moderate to critical injury by 65 percent.<sup>18</sup> Between 1960 and 2012, NHTSA estimates that seat belts have saved 329,715 lives, which constitutes more than half of the estimated lives saved by safety improvements in this time period (613,501).<sup>19</sup> In 2020, estimated average passenger vehicle seat

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<sup>16</sup> See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., DOT HS-812-069, LIVES SAVED BY VEHICLE SAFETY TECHNOLOGIES AND ASSOCIATED FEDERAL MOTOR VEHICLE SAFETY STANDARDS, 1960 TO 2012 – PASSENGER CARS AND LTVS – WITH REVIEWS OF 26 FMVSS AND THE EFFECTIVENESS OF THEIR ASSOCIATED SAFETY TECHNOLOGIES IN REDUCING FATALITIES, INJURIES, AND CRASHES 89 (2015) (2015 NHTSA Report), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069>.

<sup>17</sup> *Id.* at 107-11. See also *Seat Belts*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/seat-belts#resources> (“*Seat Belts*”).

<sup>18</sup> 2015 NHTSA Report at 107-11.

<sup>19</sup> *Id.* at xxxi- xxxii.

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belt use in the United States was 90.3 percent,<sup>20</sup> but between 46 and 51 percent of those killed in passenger vehicle crashes were not wearing seat belts.<sup>21</sup>

Individual State laws have significantly contributed to increased seat belt usage in the United States.<sup>22</sup> New York passed the first law requiring the use of seat belts in 1984.<sup>23</sup> Between 1984 and 1987, State legislatures passed seat belt laws in 29 States.<sup>24</sup> Today, all States except New Hampshire require seat belt usage in the front seats, and 40 of these States, as well as the District of Columbia and two territories, also require seat belt usage in the rear seat.<sup>25</sup> These laws, in conjunction with sustained national campaigns to encourage seat belt use (e.g., “Click It

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<sup>20</sup> See NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSP., DOT HS 813-072, TRAFFIC SAFETY FACTS RESEARCH NOTE: SEAT BELT USE IN 2020 – OVERALL RESULTS (2021) (2021 NHTSA Report),

<https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813072>.

<sup>21</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSP., DOT HS 813-266, OVERVIEW OF MOTOR VEHICLE CRASHES IN 2020 11, 13 (2022),

<https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813266>. NHTSA appears to estimate overall fatality rates of unrestrained passengers compared only to other fatalities where seat belt use was known and estimates that 51% of vehicle occupants who are killed were not wearing seat belts. *See id.* at 13. On the other hand, the Governors Highway Safety Association (GHSA) cites the same data, but computes instead that 46% of occupants killed were unrestrained, which likely reflects that GHSA compared unrestrained fatalities with total fatalities, including where seat belt use was unknown. *See Seat Belts*, GOVERNORS' HIGHWAY SAFETY ASS'N, <https://www.ghsa.org/issues/seat-belts>.

<sup>22</sup> *See* 2015 NHTSA Report at 103-105.

<sup>23</sup> *See* Nell Henderson, *N.Y. Is First State to Get Seat Belt Law*, WASH. POST (July 13, 1984), <https://www.washingtonpost.com/archive/business/1984/07/13/ny-is-first-state-to-get-seat-belt-law/b86fd522-bb32-4286-980a-caefdb3edfa5>. This law, however, only required the use of seat belts in the front seat.

<sup>24</sup> *See* 2015 NHTSA Report at 105.

<sup>25</sup> *See Seat Belts*.



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or Ticket”), have increased seat belt usage dramatically; estimated seat belt use in 1990 was 49 percent, but, as mentioned, the estimated seat belt use in 2020 was 90.3 percent.<sup>26</sup>

However, seat belt use in rural areas lags behind other parts of the United States, and rural vehicle crashes are disproportionately deadly. An analysis completed by the Centers for Disease Control and Prevention (CDC) revealed that in 2014, age-adjusted passenger vehicle occupant death rates per 100,000 population increased with increasing rurality. For example, in the southern United States, the age-adjusted death rate in vehicle crashes per 100,000 population in rural counties was more than four times as high as those in urban counties (6.8 deaths per 100,000 population in the most urban counties as compared to 29.2 deaths per 100,000 population in the most rural counties); this same study showed that self-reported seat belt use in 2014 for the most rural counties was only 74.7 percent, compared to 88.8 percent in the most urban counties.<sup>27</sup> As most agriculture is in rural areas, agricultural workers are more likely to be exposed to dangers inherent in rural transportation. The CDC also acknowledges that agriculture itself is one of the most hazardous industries in the United States. In 2021, workers in the agriculture, forestry, fishing and hunting industry experienced one of the highest fatal injury rates at 20 deaths per 100,000 full-timeworkers—and nearly half of those deaths resulted from

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<sup>26</sup> See 2015 NHTSA Report at 105; 2021 NHTSA Report at 1.

<sup>27</sup> Laure F. Beck, et al., Ctrs. for Disease Control & Prevention, *Rural and Urban Differences in Passenger-Vehicle-Occupant Deaths and Seat Belt Use Among Adults*, CDC MORBIDITY AND MORTALITY WEEKLY REPORT, Sept. 22, 2017, at 4, 6 <https://www.cdc.gov/mmwr/volumes/66/ss/ss6617a1.htm>.

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transportation incidents.<sup>28</sup> The Occupational Injury Surveillance of Production Agriculture survey demonstrated that, in surveyed years between 2001 and 2014, transportation related accidents (including tractor rollovers) constituted approximately 12.7 percent of all agricultural work-related injuries to adults 20 years and older.<sup>29</sup>

The Department's enforcement experience is consistent with the statistics described above. Of the agriculture-related injuries and fatalities that the Department has investigated in the last 5 years, more than 60 percent related to farmworker transportation. Additionally, some of the most significant injuries and fatalities resulted when workers were not wearing seat belts. For example, in calendar year (CY) 2022 alone, WHD investigated eight incidents involving serious injury or death of farmworkers. Of these incidents, seven involved agriculture-related vehicle crashes and only one involved other safety issues. Of the crashes investigated in 2022, all involved at least some workers who were not restrained by seat belts, sometimes with fatal or serious consequences. For example, on May 31, 2022, in Indiana, a vehicle being driven by one H-2A worker and carrying another H-2A worker collided with a semi-truck. The two workers were ejected from the vehicle, as neither was wearing a seat belt. The driver died and the

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<sup>28</sup> See Table A-1, *Fatal Occupational Injuries by Industry and Event or Exposure, All United States, 2021*, BUREAU OF LAB. STATS. (Dec. 16, 2022), <https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-table-a-1-2021.html>. However, this category includes tractor rollovers, which may not qualify as employer-provided transportation as it is being discussed in this section.

<sup>29</sup> Out of 334,606 injury events recorded, 42,527 of those injury events (12.7 percent) were related to transportation. See Table AI-11, *National Estimates of Agricultural Work-Related Injuries to Adults (20 Years and Older) on US Farms By Injury Event*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 10, 2018), <https://www.cdc.gov/niosh/topics/aginjury/oispa/pdfs/AI-15-508.pdf>.

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passenger was air-lifted to the hospital with life-threatening injuries. In another example, on April 15, 2022, a vehicle carrying eight farmworkers in California ran a stop sign and collided with an SUV. One occupant was not wearing a seat belt and was ejected. The ejected passenger died, and seven other workers suffered minor to moderate injuries.

Despite the statistics showing the dangers related to rural transportation, agricultural transportation, and the failure to use seat belts, as well as its own enforcement experience, the Department has limited tools to address seat belt use in employer-provided transportation. Current § 655.122(h)(4) requires employers to comply with all applicable local, State, or Federal laws and regulations and, at a minimum, the same transportation safety standards, driver's licensure, and vehicle insurance required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). However, MSPA vehicle safety regulations were promulgated in 1983 when seat belt use was less common, and they do not mandate that seat belts be provided or worn.<sup>30</sup> When State law requires the wearing of seat belts, the Department may enforce the provision and wearing of seat belts through State law under current § 655.122(h)(4). However, not all States require the provision and wearing of seat belts in all seats,<sup>31</sup> and other States exclude certain vehicles from seat belt provisions.<sup>32</sup> Even where States have farmworker-specific laws requiring seat belts, such as in Florida, California, and Maine, these laws often do not cover

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<sup>30</sup> See 29 CFR 500.104-105. See also 48 FR 15800 (Apr. 12, 1983); 48 FR 36736 (Aug. 12, 1983).

<sup>31</sup> See, e.g., GA. CODE ANN. 40-8-76.1 (only requiring the use of seat belts in the front seat).

<sup>32</sup> See, e.g., N.C. GEN. STAT. 20-135.2A (exempting any vehicle registered and licensed as a property-carrying vehicle in accordance with North Carolina General Statutes section 20-88, while being used for agricultural purposes in intrastate commerce, from seat belt requirements).

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all vehicles used to transport farmworkers.<sup>33</sup> Finally, many State seat belt laws apply only on public roads and highways,<sup>34</sup> but some vehicle crashes involving H-2A or corresponding workers occur on private property. Therefore, the Department is regularly unable to cite a violation for an H-2A employer's failure to provide seat belts to workers.

The Department has periodically considered the inclusion of seat belt requirements in farmworker transportation safety regulations. In 1983, the Department promulgated MSPA transportation safety regulations pursuant to its authority under MSPA (29 U.S.C. 1801-1872) establishing vehicle safety, drivers' licensure, and insurance standards for vehicles transporting MSFWs, a category that excludes H-2A workers but may include workers in corresponding employment (*see* 29 CFR 500.20). *See* 48 FR 15800 (Apr. 12, 1983); 48 FR 36736 (Aug. 12, 1983). In these regulations, the Department declined to require seat belts, stating that requiring seat belts could place an unreasonable economic burden on employers and lead them to

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<sup>33</sup> *See* CAL. VEH. CODE § 31405 (applying only to farm labor vehicles); FLA. STAT. § 316.622 (same); ME. REV. STAT. tit. 26, § 643, tit. 29 § 2088. Both California and Florida law define a "farm labor vehicle" as a vehicle used for the transportation of nine or more farmworkers, in addition to the driver. *See* CAL. VEH. CODE § 322; FLA. STAT. § 316.003(26).

<sup>34</sup> *See, e.g.*, CAL. VEH. CODE § 31405(d) (stating that "no person shall operate a farm labor vehicle *on a highway*") (emphasis added); CAL VEH. CODE § 360 (defining highway as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel"). *See also, e.g.*, N.C. GEN. STAT. § 20-125.2A(a) (stating that "each occupant of a motor vehicle ... shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a *street or highway* in this State") (emphasis added); N.C. GEN. STAT. § 20.4.01(13) (providing that a highway is "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic" and that "[t]he terms 'highway' and 'street' and their cognates are synonymous").

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discontinue transporting migrant workers at short distances.<sup>35</sup> See 48 FR 36736,36738.

Beginning in 2010, the Department required all employer-provided transportation in the H-2A program to comply with MSPA standards for vehicle safety, drivers' licensure, and insurance. See 20 CFR 655.122(h)(4); 75 FR 6884, 6965 (Feb. 12, 2010). Seat belts were not discussed in the 2010 rulemaking. Prior to the 2010 H-2A Final Rule, H-2A regulations required only that all employer-provided transportation comply with all applicable laws and regulations. In an NPRM published in 2019, the Department solicited comments on additional transportation-related provisions to help protect workers against driver fatigue and other unsafe driving conditions. See 84 FR 36168, 36195 (Jul. 26, 2019). In the corresponding final rule, the Department declined to include any additional vehicle safety standards at the time, including seat belts, but noted that employers must comply with State laws, many of which required seat belts. See 87 FR 61660, 61719 (Oct. 12, 2022).

Much has changed with respect to seat belts since the MSPA vehicle safety standards were first developed in 1983. Many of the regulations requiring the inclusion of seat belts when manufacturing vehicles and incorporating new technologies to increase safety have been published since 1983. Additionally, since 1983, seat belt use has become significantly more

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<sup>35</sup> 29 U.S.C. 1841(2)(B) explicitly requires the Department to consider the extent to which a proposed transportation standard under MSPA would cause an undue burden on agricultural employers, agricultural associations, or farm labor contractors, a standard not included in the H-2A provisions of the INA. Also, unlike the H-2A program, MSPA does not require employers to provide transportation between living quarters and the worksite, or inbound or outbound transportation (unless disclosed that such transportation would be provided). Additionally, the Department reached this conclusion nearly four decades ago, when seat belts were less commonly used.

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common, increasing from 14 percent to 90.3 percent in 2020.<sup>36</sup> Research completed since 1983 has emphasized the importance of seat belts as a lifesaving and injury-reducing essential technology, and every State except one has passed seat belt laws since the MSPA vehicle safety regulations were promulgated. Although the Department does not propose to amend the MSPA regulations at this time, it seeks to apply the knowledge gained regarding the importance of seat belts to the rapidly growing H-2A program.

Therefore, pursuant to its authority to determine the minimum terms and conditions of employment acceptable under the H-2A program, 8 U.S.C. 1188(a)(1), the Department proposes to revise § 655.122(h)(4) to prohibit an employer from operating any employer-provided transportation that is required by DOT NHTSA regulations at 49 CFR 571.208 to be manufactured with seat belts unless all passengers and the driver are properly restrained by seat belts meeting standards established by 49 CFR 571.209 and 49 CFR 571.210. Essentially, if the vehicle is manufactured with seat belts, the employer would be required to retain and maintain those seat belts in good working order and ensure that each worker is wearing a seat belt before the vehicle is operated.

By relying on DOT's regulations to determine which vehicles pose an unreasonable risk of death or injury in a vehicle crash without seat belts, the Department intends to depend on DOT's considerable research and expertise to identify which types of vehicles require seat belts

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<sup>36</sup> *Compare* 2021 NHTSA Report at 1 (estimating that seat belt use by adult front-seat passengers was about 90.3 percent in 2020), *with* TRANSP. RESEARCH BD. OF THE NAT'L ACADS.. BUCKLING UP: TECHNOLOGIES TO INCREASE SEAT BELT USE 5 (2003) (estimating that seat belt use was about 14 percent in 1984).

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for sufficient occupant protection and which types of vehicles have sufficient occupant protection even without seat belts. The most common vehicles that the Department encounters in its enforcement are passenger cars,<sup>37</sup> 15-passenger vans (which would constitute a bus per the NHTSA definition),<sup>38</sup> and buses (both school buses<sup>39</sup> and over-the-road buses<sup>40</sup>). Currently, 49 CFR 571.208 requires that all passenger cars and buses with a gross vehicle weight rating (GVWR) of 10,000 pounds or fewer (such as most 15-passenger vans), be manufactured with seat belts.<sup>41</sup> Therefore, the Department would require that these vehicles maintain seat belts in good working order when transporting workers (e.g., replace the seat belt when it is cut or broken). However, 49 CFR 571.208 does not currently require that school buses with a GVWR of 10,000 pounds or more, or an over-the-road bus with a GVWR between 10,000 pounds and 26,000 pounds GVWR, be manufactured with seat belts for passengers.<sup>42</sup> Currently, NHTSA does not consider these vehicles to constitute an unreasonable safety risk to the public without

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<sup>37</sup> NHTSA defines a passenger car as a motor vehicle with motive power, except a low-speed vehicle, multipurpose passenger vehicle, motorcycle, or trailer, designed for carrying 10 persons or less. 49 CFR 571.3(c).

<sup>38</sup> A 15-passenger van would constitute a bus as defined by NHTSA. NHTSA defines a bus as a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons. 49 CFR 571.3(c).

<sup>39</sup> NHTSA defines a school bus as a bus that is sold, or introduced in interstate commerce, for purposes that include carrying students to and from school or related events, but does not include a bus designed and sold for operation as a common carrier in urban transportation. 49 CFR 571.3(c).

<sup>40</sup> NHTSA defines an over-the-road bus as a bus characterized by an elevated passenger deck located over a baggage compartment, except a school bus. 49 CFR 571.136(S4).

<sup>41</sup> See 49 CFR 571.208(S4.4.3).

<sup>42</sup> See 49 CFR 571.208(S4.4.4).

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seat belts.<sup>43</sup> Therefore, at this time the Department would not require that school buses exceeding 10,000 pounds GVWR and over-the-road buses between 10,000 pounds and 26,000 pounds GVWR install and maintain seat belts. However, if, at a later date, NHTSA were to amend 49 CFR 571.208 to require these vehicles to be manufactured with seat belts, the Department's proposed regulation would automatically, without further revision, similarly require the employer to require occupants of those vehicles to wear seat belts. The Department believes that reliance on NHTSA's standards for vehicle manufacturing strikes a reasonable balance between safety measures intended to protect vulnerable workers and significant costs associated with retrofitting relatively safe vehicles with seat belts when such vehicles were not engineered for seat belt installation.<sup>44</sup> Additionally, these regulations would be consistent with those issued by OSHA for motor vehicles used in the construction industry and in shipyard employment, which

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<sup>43</sup> See 78 FR 70416, 70422-23 (Nov. 25, 2013) (discussing over-the-road buses between 10,000 pounds and 26,000 pounds GVWR); 73 FR 62744 (Oct. 21, 2008) (upgrading school bus passenger crash protection requirements). See also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SCHOOL BUS SAFETY: CRASHWORTHINESS RESEARCH (April 2002) (discussing school bus occupant safety), <https://www.nhtsa.gov/sites/nhtsa.gov/files/sbreportfinal.pdf>.

<sup>44</sup> NHTSA has provided guidance for retrofitting school buses with seat belts. See Guideline for the Safe Transportation of Pre-school Age Children in School Buses, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (February 1999). Cost estimates for retrofitting a school bus with seat belts vary, but are generally around \$15,000 per bus, with one estimate as high as \$36,000 per bus. See Stephen Satterly, *School Bus Seat Belts: Opening a Dialogue*, SAFE HAVENS INT'L (Dec. 5, 2016), <https://safehavensinternational.org/school-bus-seat-belts-opening-dialogue>, Matthew Simon, *Report: Adding Seatbelts Could Cost \$15k per school bus*, WSAW-TV (Sept. 1, 2016), <https://www.wsaw.com/content/news/NewsChannel-7-Investigates--Report-Adding-seat-belts-could-cost-15K-per-school-bus-392104851.html>; Mike Chouinard, *Island District Holds Off School Bus Seatbelt Retrofits*, N. ISLAND GAZETTE (Oct. 7, 2020), <https://www.northislandgazette.com/news/island-district-holds-off-school-bus-seatbelt-retrofits-1407935>.



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include similar exemptions from providing seat belts for vehicles not manufactured with seat belts.<sup>45</sup>

The Department welcomes comments on this proposal, including if there are any other factors or types of vehicles that it should consider in promulgating these regulations. The Department also seeks comments as to whether employers ever retrofit vehicles with additional seats (or any seats, if the vehicle was manufactured without passenger seats) in such a way that complies with existing vehicle safety standards under 20 CFR 655.122(h)(4), and how these vehicles should comply with proposed seat belt standards.

The Department further proposes that the seat belts must comply with NHTSA regulations for seat belt assembly and anchorages at 49 CFR 571.209 and 49 CFR 571.210. The Department believes that referencing these standards in regulations would ensure that seat belts meet existing standards for manufacture and clarify to the regulated community that makeshift or jerry-rigged restraints would not constitute a seat belt.

The proposed regulation also would prohibit the employer from operating any employer-provided transportation unless all passengers and the driver are properly restrained by a seat belt. The Department often finds that workers do not use seat belts even when they are provided. As demonstrated by NHTSA's research referenced above, the provision of seat belts is often insufficient to increase seat belt usage without enforcement and public awareness campaigns.

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<sup>45</sup> See 29 CFR 1915.93(b) (seat belt standards in shipyard work); 29 CFR 1926.601(b)(9) (seat belt standards for construction work); Occupational Safety & Health Admin., Standard Interpretation No. 1926.601(b)(9) on Seat Belts (Jan. 19, 1994) (explaining that seat belt standards in construction work refer to DOT regulations).

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Therefore, the Department believes this regulation would be most effective if the employer requires workers to wear seat belts. Additionally, while the proposed regulation refers specifically to the employer not operating the transportation, the Department understands that driving vehicles is often delegated to supervisors or workers. An employer would be responsible for ensuring that all drivers, including employees or agents of the employer, do not operate the vehicle until all occupants are properly restrained. The Department seeks comment as to whether, and how, it should require employers to enforce the wearing of seat belts, or whether it should require employers only to provide seat belts.

Finally, the Department seeks comment as to how this requirement for seat belts should interact with vehicles subject to the limited exemption from seat requirements found in MSPA regulations at 29 CFR 500.104(l), which is also applicable to some H-2A employer-provided transportation. Transportation subject to this exemption is limited to those vehicles that are subject to the vehicle safety standards in 29 CFR 500.104 when those vehicles are primarily operated on private farm roads when the total distance traveled does not exceed 10 miles, so long as the trip begins and ends on a farm owned or operated by the same employer.<sup>46</sup> As a vehicle without seats cannot be equipped with seat belts, the Department is considering whether vehicles subject to this limited exemption also should be exempted from seat belt requirements during these same trips, or, alternatively, whether this exemption should be inapplicable to H-2A employers. The Department seeks comment on this issue, including the circumstances in which

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<sup>46</sup> See 29 CFR 500.102; 29 CFR 500.104(l). See also WAGE & HOUR DIV., DEP'T OF LAB., FACT SHEET #50, TRANSPORTATION UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (2016), <https://www.dol.gov/agencies/whd/fact-sheets/50-mspa-transportation>.

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employers use the limited exemption from seats found in 29 CFR 500.104(l) and the import of this limited exemption to business practices. The Department also seeks comment on known vehicle crashes or other safety hazards that have resulted or been exacerbated due to the use of this limited exemption and any anticipated hazards.

The Department also proposes non-substantive changes to § 655.122(h)(4) to divide this paragraph into separate paragraphs (i) through (iv).

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

The Department proposes to remove the language at § 655.122(i)(1)(i) and (ii) that explains the work contract period can be shortened by agreement of the parties with the approval of the CO. These minor conforming changes will ensure these paragraphs are consistent with proposed changes to delayed start of work requirements at proposed § 655.175(b), which permits only minor delays to the start date of work and requires notice to workers and the SWA, but not CO approval, as discussed in the preamble explaining changes in proposed § 655.175.

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

The Department proposes revisions to the regulations governing productivity standards at § 655.122(l). Current § 655.122(l)(2)(iii) requires the employer to disclose productivity standards in the job offer only when the employer pays on a piece rate basis and requires one or more productivity standards as a condition of job retention. The Department proposes to redesignate § 655.122(l)(2)(iii) as § 655.122(l)(3) and 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.

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The Department believes that this revision is necessary so that workers fully understand the material terms and conditions of employment, including any productivity standards that may serve as a basis for termination for cause, at the time the offer of employment is made. The revisions proposed in this section conform with those proposed in § 655.122(n)(2)(i), where the Department proposes that termination for cause for failure to comply with a productivity standard would only be permissible when such productivity standard is included in the job offer (among other conditions).

As explained further in the preamble section addressing proposed § 655.122(n), the Department proposes that, among other conditions, termination for cause for failure to meet a productivity standard may only be invoked by an employer when workers were informed of, or reasonably should have known, the productivity standard; the productivity standard is listed in the job offer; and the productivity standard is reasonable and applied consistently. The disclosure in the job offer of any productivity standards required as a condition of job retention helps to achieve these other requirements. Specifically, it ensures that workers are aware of the productivity standard, and that all workers are held to the same productivity standard. The disclosure in the job offer also ensures that productivity standards do not change after the employer communicates those standards to the worker. Different productivity standards for different crops, grades of crops, or job duties are permissible so long as all are disclosed in the job offer. Consistent with current guidance, productivity standards must be static, objective, and specifically quantify the expected output per worker required for job retention in the specific crop or agricultural activity. Vague standards, such as requiring workers to “perform work in a timely and proficient manner,” “perform work at a sustained, vigorous pace,” or “keep up with

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the crew,” are not acceptable productivity standards as they lack objectivity, quantification, and clarity. Failure to meet such vague standards will not be accepted by the Department as termination for cause. See preamble section corresponding with proposed § 655.122(n) for further discussion.<sup>47</sup>

Current § 655.122(l)(2)(iii) also requires that productivity standards listed in the job offer be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or if the employer first applied for temporary agricultural labor certification after 1977, productivity standards listed in the job order must be no more than those normally required (at the time of the first H-2A Application) by other employers for the activity in the area of intended employment. In other words, without OFLC's approval, an employer cannot increase productivity standards beyond those normally required by other employers when it first used the H-2A program, unless the employer first used the H-2A program in 1977 or earlier, in which case the employer cannot increase productivity standards beyond those it required in 1977. Proposed § 655.122(l)(3) would mandate that all productivity standards required as a condition of job retention be disclosed in the job offer regardless if the worker is paid a piece rate or an hourly wage. The proposal would broaden this requirement to workers paid on an hourly basis, not only those paid on a piece rate basis.

The Department believes this revision is appropriate because pressure for increased worker productivity exists regardless of how workers are paid. As stated in the preamble to the

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<sup>47</sup> See OFLC, Frequently Asked Questions, H-2A Temporary Agricultural Foreign Labor Certification Program, 2010 Final Rule, Round 9 (October 30, 2015), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_FAQ\\_Round9.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_FAQ_Round9.pdf).

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2010 H-2A Final Rule, the regulations have reflected concerns about productivity standards for more than 30 years. Initial concerns focused on employers paying piece rates; the Department found that, when faced with an increased hourly guarantee, some employers simply required workers to work faster instead of increasing piece rates, which may have adversely affected the wages of similarly employed workers in the United States. *See* 43 FR 10306, 10309 (Mar. 10, 1978). Therefore, H-2A regulations published in 1987 froze productivity standards at the 1977 level (unless a higher rate was approved) or, if the employer began using the program after 1977, to those normally required by other employers for the activity in the area of intended employment at the time the employer first used the program (unless a higher rate was approved). *See* 52 FR 20496-01, 20515 (June 1, 1987). The 2010 H-2A Final Rule instituted the same standards as the 1987 rule, and these standards remained unchanged in the 2022 Rule. *See* 75 FR 6884, 6913-6914 (Feb 12, 2010); 87 FR 61660-01, 61801 (Oct. 12, 2022).

Although the Department has historically recognized this issue as affecting workers paid on a piece rate basis, workers paid on an hourly basis may also be subject to productivity standards as a condition of job retention, which may adversely affect the working conditions of similarly employed workers in the United States and inhibit the ability to determine if there are sufficient workers who are able, willing, qualified, and available to perform the work. Advocacy organizations have identified that some employers may set productivity standards so high that workers in the United States are reluctant to accept or keep these jobs without a pay increase.<sup>48</sup>

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<sup>48</sup> *See* FARMWORKER JUSTICE, *NO WAY TO TREAT A GUEST: WHY THE H-2A VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS* 21, 25 (2012) (Farmworker Justice Report).

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Without a ceiling on excessively high productivity standards for hourly employees, working conditions for both H-2A and domestic workers may be adversely affected as productivity demands rise, and domestic workers may leave the agricultural workforce. To prevent this adverse effect, this proposed rule would require all employers establishing productivity standards as a condition of job retention to refrain from setting such productivity standards above the permitted levels, which were previously required only if the employer was paying on a piece rate basis.

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

The Department proposes a new paragraph § 655.122(l)(4) that would explicitly clarify that the employer must specify in the job offer any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours will be paid. The H-2A program does not mandate the payment of an overtime premium wage rate for hours worked exceeding a certain number in the day, week, or pay period. However, the Fair Labor Standards Act's (FLSA) overtime requirements, as well as various State and local laws that require overtime pay, apply independently of the H-2A program's wage requirements. Some H-2A workers and workers in corresponding employment may be entitled to overtime pay under one or more of these laws.

Under the Department's longstanding regulations, an H-2A employer must assure that it will comply with all applicable Federal, State, and local laws, including any applicable overtime

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laws, during the work contract period. *See* § 655.135(e).<sup>49</sup> In addition, an H-2A employer must accurately disclose the actual, material terms and conditions of employment, including those related to wages, in the job order. *See* §§ 655.103(b), 655.121(a)(3), and 655.122(l); *see also* § 655.210. Pursuant to these authorities, an H-2A employer already must disclose in the job order any available overtime pay, whether required under Federal, State, or local law, or otherwise voluntarily offered by the employer. Despite these existing authorities, OFLC and WHD frequently encounter job orders filed in connection with H-2A applications that either omit disclosure of or fail to accurately describe applicable overtime pay. Failure to clearly and fully disclose any available overtime pay in the job order harms prospective workers, who may be more interested in the job opportunity if aware of the availability of overtime. Incomplete or nonexistent disclosures also hamper the Department's administration and enforcement of the H-2A program requirements.

Therefore, the Department proposes to revise the current wage disclosure requirements found at § 655.122(l) to expressly clarify in a new paragraph (4) that an employer must disclose in the job order any applicable overtime pay. Specifically, under proposed § 655.122(l)(4), 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 (rather than voluntarily offered by the

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<sup>49</sup> *See, e.g.,* CAL. LAB. CODE §§ 500-556, 558.1; Cal. Indus. Welfare Comm'n Order No. 14-2001.



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employer), the applicable Federal, State, or local law governing the overtime pay. The proposed subordinate paragraph (4)(iii) provides examples of circumstances that might apply, such as after how many hours in a day, week, or pay period the overtime premium wage rate will be paid, or if overtime premium wage rates will vary between places of employment. This proposed list is intended to be illustrative only; an employer must accurately disclose the actual circumstances under which overtime would be paid. The disclosures required under proposed § 655.122(1)(4) are similar to the overtime disclosure requirement under the H-2B program regulations at § 655.18(b)(6). *See also* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2021-3, OVERTIME OBLIGATIONS PURSUANT TO THE H-2B VISA PROGRAM (Dec. 7, 2021).<sup>50</sup> Where multiple overtime laws apply, the employer must comply with the law that provides the greatest benefit to the employee. For example, if an employer is required by Federal law to pay time and a half after 40 hours in a week, but is required by State law to pay overtime at time and a half after 46 hours in a week, the employer must comply with the Federal law as it is more beneficial to the employee. The Department has also proposed corresponding amendments to the Forms ETA-790A and ETA-9142A to include dedicated spaces for disclosure of any applicable overtime pay. The Department believes these proposed revisions would improve the frequency and accuracy of disclosures of available overtime pay, thereby improving notice to prospective workers of the actual terms and conditions of the job opportunity and improving the Department's enforcement of any applicable overtime pay requirements.

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<sup>50</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab\\_2021\\_3.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_3.pdf).

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Similarly, the Department proposes to amend the pay disclosure requirements at § 655.210(g), governing the contents of job orders for herding and range livestock production occupations, to include a new paragraph (g)(3) that would require employers to disclose any available overtime pay, whether voluntarily offered by the employer or required by State or Federal law, and the details regarding such pay.

The Department welcomes comment on this proposal.

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

The Department proposes revisions to § 655.122(n), regulating employer obligations when an employer terminates an employee for cause or an employee has abandoned employment, to define termination for cause. By proposing a definition of termination for cause, the Department seeks to ensure that disciplinary and/or termination processes be justified and reasonable. The Department believes it is necessary to clarify the definition of termination for cause because workers terminated for cause under the H-2A program are stripped of essential rights to which they would otherwise be entitled. This proposed definition is also necessary because the termination without cause of one or more workers may constitute a layoff for lawful, job-related reasons, and particular employer obligations apply to layoffs of U.S. workers. *See* § 655.135(g).

The current regulations specify when job abandonment occurs, outline procedures for notifying the NPC and DHS, and require the maintenance of records of this notification, but they do not define termination for cause. A worker who abandons employment or is terminated for cause is not entitled to payment for outbound transportation under § 655.122(h)(2) or the three-fourths guarantee under § 655.122(i), and a U.S. worker who abandons employment or is

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terminated for cause need not be contacted for employment in the subsequent year as required by § 655.153. On the other hand, a worker who is terminated without cause is entitled to outbound transportation (§ 655.122(h)(2)), the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(i)), and, if a U.S. worker, to be contacted for work in the next year (§ 655.153), with one limited exception. An employer is not liable for the payment of the three-fourths guarantee to an H-2A worker whom the CO certifies is displaced because of the employer's fulfillment of its obligation to hire U.S. workers in compliance with the 50-percent rule described in § 655.135(d). *See* § 655.122(i)(4). Therefore, such H-2A worker would be terminated without cause but would not be entitled to the three-fourths guarantee. However, this displaced H-2A worker remains entitled to payment for outbound transportation pursuant to § 655.122(h)(2).

The Department has long acknowledged that employers need not cover some obligations for workers terminated for cause. *See, e.g.*, 43 FR 10306, 10315 (Mar. 10, 1978) (employer need not pay outbound transportation for H-2 workers terminated for cause); 52 FR 20496-01, 20501, 20515 (June 1, 1987) (where an H-2A worker is terminated for cause, the worker is not entitled to the three-fourths guarantee and the employer need not pay outbound transportation). But the Department has also recognized that some employers may abuse this provision in order to avoid those obligations. *See, e.g.*, 73 FR 77110-01, 77135 (Dec. 18, 2008) (requiring employers to contact former U.S. workers except for those dismissed for cause and noting that if employers were "allowed ... to reject former workers who completed their previous term on the alleged

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ground that the workers were actually poor performers, it would open the door to bad actor employers to reject former workers on the basis of essentially pretextual excuses”).

Given the serious consequences associated with a designation of termination for cause, and the potential for misuse, the Department believes that a clear, regulatory definition of termination for cause would benefit employers, associations, agents, workers, advocates, and the public in general and therefore proposes to insert one. Providing a clear definition of termination for cause would not only provide structure and clarity to both workers and employers, but also make it easier for the Department to identify pretextual terminations.

The Department's enforcement experience also supports the need for a specific and clear definition of termination for cause. Some employers, in seeking to evade responsibilities under § 655.122(h)(2), § 655.122(i), § 655.153, or all three, have terminated workers ostensibly “for cause.” For example, one employer terminated 114 H-2A workers, out of a total of 240 H-2A workers employed, and an additional 20 workers in corresponding employment, for failing to meet production quotas. The employer alleged that workers were not eligible for the three-fourths guarantee because they were terminated for cause. However, the Department's investigation revealed that the employer had employed, in some weeks, more than 100 more workers than it employed the previous year without a proportional increase in acres planted. With the surplus in employees, worker productivity decreased significantly. An analysis of one crew showed that workers, who were paid a consistent piece rate, earned an average of \$12.32 per hour when the crew consisted of 39 employees, but earned only \$6.72 per hour on average when the crew consisted of 123 employees. Once crew sizes were again proportional to prior years, worker productivity increased. A different crew, also paid a consistent piece rate, earned

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an average of \$8.14 per hour when the crew consisted of 121 workers, but, following terminations, earned an average of \$12.43 per hour when the crew consisted of 91 workers. The employer terminated workers assigned to the less productive fields, even when their production rates matched those of their coworkers working the same fields. The terminations were unequally applied to workers and were for conditions outside the workers' control. The three-fourths guarantee is intended to safeguard against this very situation—employers overstating their labor needs—but the employer attempted to evade its three-fourths guarantee obligations by terminating employees without cause.

In light of this enforcement experience, the Department believes it needs stronger regulatory requirements to more easily prevent or detect attempts to evade these important worker protections. This is necessary in order for the Department to fulfill its statutory mandate to ensure that H-2A workers are employed only when there are not sufficient workers who are able, willing, qualified, and available to perform the labor or services involved in the petition and when the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed workers in the United States. *See* 8 U.S.C. 1188(a)(1). The proposed regulations would achieve this goal by protecting worker access to the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(h)(2)), outbound transportation (§ 655.122(i)), and/or, if a U.S. worker, to be contacted for work in the next year (§ 655.153), unless a reasonable and justified disciplinary process results in a termination for cause and thus nullifies the worker's entitlement to these rights. An unreasonable or unjustified termination that an employer ostensibly describes as being "for cause" undoubtedly has an

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adverse effect on similarly employed workers in the United States and interferes with the Department's ability to determine that there are not sufficient workers to perform the labor or services. For example, where an employer denies an H-2A worker payment for outbound transportation under § 655.122(h)(2) on the grounds that the worker was terminated, ostensibly "for cause," but for unjustified and unreasonable reasons, the worker would be required to pay for their own transportation to return to their country of origin. The Department has long recognized that inbound and outbound transportation expenses for H-2 workers are an inescapable consequence of using the H-2 programs and are primarily for the benefit of the employer under the FLSA. H-2A regulations (and, prior to 1987, H-2 regulations) have reflected this reality by requiring these expenses to be borne by employers. *See* 43 FR 10306 (Mar. 10, 1978); 52 FR 20496-01 (June 1, 1987); 73 FR 77110-01 (Dec. 18, 2008); 75 FR 6884 (Feb. 12, 2010); 87 FR 61660 (Oct. 12, 2022); U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2009-2, TRAVEL AND VISA EXPENSES OF H-2B WORKERS UNDER THE FLSA (Aug. 21, 2009);<sup>51</sup> *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002). An employer who unreasonably and unjustifiably requires a worker to pay for their own outbound transportation has artificially reduced its cost to use the H-2A program by shifting outbound transportation costs to the workers themselves, which may reduce the worker's earnings below the amount required by § 655.122(l) in the worker's last workweek. As the wage required by § 655.122(l) is the minimum amount required to prevent adverse effect, any cost-shifting that reduces wages below this amount may adversely affect wages and working

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<sup>51</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009_2.pdf).

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conditions of similarly employed workers in the United States. Clarifying that workers are terminated for cause only where the termination is reasonable and justified would minimize such adverse effect.

Similarly, adverse effects on similarly employed workers in the United States may result when an employer denies the three-fourths guarantee required by § 655.122(i) to a worker who is unjustly and unreasonably terminated, ostensibly “for cause.” The three-fourths guarantee is an essential protection that requires employers to provide an accurate description of the amount of work available and the periods in which work is available, which gives workers an opportunity to evaluate the desirability of the offered job. An employer that fails to provide the work promised during recruitment must pay workers for work hours equivalent to three-fourths of the workdays offered, which disincentivizes employers from hiring workers without sufficient work. The Department has long held that the three-fourths guarantee is an essential protection to prevent adverse effect on similarly employed workers in the United States. *See* 43 FR 10306, 10308 (Mar. 10, 1978); 73 FR 77110-01, 77152 (Dec. 18, 2008). A job with insufficient work creates undesirable conditions because the workers may not earn sufficient wages to pay bills and support their families. In this situation, both H-2A and U.S. workers may be induced to seek work elsewhere if the promised work does not materialize. The employer has therefore failed to determine if there are sufficient U.S. workers able, willing, and qualified to perform the work, and the wages and working conditions of similarly employed workers in the United States may be adversely affected if H-2A workers seek work outside the terms of their H-2A nonimmigrant status because the job they were promised does not actually exist. *See* 80 FR 24042-01, 24066 (Apr. 29, 2015).

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Finally, where an employer declines to rehire a U.S. worker under § 655.153 on the grounds that the worker was terminated, ostensibly “for cause,” but the termination was unreasonable and unjustified, the employer fails to adequately test the labor market for able, willing, and qualified workers because it has unreasonably and unjustly removed this worker from the labor pool.

In addition, the proposed definition of termination for cause will assist the Department in identifying terminations for pretextual reasons. These pretextual reasons may attempt to mask violations of other provisions, such as the prohibitions on layoffs of U.S. workers (§ 655.135(g)) and retaliatory termination (§ 655.135(h)), for which the appropriate remedy may be reinstatement or make-whole relief. *See* 29 CFR 501.16. Workers also would be protected from terminations for pretextual reasons for actions that may not be otherwise protected by the current H-2A regulations. Even if the underlying activity is not protected by the H-2A protections, the Department retains an interest in ensuring that reasonable activities and communications are not misused or mischaracterized as a basis for termination for cause. This ensures that a worker may advocate on their own behalf without fear of being terminated, ostensibly “for cause.” This additional safeguard on the ability to engage in self-advocacy would prevent adverse impact on working conditions for similarly employed workers in the United States by ensuring that employers cannot evade their obligations with respect to workers engaged in self-advocacy.

Finally, the Department believes that its proposed definition of termination for cause will also benefit employers by providing regulatory certainty and increasing the quality and desirability of agricultural jobs. Employers will have clear guidelines as to how the Department will define termination for cause. Where there are farm labor shortages, employers may



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experience improved ability to recruit agricultural workers where workers are assured that they will be entitled to the three-fourths guarantee and outbound transportation costs unless they are terminated for cause or they abandon their employment.

For these reasons, the Department proposes to clarify in the regulations that a worker is terminated for cause only when the employer terminates the worker for failure to meet productivity standards or failure to comply with employer policies or rules. This definition is substantively similar to current enforcement guidance that appears in U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, FIELD ASSISTANCE BULLETIN NO. 2012-1, H-2A "ABANDONMENT OR TERMINATION FOR CAUSE" ENFORCEMENT OF 20 CFR § 655.122(N) (Feb. 28, 2012).<sup>52</sup> There, WHD stated that termination for cause refers to termination based on a specific act of omission or commission by the employee, and that, for example, insubordination, deliberately violating company policies or rules, lying, stealing, breaching the employment contract, and other job-related misconduct are all possible bases for termination for cause. *Id.* at 6.

Further, the Department proposes that an employer may terminate a worker for cause only if six conditions listed in proposed § 655.122(n)(2)(i) are met. Importantly, the employer must comply with all six conditions for the employer's actions to qualify as termination for cause. These proposed conditions, explained in the following paragraphs, clarify that termination for cause exists only where disciplinary and/or termination processes are justified and reasonable; it does not exist where rules, policies, and/or standards are arbitrary, unknown, or

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<sup>52</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012\\_1.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012_1.pdf).

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selectively enforced. These conditions serve to promote the integrity and fairness of any disciplinary and/or termination process, and help to reduce the possibility that an employer may, purposefully or subconsciously, discriminate against a worker for reasons that are unrelated to work. These proposed conditions reflect common-sense personnel practices, and some of these conditions may also be found in State and local laws or bills prohibiting wrongful discharge.<sup>53</sup> The Department believes that many agricultural employers already follow similar standards when terminating a worker for cause, as records of these types are often essential in responding to discrimination complaints investigated by the EEOC or DOJ's Immigrant and Employee Rights Section, claims filed pursuant to State unemployment insurance programs, or the Department when investigating retaliatory termination under the laws that it enforces (including the H-2A program). These requirements would apply to H-2A workers and workers in corresponding employment. Accordingly, these proposed conditions would preserve worker access to outbound transportation (§ 655.122(h)(2)), the three-fourths guarantee (§ 655.122(i)), and/or, if a U.S. worker, to be contacted for work in the next year (§ 655.153) unless a reasonable and justified disciplinary process has resulted in termination for cause, which prevents adverse effect on similarly employed workers in the United States and ensures that jobs are available to workers in the United States who are able, willing, and qualified to perform the work.

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<sup>53</sup> See, e.g., N.Y.C. ADMIN. CODE § 20-1272, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-131240>; PHILA. CODE § 9-4703, [https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia\\_pa/0-0-0-280911#JD\\_Chapter9-4700](https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-280911#JD_Chapter9-4700); H.B. 3530, <sup>10</sup>2nd Gen. Assemb. (Ill. 2021 & 2022), <https://www.ilga.gov/legislation/102/HB/PDF/10200HB3530lv.pdf>.

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First, proposed § 655.122(n)(2)(i)(A) would require that the employees were informed (in a language understood by the employee) of, or reasonably should have known of, the policy, rule, or productivity standard that is the basis for the termination for cause. Basic concepts of fairness preclude the termination of a worker for cause if that worker was not informed, or had no reasonable basis for knowing, that the infraction or performance issue constituted grounds for termination. Policies and rules are not required to be listed in the job offer but must be clearly communicated to and understood by the workers. Ways in which the employer may communicate policies and rules to workers include employee handbooks, posters, trainings, staff meetings, and verbal instruction. If the policy or rule is not explicitly communicated, the Department will review whether a reasonable person would know that the policy or rule exists. For example, a reasonable person would know that conduct that is obviously illegal, such as unlawful sexual harassment or assault, can be a basis for discipline or termination. Similarly, a reasonable person would know that purposefully damaging the crop would be a basis for discipline or termination.

Second, the Department proposes in § 655.122(n)(2)(i)(B) that, if the termination is for failure to meet a productivity standard, such standard must be disclosed in the job offer. The Department has long held that if an employer pays a piece rate and requires a productivity standard, such productivity standard must be disclosed in the job offer. *See current* § 655.122(l)(2)(iii). In this proposed rule, the Department proposes that any productivity standard must be disclosed in the job offer regardless of whether the worker is paid on a piece rate or hourly basis. *See proposed* § 655.122(l)(3). The job offer communicates the material terms and conditions of employment to H-2A workers and workers in corresponding

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employment, and therefore any productivity standard which may serve as a basis for termination should be disclosed to the worker in the job offer. This disclosure in the job offer ensures that the employer informs the workers of the productivity standard, and that the productivity standard is consistent for all workers, both of which are essential elements of any just disciplinary process. Consistent with current guidance, and discussed in the preamble corresponding with proposed § 655.122(l)(3), any productivity standard that serves as a basis for termination for cause must be static, quantified, and objective.<sup>54</sup> Vague standards (i.e., those that are not quantified and depend on the employer's subjective judgement) do not constitute productivity standards, and failure to comply with such vague standards will not be accepted by the Department as a valid reason for termination for cause.

Third, proposed § 655.122(n)(2)(i)(C) would allow termination for cause only if compliance with the policy, rule, or productivity standard is within the employee's control. For example, termination for cause would not apply if a worker were unable to meet productivity standards if working in a field where compliance with the productivity standard is impossible for any worker (e.g., in a field where most fruit to be picked remains unripe, or where the employer has hired significantly more employees than required to complete available work). Similarly, termination for cause would not apply where a worker is regularly tardy but arrives using employer-provided transportation that habitually arrives late through no fault of the worker.

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<sup>54</sup> See OFLC, Frequently Asked Questions, H-2A Temporary Agricultural Foreign Labor Certification Program, 2010 Final Rule, Round 9 (October 30, 2015), [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_FAQ\\_Round9.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_FAQ_Round9.pdf).

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Reasonable disciplinary processes should not penalize workers for infractions outside of their control.

Fourth, proposed § 655.122(n)(2)(i)(D) would clarify that termination for cause would apply only where the policy, rule, or productivity standard is reasonable and applied consistently. A just and equitable discipline system requires equal treatment under the rules for all H-2A and corresponding workers. Termination for cause would not apply where one worker is terminated for noncompliance with a policy with which another worker performing a similar job is not required to comply. Similarly, termination for cause would not apply where a worker is terminated pretextually for noncompliance with a policy or rule that the employer infrequently or sporadically enforces.

Fifth, proposed § 655.122(n)(2)(i)(E) would outline that termination for cause would apply only where the employer undertakes a fair and objective investigation into the job performance or misconduct. Termination for cause would not apply where an employer merely assumes that the worker has failed to comply with a policy, rule, or productivity standard, or relies on a dubious third-party account as the basis for the termination.

Sixth, proposed § 655.122(n)(2)(i)(F) would require the employer to engage in progressive discipline to correct the worker's performance or behavior before terminating that worker for cause. Proposed § 655.122(n)(2)(ii) would define progressive discipline 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. Examples of disciplinary measures may include counseling, verbal warnings, written warnings, and, when appropriate, termination for cause. Disciplinary measures are proportional to the failure but may increase in severity if the

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failure is repeated. For example, a worker who blatantly and willfully ignores known safety procedures when operating heavy machinery, putting their safety and/or the safety of others at risk, should encounter different disciplinary consequences than a worker who is 15 minutes tardy for the first time that season. Additionally, a worker who is tardy for the first time may experience different disciplinary consequences than a worker who is tardy for the fifth time in 2 weeks. Progressive discipline ensures that workers are not harshly punished for minor, first-time infractions and reinforces the conditions for termination for cause in proposed § 655.122(n)(2)(i), specifically that rules, policies, and productivity standards are communicated to the workers and are reasonable. This furthers the Department's objective of ensuring that disciplinary procedures resulting in termination for cause are reasonable and justified, thus avoiding adverse impact on similarly employed workers in the United States by protecting access to outbound transportation (§ 655.122(h)(2)), the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(i)), and, if a U.S. worker, to be contacted for work in the next year (§ 655.153).

The Department recognizes that in rare circumstances, termination for cause may be an appropriate disciplinary consequence for a first-time offense of egregious misconduct even in a progressive discipline system. Egregious misconduct means behavior that is plainly illegal or that a reasonable person would understand as being offensive, such as violence, drug or alcohol use on the job, or unlawful assault, as opposed to failure to meet performance expectations or productivity standards. The Department also emphasizes that all other conditions outlined in proposed § 655.122(n)(2)(i) must be met in cases of termination for cause involving egregious

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misconduct. Specifically, the worker must be informed, or reasonably should have known, about the policy or rule; compliance with the policy or rule must be within the worker's control; the policy or rule must be reasonable and applied consistently; and the employer must undertake a fair and objective investigation into the purported misconduct. Egregious misconduct need not be explicitly prohibited verbally or in writing—workers are generally expected to understand that the behavior is prohibited—but the Department encourages employers to clearly communicate to workers that activities like unlawful harassment, substance abuse, and illegal or violent conduct will not be tolerated.

Prior to each disciplinary measure, the employer must notify the worker of the infraction and allow the worker an opportunity to present evidence in their defense to dispute the accuracy of the employer's description of the infraction or failure to meet the productivity standards. Fair and just disciplinary policies should ensure that the employer undertakes reasonable steps to determine whether the worker committed an infraction that was within their control or failed to meet productivity standards. Such policies also should ensure that the employer considers any mitigating circumstances that may provide context to any infraction or failure to meet productivity standards.

The Department also proposes that, after imposing any disciplinary measure prior to termination, the employer must provide relevant and adequate instruction to the worker, and the worker must be afforded reasonable time to correct the behavior or meet the productivity standard following instruction. The type of instruction and the amount of time afforded to fix the issue may vary depending on the misconduct or performance issue. For example, if the worker is not meeting productivity standards, the worker should be provided training on harvesting

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techniques and a reasonable amount of time to develop those techniques to meet the productivity standard. In another example, if a worker arrives late to work one morning and is verbally counseled, the employer should make clear the time the worker is expected to arrive at work. In this second example, the employer can reasonably expect the worker to correct the behavior by the next shift. Of course, there may be extenuating circumstances for the tardiness and the employer should take those into account as part of any counseling.

In the proposed regulation, the employer must also document, in writing, each disciplinary measure, evidence the worker presented in their defense, and resulting instruction, and the employer must clearly communicate to the worker, either verbally or in writing, in a language the worker understands, that a disciplinary action occurred, so as to create a record of the discipline and minimize the potential misunderstanding as to whether a disciplinary action occurred. The employer must also document any explanation that the employee provided in response to any purported infraction. These requirements—instruction, a reasonable period to fix issues, employee explanation, and documentation—are intended to ensure a worker is not prematurely terminated and deprived of their rights to the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(h)(2)), outbound transportation (§ 655.122(i)), and/or, if a U.S. worker, to be contacted for work in the next year (§ 655.153), for misconduct or performance issues that are unknown to the worker and/or are easily remedied.

Proposed § 655.122(n)(2)(iii) would outline specific reasons for which workers may not be terminated for cause. This proposed language makes clear that an employee continues to be entitled to outbound transportation (§ 655.122(h)(2)), the three-fourths guarantee (including



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meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(i)), and, if a U.S. worker, to be contacted for work in the next year (§ 655.15) if the employer has broken the law in terminating the worker, or if the worker is reasonably exercising their rights to a safe workplace.

Specifically, termination for cause would not apply where the termination is contrary to a Federal, State, or local law; for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; for discrimination on the basis of race, color, national origin, age, sex (including sexual orientation and gender identity),<sup>55</sup> religion, disability, or citizenship; or, where applicable, where the employer fails to comply with its obligation under § 655.135(m)(4) in a meeting that contributed to the employee's termination. The Department seeks comment on these reasons for termination excluded from termination for cause, and whether any other reasons should explicitly be included in this list.

The Department does not propose changes to the prohibition on preferential treatment of H-2A workers (§ 655.122(a)) or layoffs of U.S. workers (§ 655.135(g)), but reminds employers that they are prohibited from offering preferential treatment to H-2A workers over U.S. workers. *See* § 655.122(a). Similarly, employers are prohibited from laying off similarly employed U.S. workers in the occupation that is the subject of the H-2A Application in the area of intended

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<sup>55</sup> "Sex" includes sexual orientation and gender identity because differential treatment on those bases necessarily involves discrimination because of sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("it is impossible to discriminate against a person" under Title VII because of their sexual orientation or gender identity "without discriminating against that individual based on sex").

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employment in the period beginning 60 days before the first date of need and continuing throughout the period certified on the H-2A Application, except on the basis of lawful, job-related reasons. While U.S. workers in corresponding employment may be laid off for lawful, job-related reasons such as lack of work or the end of the growing season, such a layoff is permissible only after all H-2A workers have been laid off. *See* § 655.135(g). As noted above, a worker in corresponding employment may only be terminated for cause using the same procedures, found in proposed § 655.122(n)(2), as those used to terminate an H-2A worker for cause. However, such processes must be applied fairly and consistently (and in compliance with the conditions set forth in § 655.122(n)(2)(ii)). In addition, to comply with the prohibitions on preferential treatment (§ 655.122(a)) and layoffs of U.S. workers (§ 655.135(g)), U.S. workers in corresponding employment may not be terminated without cause, or laid off, before all H-2A workers are terminated without cause. Of course, any worker terminated without cause, or laid off, is entitled to outbound transportation (§ 655.122(h)(2)), the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came) (§ 655.122(i)), and, if a U.S. worker, to be contacted for work in the next year (§ 655.153). Where the employer terminates an H-2A or worker in corresponding employment without cause, Department will, as appropriate, cite violations, assess civil money penalties, compute back wages, and/or pursue debarment for (1) failure to pay outbound transportation, (2) failure to comply with the three-fourths guarantee, and/or (3) failure to contact a U.S. worker for employment in the following season. When computing back wages owed under the three-fourths guarantee, the Department will compute for

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the hours not offered pursuant to § 655.122(i)(1) as well as any housing and meals not provided when required pursuant to § 655.122(i)(5).

Proposed § 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). The employer would be required to prove that the termination was justified and proper progressive discipline procedures were followed. The Department believes that it is reasonable to require employers, as the entities seeking an exemption from outbound transportation, the three-fourths guarantee (including meals and housing until the worker departs for other H-2A employment or to the place outside the United States from which the worker came), and notification requirements found in §§ 655.122(h)(2), 655.122(i), and 655.153, to demonstrate why termination for cause was warranted.<sup>56</sup>

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<sup>56</sup> Termination for cause provides employers with an exception from certain provisions of the H-2A program. Where a party seeks an exemption from prescribed terms or from a generally applicable provision, it is generally appropriate to assign to that party the burden of demonstrating the conditions for such an exemption. *See, e.g., Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91-94 (2008) (employers bear burden of proving certain exemptions to Age Discrimination in Employment Act); *Karawia v. U.S. Dep't of Lab.*, 627 F. Supp. 2d 137, 146 (S.D.N.Y. 2009) (under 29 CFR 4.188, a contractor found by the Secretary to have violated the Service Contract Act bears the burden of establishing unusual circumstances to warrant relief from the debarment sanction that generally applies to violators); 29 CFR 525.21(c) (where an employer that has obtained a special certificate under FLSA section 14(c) allowing the employer to pay special minimum wage rates to certain workers with disabilities, and the employer seeks to obtain authority to lower the wage rate of a worker with a disability below the rate specified in the certificate, the employer has the burden of establishing the necessity of lowering the wage of that worker); 29 CFR 779.101 (stating that “[a]n employer who claims an exemption under the [FLSA] has the burden of showing that it applies”) (citing *Walling v. Gen. Indus. Co.*, 330 U.S. 545 (1947) and *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945)).

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Consistent with current policy, where an employer constructively discharges a worker, the Department will consider that worker to be terminated without cause. Constructive discharge occurs when a worker departs employment because working conditions have become so difficult that a reasonable person would have felt compelled to leave the job. Constructive discharge may occur in a wide variety of situations, such as where a worker departs employment because of unsafe or intolerable housing conditions (such as grossly inadequate heating during the winter, lack of running water, or exposure of bare electrical wires), because the employer requires the worker to work in an unsafe workplace (for example, where an employer requires a worker to work in a field that was recently sprayed with pesticides before the required re-entry interval has elapsed), or because the worker has not received work assignments for an extended period of time, despite being available and willing to take on new work. Along the same lines, where a worker involuntarily leaves employment prior to the end of the contract period, the employee's departure may be deemed constructive discharge rather than abandonment under 655.122(n)(1). Consistent with current practice, in assessing whether alleged abandonment is voluntary, the Department will consider, for example, whether the employer sought to influence workers to leave a job prior to the end of the contract period or whether the employer took other steps to render working conditions so intolerable that a reasonable person in the worker's position would not stay. *See* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN No. 2012-1, H-2A "ABANDONMENT OR TERMINATION FOR CAUSE" ENFORCEMENT OF 20 CFR § 655.122(N) (Feb. 28, 2012).<sup>57</sup>

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<sup>57</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012\\_1.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012_1.pdf).

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The Department also proposes additional recordkeeping obligations in § 655.122(n)(4). The regulations at current § 655.122(n) require employers to maintain records of notification to the NPC, and to DHS in the case of an H-2A worker. Proposed § 655.122(n)(4)(i) would make a minor clarification that such records of notification must be maintained with respect to both abandonment and termination for cause, which is consistent with DOL's established interpretation of the current regulations. Further, proposed § 655.122(n)(4)(ii) would require the employer to maintain disciplinary records, including each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker. Finally, proposed § 655.122(n)(4)(iii) would require that the employer maintain records indicating the reason(s) for termination of any employee, including disciplinary records as described in § 655.122(n)(4)(ii) and § 655.167. These records are necessary to show that an employer complied with the regulations throughout the process leading to the termination for cause. An employer that does not maintain these records may not meet the burden of demonstrating to the Department that any termination for cause meets the requirements of proposed § 655.122(n)(2), as required by proposed § 655.122(n)(2)(iv). The Department also proposes conforming edits to § 655.167, specifically by adding paragraphs (c)(10) and (11), requiring employers to retain records indicating the reason(s) for termination of any employee, including records of each step of progressive discipline, any subsequent instruction afforded the worker, and any investigation, including any evidence or information that the worker presented in their defense, relating to the termination as set forth in § 655.122(n). The maintenance of disciplinary records for all employees, not simply those who were terminated, will assist employers in meeting their burden to demonstrate that

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discipline leading to termination was not pretextual and was consistent with company policies and procedures. The Department seeks comments as to whether it should require any other records in support of these proposed requirements.

Finally, the Department proposes minor edits to § 655.122(n) to improve readability and clarity. Specifically, the Department proposes to number paragraphs within this section and to reorder the mentions of termination for cause and abandonment of employment. Additionally, the Department proposes to clarify that the employer must notify the NPC and, in the case of an H-2A worker, DHS, not later than 2 working days after any termination for cause or abandonment occurs. This edit would be consistent with DOL's established interpretation of the current regulations at § 655.122(n) and would clarify ambiguous language to specify that the notice procedures apply both to termination for cause and to abandonment.

### **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 proposes to expand its collection of information about employers and the managers and supervisors of workers at places of employment by collecting additional information about the owner(s) of agricultural businesses that employ workers under the H-2A Application, the operators of the place(s) of employment identified in the job order, and the managers and supervisors of the workers when performing labor or services at those place(s) of employment. Specifically, the Department proposes to require that each prospective H-2A employer, as defined at 20 CFR 655.103(b), provide the following information in relation to the

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owner(s) of each employer, any person or entity (if different than the employer(s)) who is an operator of the place(s) of employment, including an H-2ALC's fixed-site agricultural business client(s), and any person who manages or supervises the H-2A workers and workers in corresponding employment under the H-2A Application: full name, date of birth, address, telephone number, and email address. The Department also proposes to revise the Form ETA-9142A to require the employer provide additional information about prior trade or DBA names the employer has used in the 3 years preceding its filing of the H-2A Application, if any, rather than collecting only the DBA name the employer currently uses. Accordingly, the Department proposes to revise and restructure § 655.130 by adding four new paragraphs, (a)(1) through (4), to specify the information employers must provide at the time of filing an H-2A Application.

In a new paragraph (a)(1), the Department proposes to retain the language currently in § 655.130(a) that addresses the H-2A Application and supporting documentation the employer must submit. The remainder of § 655.130(a), which contains language regarding collection of the employer's information—i.e., FEIN, valid physical location in the United States, and means of contact for recruitment—would be moved to proposed paragraph (a)(2). Also, in paragraph (a)(2), the Department proposes to explicitly require disclosure of the employer's name and the additional employer information collection the Department proposes to require (i.e., the identity, location, and means of contact for each owner). Proposed paragraph (a)(3) would require the employer to provide the identity, location, and contact information of all persons or entities who are operators of the place(s) of employment listed in the job order, if different from the employer(s) identified under paragraph (a)(2), including an H-2ALC's fixed-site agricultural business client(s) who operate the place(s) of employment where the workers employed under

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the H-2A Application will perform labor or services. In addition, paragraph (a)(3) would require the employer to provide the identity, location, and contact information of all persons who will manage or supervise H-2A workers and workers in corresponding employment under the H-2A Application at each place of employment. Proposed paragraph (a)(4) would require the employer to continue to update the information required by the above paragraphs until the end of the work contract period, including extensions thereto, and retain this information post-certification and produce it upon request by the Department. To effectuate proposed § 655.130(a)(4), the Department proposes a new record retention paragraph at § 655.167(c)(9) that would require the employer to retain the information specified in paragraphs (a)(2) and (3) of § 655.130 for the 3-year period specified in § 655.167(b).

The additional information the Department proposes to collect is necessary to improve program administration and better protect vulnerable agricultural workers. The new collections would allow the Department to gain a more accurate and detailed understanding of the scope and structure of the employer's agricultural operation, which is essential to the Department's fulfillment of various obligations in the administration and enforcement of the H-2A program. During the application process, this information would assist the Department in determining whether the employer has demonstrated a bona fide temporary or seasonal need, or, conversely, whether an employer has, through multiple related entities, sought to obtain year-round H-2A labor. The additional information would enhance the Department's enforcement capabilities by helping the Department identify, investigate, and pursue remedies from program violators; ensure that sanctions, such as debarment or civil money penalties, are appropriately assessed and applied to responsible entities, including individuals and successors in interest when appropriate;



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and determine whether an H-2A employer subject to investigation has prior investigative history under a different name. For example, contact information for owners, operators, and supervisors may assist the Department in locating the employer and workers for the purposes of conducting an investigation, presenting findings (either verbally or in a written determination) and obtaining payment for back wages and civil money penalties following a final order of the Secretary.

Similarly, this information provided at the application stage may assist the Department to identify whether an individual or successor in interest should be named on any determination and therefore subject to any sanctions or remedies assessed. As explained in the discussion of proposed § 655.104, in the experience of the Department, some H-2A employers have sought to avoid penalties and continue participating in the program despite having been debarred by reconstituting as a new legal entity while ultimately retaining the underlying business that was debarred from the H-2A program. In an audit or investigation of an employer, this information would allow the Department to better identify those persons with a financial stake in the certified H-2A employer who employ agricultural workers through non-petitioning entities. In addition, and as set forth in the discussion of proposed § 655.103(e), in the experience of the Department, some employers have established one entity that pays the firm's H-2A workers and another entity that pays the firm's other workers, while in fact the entire agricultural operation constitutes a single employer. This information will assist the Department in determining quickly whether the employees of the non-petitioning entity are in corresponding employment as employees of a single employer with an H-2A labor certification.

OFLC may use this information in post-adjudication audit examinations and/or program integrity proceedings (e.g., revocation or debarment actions). The information will help OFLC

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verify that persons representing employers both in the labor certification process and in the process of recruiting, managing, or supervising workers are acting on behalf of the employers within the scope of the terms and conditions of the labor certification and any contracts or agreements with employers, and in compliance with the revised regulations and all employment-related laws, such as laws prohibiting discrimination, retaliation, or the imposition of unlawful recruitment or visa-related fees. Collection of prior DBA names and identifying information for people other than the employer will make it easier for OFLC and WHD to search across applications within a filing system database to identify instances in which employers have changed names or roles to avoid complying with program regulations or avoid monetary penalties or serious sanctions such as program debarment. The proposed information collections also will facilitate interagency information sharing and permit OFLC and WHD to share relevant identifying information with other agencies when necessary to aid an investigation or enforcement action.

The Department will collect this information primarily through the H-2A Application the employer must complete to obtain temporary labor certification, and the Department proposes revisions to these forms under the Paperwork Reduction Act (PRA) for this purpose. In particular, the Department proposes revisions to the Form ETA-790A, *Addendum B*, to collect more detailed information about employers and the places of employment at which workers will provide the agricultural labor or services described in the job order. In addition, the Department proposes a new Form ETA-9142A, *Appendix C*, to collect the additional identifying information for owners and operators of places where work is performed and the people who manage and supervise workers under the H-2A Application, discussed above. The Department will collect,

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store, and disseminate all information and records in accordance with the Department's information sharing agreements and System of Records Notices, principles set forth by the Office of Management and Budget (OMB), and all applicable laws, including the Privacy Act of 1974 (Pub. L. 93-579, sec. 7, Dec. 31, 1974, 88 Stat. 1909), Federal Records Act of 1950 (Pub. L. No. 81-754, 64 Stat. 585 [codified as amended in chapters 21, 29, 31, and 33 of 44 U.S.C.]), the PRA (44 U.S.C. 3501 et seq.), and the E-Government Act of 2002 (Pub. L. No. 107-347 (2002)). More information about the Department's proposed changes to the H-2A information collection instruments and the Department's collection and use of this information is available in supporting documentation in the PRA package the Department has prepared for this rulemaking.

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

### *a. Section 655.135 Introductory Language, WHD Authority*

The Department proposes a minor, clarifying revision to the introductory language to § 655.135 to include explicit reference to 29 CFR part 501 as part of the obligations and assurances of an employer seeking to employ H-2A workers. The current introductory language specifies that an employer seeking to employ H-2A workers must agree as part of the job order and Application that it will comply with all requirements under 20 CFR part 655, subpart B. Those requirements currently include compliance with WHD's investigative and enforcement authority under 29 CFR part 501. *See, e.g.,* 20 CFR 655.103(b), 655.101(b). The proposed revisions here would simply make these obligations more explicit in § 655.135 and on the job order, to better ensure that both workers and employers are fully aware of WHD's authorities. The Department welcomes comments on this proposed revision.

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

The Department proposes to revise the assurances and obligations of H-2A employers to include stronger protections for workers who advocate for better working conditions on behalf of themselves and their coworkers. The Department believes that these protections will significantly improve the Department's efforts to prevent adverse effect on the working conditions of similarly employed agricultural workers in the United States because the hiring of H-2A workers may suppress the ability of domestic workers to negotiate with employers and advocate on their own behalf. Even if workers in the United States were to demand better conditions or pay, under the current H-2A regulatory framework, employers may turn to the H-2A program for an alternative, vulnerable workforce that faces significant barriers to pushing for better conditions or organizing, thus undermining advocacy efforts by or on behalf of workers in the United States. The proposals in this rule seek to correct this imbalance in bargaining power by protecting the rights of H-2A and other workers to advocate for better working conditions. In other words, the protections that the Department proposes would provide an important "baseline" or minimum condition of employment under the H-2A program below which workers in the United States would be adversely affected, for the reasons set forth below.

Specifically, the Department proposes to broaden the provision at § 655.135(h), which prohibits unfair treatment, by adding a number of protected activities that the Department has determined will play a significant role in safeguarding collective action, and that workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation. The Department also proposes a new employer obligation at § 655.135(m) that would ensure that H-

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2A employers do not interfere with efforts by their vulnerable workforce to advocate for better working conditions by including a number of requirements that would advance worker voice and empowerment and further protect the rights proposed under § 655.135(h). The Department also proposes a new employer obligation at § 655.135(n) that would explicitly allow H-2A workers and workers in corresponding employment the right to invite or accept guests to worker housing and also would provide a narrow right of access to worker housing to labor organizations. Some of these proposed protections would be limited to those workers who are engaged in agriculture as defined and applied in 29 U.S.C. 203(f)—that is, those who are exempt from the protections of the NLRA.

The Department believes that the proposed protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). The Department has historically understood the INA's adverse effect requirement both as requiring parity between the terms and conditions of employment provided to domestic and H-2A workers and as establishing a baseline "acceptable" standard for working conditions below which workers in the United States would be adversely affected. Courts have long recognized that Congress delegated to the Department broad authority to implement the prohibition on adverse effect. *See, e.g., Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 984 (D.C. Cir. 2021); *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (citing *AFL-CIO v. Brock*, 835 F.2d 912, 915 n.5 (D.C. Cir. 1987)).

In the 1978 H-2 regulations for agricultural employment, the Department characterized many of the longstanding terms and conditions of the program now found at 20 CFR 655.122—including housing, workers' compensation insurance, the provision of tools and equipment, the

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maximum meal charge, inbound and outbound and daily transportation, the three-fourths guarantee, and recordkeeping and earning statements—as “the minimum level” of working conditions “below which similarly employed” workers in the United States “would be adversely affected.” 20 CFR 655.0(d), 655.202(b) (1978), 43 FR 10306, 10312, 10314 (Mar. 10, 1978). The 1978 rule further explained that “[i]f it is concluded that adverse effect would result,” the Department would not be able to separately determine whether U.S. workers are available because “U.S. workers cannot be expected to accept employment under conditions below the established minimum levels.” 43 FR 10306, 10312 (Mar. 10, 1978).

In IRCA, which bifurcated the H-2 program and created the separate H-2A program, Congress explicitly adopted the adverse effect requirement, stating that the Secretary may not issue a temporary labor certification unless the petitioning employer has established, among other things, that the employment of H-2A workers “will not adversely affect the ... working conditions of workers in the United States similarly employed.” 8 U.S.C. 1188(a)(1). The Department retained the “minimum” terms and conditions of employment required under the program, explicitly described in the regulations as intended to prevent adverse effect, in its 1987 rulemaking. 52 FR 16770, 16779-80 (May 5, 1987); 52 FR 20496, 20508, 20513 (June 1, 1987); *see also Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016) (explaining that the regulations’ provision of minimum benefits to H-2A workers, including sound working conditions, “ensure[s] that foreign workers will not appear more attractive to the employer than domestic workers, thus avoiding any adverse effects for domestic workers”) (citations omitted).

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Over the past decade, use of the H-2A program has grown dramatically while overall agricultural employment in the United States has remained stable, meaning that fewer domestic workers are employed as farmworkers.<sup>58</sup> The Department believes that this is because the dangers and physical hardships inherent in agricultural employment,<sup>59</sup> combined with the lack of protections for worker organizing and bargaining power, have together contributed to worsening working conditions in agricultural employment—a lowering baseline—leading to a decreasing number of domestic workers willing to accept such work.<sup>60</sup> Congress explicitly prohibited in the INA the granting of labor certifications in the event of a strike or lockout at the worksite, a prohibition that recognizes the potential for the hiring of H-2A workers to suppress domestic workers' bargaining power and organizing efforts and, thus, have a negative impact on workers in the United States. 8 U.S.C. 1188(b)(1).

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<sup>58</sup> According to USDA's Economic Research Service, employment of farmworkers in the United States has remained stable since the 1990s, but the number of positions certified in the H-2A program has increased sixfold from 2005 to 2021. *See Farm Labor*, U.S. DEP'T OF AGRICULTURE, <https://www.ers.usda.gov/topics/farm-economy/farm-labor>; *H-2A Seasonal Worker Program Has Expanded Over Time*, U.S. DEP'T OF AGRICULTURE, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104874>.

<sup>59</sup> *Workplace Safety and Health Topics: Agricultural Safety*, NATIONAL INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, .

<sup>60</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, *RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM* 4, 6 (CDM Report), <https://cdmigrante.org/ripe-for-reform>; Farmworker Justice Report at 7, 11, 17, 31; Miriam Jordan, *Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/us/black-farmworkers-mississippi-lawsuit.html>; POLARIS, *LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS, A DATA ANALYSIS 2018-2020* 13, 18 (May 2022) (Polaris 2018-2020 Report), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>.

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Some of the characteristics of the H-2A program, including the temporary nature of the work, frequent geographic isolation of the workers, and dependency on a single employer, create a vulnerable population of workers for whom it is uniquely difficult to advocate or organize to seek better working conditions.<sup>61</sup> In its enforcement experience, the Department has received reports of employers that have prohibited or effectively prevented H-2A workers from receiving assistance from certain service providers. For example, some employers have prevented H-2A workers from consulting with legal aid organizations regarding workers' rights under the H-2A program. Others have refused to transport workers to a medical provider for care in the United States, and one employer required instead that workers return to Mexico to access medical care for an on-the-job injury. The Department has seen flyers prohibiting workers from talking to visitors at the housing site without supervisor permission and posters prohibiting visitors to agricultural establishments unless the visitors first check in with the employer. *See also Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 337-40 (D. Md. 2017) (employer unlawfully blocked legal aid workers from visiting H-2A workers in employer-provided housing). Nongovernmental organizations (NGOs) that work with H-2A workers report similar employer interference with workers' rights to access services and information, including medical treatment and legal assistance.<sup>62</sup>

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<sup>61</sup> CDM Report at 4-6, 9, 13, 18-19, 23, 27; Farmworker Justice Report at 17; Polaris 2018-2020 Report at 13, 18-19, 26.

<sup>62</sup> CDM Report at 5, 23, 27, 30; Farmworker Justice Report at 22, 33; Polaris 2018-2020 Report at 7, 8, 19, 26.



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Workers in the H-2A program are also vulnerable to retaliation, which discourages workers from advocating for their own rights and the rights of their coworkers.<sup>63</sup> For example, the Department debarred and assessed penalties against an H-2A employer that instructed workers to lie about their pay to investigators and threatened to kill workers who talked to authorities.<sup>64</sup> The Department also recently obtained a temporary restraining order and preliminary injunction against an H-2A employer who, after workers requested more food and water, threatened workers with a gun, shooting twice near the workers.<sup>65</sup> In another example, the Department recently debarred and assessed penalties against an employer who underpaid workers by more than \$5.00 per hour and confiscated workers' passports to keep them from leaving employment upon realizing they were being underpaid.<sup>66</sup> These examples are just a few among the many instances of retaliation that the Department has witnessed, and that workers

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<sup>63</sup> Farmworker Justice Report at 30-31; Polaris 2018-2020 Report at 16-17, 26.

<sup>64</sup> Individuals associated with this employer also pleaded guilty to criminal charges for their role in forced labor racketeering conspiracy. See Press Release, U.S. Dep't of Just., *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering Conspiracy Involving the Forced Labor of Mexican Workers* (Sept. 27, 2022), <https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced-labor-mexican>; Press Release, U.S. Dep't of Just., *Three Defendants Sentenced in Multi-State Racketeering Conspiracy Involving Forced Labor of Mexican Agricultural H-2A Workers* (Oct. 27, 2022), <https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican>.

<sup>65</sup> See Press Release, U.S. Dep't of Lab., *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots* (Oct. 28, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20211028-0>.

<sup>66</sup> See Press Release, U.S. Dep't of Lab., *US Department of Labor Investigation Results in Judge Debarring North Carolina Farm Labor Contractor for Numerous Guest Worker Visa Program Violations*.

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experience, that demonstrate that workers can face significant hurdles when advocating on their own behalf to assert even their basic rights under the current H-2A program regulations.

As explained, the Department believes that the fear of retaliation, combined with 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.<sup>67</sup> In addition, based on its enforcement experience, the Department has determined that the H-2A program currently does not provide sufficient protections for such workers to safely and consistently assert their rights under the program and engage in self-advocacy. This lack of sufficient protections adversely affects the ability of domestic workers to advocate for acceptable working conditions, leading to reduced worker bargaining power and, ultimately, deterioration of working conditions in agricultural employment. However, when these workers have engaged in organizing, it has led to better working conditions for all workers. According to the Farm Labor Organizing Committee, AFL-CIO, union advocacy has improved conditions for the workers it represents (over 10,000 H-2A workers employed at North Carolina agricultural sites), including by helping H-2A workers to obtain remedies for likely violations of the H-2A program's

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<sup>67</sup> According to BLS data, in 2021, union representation in agriculture was just 3.1 percent of total workers employed compared to the 11.6 percent of workers employed overall represented by unions; in 2022, agricultural union representation was 4.3 percent of workers employed, compared to 11.3 percent of workers employed overall. *BLS News Release, Union Members—2022* tbls 1, 3, BUREAU OF LAB. STATS., <https://www.bls.gov/news.release/pdf/union2.pdf>. See also Report for Congress, *Farm Labor: The Adverse Effect Wage Rate (AEWR)*, CONGRESSIONAL RESEARCH SERVICE (updated March 26, 2008) n.17; *Farmworker Justice Report* at 31.

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requirements relating to housing safety standards, travel reimbursements, wages, and other requirements.<sup>68</sup>

Therefore, the Department believes that changes proposed here, which would expand the H-2A anti-retaliation regulation and include employer obligations that would make advocacy and organizing more available to workers in the H-2A program, would help improve the working conditions of workers protected under the H-2A program, and thus prevent an adverse effect on similarly employed workers in the United States. The Department believes that the proposed protections also would increase U.S. worker response to H-2A employers' recruitment efforts, both by improving working conditions under the H-2A program and by increasing U.S. workers' interest in H-2A job opportunities that include protections for advocacy and organizing efforts that would not be undermined by the availability of an alternative, more vulnerable workforce. These proposals also would enhance worker bargaining power and meaningfully equip workers to prevent further deterioration of working conditions that adversely affect workers in the United States.

The Department welcomes comments on whether, in fact, foreign workers employed under the H-2A program are more vulnerable to labor exploitation than similarly employed domestic workers, due to the temporary nature of the work; frequent geographic isolation of the workers; dependency on a single employer for work, housing, transportation, and necessities,

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<sup>68</sup> See Farmworker Justice Report at 30-31; 2017 GRIEVANCE SUMMARY, Farm Lab. Org. Comm., <https://floc.com/2017-grievance-summary>.

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including access to food and water; language barriers; possible lack of knowledge about their legal rights; or other factors. It also welcomes evidence or experience regarding, or refuting, the unique vulnerability of these workers, and whether existing worker protections are adequate to prevent violations of H-2A program requirements, dangerous working conditions, retaliation, and labor trafficking, or to promote H-2A workers' ability to advocate or organize to seek better working conditions. The Department also seeks comments on whether domestic agricultural workers have greater voice and empowerment at work generally than foreign agricultural workers, despite the fact that they are not covered by the NLRA, due to their established presence in the United States, their domestic network of family and friends, their greater familiarity with services and supports available to workers in the United States, and their ability to find alternative employment. And more generally, the Department also seeks comment on how to increase, or increase awareness of existing, protections for workers advocating for better working conditions and to help prevent adverse effect on workers in the United States, without infringing on employers' rights to manage their workplaces. It welcomes the views of employers, workers, worker advocates, labor organizations, and other stakeholders on these issues. In particular, the Department welcomes any evidence, research, and/or empirical data regarding these issues. The Department also welcomes comments on whether further protections for workers' advocacy and organization, in addition to the protections contained within the following sections, are necessary to ensure that the employment of foreign workers under the H-2A program does not adversely affect the wages or working conditions of domestic workers.

- i. The Department's Proposed Regulations Would Not Be Preempted by the NLRA*

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Some of the provisions included in the Department's proposed regulations would be limited to persons who are engaged in agriculture as defined and applied in 29 U.S.C. 203(f) ("FLSA agriculture"). For these workers, and these workers alone, the proposed regulations would protect some conduct and provide some rights necessary to safeguard collective action and protect against retaliation. The NLRA's coverage extends only to workers who qualify as "employee[s]" under section 2(3) of that Act, and the NLRA's definition of employee expressly excludes "any individual employed as an agricultural worker." 29 U.S.C. 152(3). Congress has provided that the definition of "agricultural" in section 3(f) of the FLSA also applies to the NLRA. *See, e.g., Holly Farms v. NLRB*, 517 U.S. 392, 397–98 (1996). Following the plain text of the statute, both Federal courts and the NLRB have long held that the NLRA does not apply to agricultural workers, worker organizing by agricultural workers, or unions "composed exclusively of agricultural laborers." *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 647 (D.C. Cir. 1951); *see also, e.g., Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990). Because portions of the Department's proposed regulations would apply only to workers who fall within the NLRA and FLSA definitions of agricultural labor, those proposed provisions would apply exclusively to workers who are exempt from the NLRA. Thus, to the extent that one might argue that the proposed changes in this section safeguarding collective action would be preempted by Federal labor law, the NLRA's exemption of agricultural labor shows that the proposal here is not preempted. As the Supreme Court explained in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the NLRA preempts regulation of activities that either are or arguably are "protected by [section] 7 of the National Labor Relations Act, or . . . an unfair labor practice under [section] 8." *Id.* at 244; *see also UAW-Labor Emp. & Training Corp. v.*

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*Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003). Conduct may be “arguably” governed by section 7 or 8 of the NLRA when there is a plausible argument for preemption “that is not plainly contrary to [the Act’s] language and that has not been authoritatively rejected by the courts or the Board.”

*Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 395 (1986). Because agricultural workers are expressly excluded from the NLRA by the plain text of the statute, agricultural worker organizing is neither protected by section 7 of the Act nor subject to section 8’s limitations on unfair labor practices. *See* 29 U.S.C. 152(3); *see also Di Giorgio*, 191 F.2d at 647–49 (holding that section 8’s prohibition on secondary boycotts did not apply to a Farm Union, because an organization composed exclusively of agricultural workers is not governed by the NLRA).

Moreover, because any argument that the NLRA governs agricultural workers would be “plainly contrary to [the NLRA’s] language,” the conduct that would be protected under the Department’s proposed rule is not even arguably governed by the NLRA. *See Int’l Longshoremen’s Ass’n*, 476 U.S. at 395; *see also Wilmar Poultry Co., Inc. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) (holding that *Garmon* preemption does not apply to State regulation of agricultural workers’ labor activity “because the NLRA’s protections and prohibitions do not apply to agricultural laborers.”).

The Supreme Court held in *International Ass’n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), that the NLRA also preempts regulation of employer or worker conduct that Congress intended to leave unregulated “to be controlled by the free play of economic forces.” *Id.* at 140 (quotations omitted). *Machinists* preemption applies to State or Federal regulation of “economic weapons” that would “frustrate effective implementation of the Act’s processes.” *Id.* at 147–48 (quotations omitted).

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The Department's proposed rule could not frustrate 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. Thus, the text and structure of the NLRA indicate that *Machinists* field preemption does not extend to agricultural worker organizing. See *United Farm Workers v. Arizona Ag. Emp. Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (explaining that when "Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit" and *Machinists* preemption does not apply); *Wilmar Poultry*, 430 F. Supp. at 578 (holding that *Machinists* preemption does not apply to State regulation of agricultural laborers). Similarly, courts have held that *Machinists* preemption does not prevent State labor relations regulations that apply to other workers excluded from the NLRA. See, e.g., *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) (public employees); *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 792 (9th Cir. 2018) (independent contractors); *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015) (domestic service workers).

Furthermore, in these proposed regulations the Department would be exercising its authority under the INA to regulate the labor market to prevent adverse effect on the working conditions of agricultural workers in the United States. 8 U.S.C. 1188(a)(1). Congress could not have intended for the NLRA to "occupy the 'field' with respect to the regulation of all labor concerns," as it delegated authority under the INA to the Department. See *Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 25 (D.D.C. 2015) (citing *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364) (holding that a DOL regulation was not preempted under *Machinists* because it was an exercise of the President's procurement power, rather than an exercise of authority conferred by

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the NLRA, and because Congress did not intend for the NLRA to “foreclose all other” labor regulation). For these reasons, no part of the Department’s proposed regulation would be preempted by the NLRA.

Because certain provisions of this proposed rule would be limited to workers engaged in FLSA agriculture, the Department notes that workers who are not engaged in FLSA agricultural labor (e.g., those workers engaged in logging occupations) would not be covered by those proposed provisions. The vast majority of workers excluded from those proposed provisions, however, are covered by the NLRA, and are thus already afforded the right to self-organization. Nothing in this proposed rule would alter or circumscribe the rights of workers already protected by the NLRA to engage in conduct and exercise rights afforded under that law.

*ii. Section 655.103(b), Definitions*

In support of the new employer obligations the Department is proposing, the Department proposes to add two new definitions to § 655.103(b).

The Department proposes to define “key service provider” to mean a health-care provider; a community health worker; an education provider; an attorney; a legal advocate or other legal service provider; a government official, including a consular representative; a member of the clergy; and any other service provider to which an agricultural worker may need access. The Department has adapted this proposed definition from one used in the Colorado Agricultural Labor Rights and Responsibilities Act, COLO. REV. STAT. 8-13.5-201, because it believes that a definition and examples of the types of service providers that workers should have access to would be useful for both workers and employers. The list of service providers included in the proposed definition is intended to be illustrative and not exhaustive. For example, the



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Department would consider a non-union worker center to be a key service provider under the proposed definition, as well as the representatives, directors, or other individual employees of a worker center. Worker centers are generally non-union, community-led organizations that provide or engage in services, advocacy, and organizing to support workers in low-wage industries and occupations, particularly in those industries and occupations excluded from Federal labor law, such as agriculture.<sup>69</sup> The Department is soliciting comment on the scope of this proposed definition, in particular as to whether it is sufficient, whether other types of service providers should be included in the list of examples in the regulation, or whether this definition is too broad.

The Department proposes to define “labor organization” to mean an organization in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers over grievances, labor disputes, or terms or conditions of employment. This definition is similar to the one used under the NLRA with key differences to reflect the nature of the H-2A program. While this definition would thus incorporate many NLRA principles regarding the

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<sup>69</sup> For example, the Coalition of Immokalee Workers is a worker-based human rights organization that focuses on fighting human trafficking and gender-based harassment and violence affecting farmworkers, and improving labor standards through a voluntary code of conduct called the Fair Food Program (“FFP”), a market-centered approach to the protection of human rights in corporate supply chains. “Key service providers” under the voluntary FFP might include worker educators who provide regular training at participating farms; investigators who conduct audits and accept, investigate, and resolve complaints; and representatives who work with participating buyers to enforce the voluntary FFP at participating farms. See COALITION OF IMMOKALEE WORKERS, FAIR FOOD PROGRAM (2021), <https://ciw-online.org/blog/2021/09/released-2021-fair-food-program-report>. Similar worker centers serve farm workers in other States. See also ECONOMIC POLICY INSTITUTE, BRIEFING PAPER NO. 159: WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (Dec. 31, 2005), <https://www.epi.org/publication/bp159>.

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meaning of the term “labor organization,” the Department intends the range of organizations that would be considered labor organizations under these proposed regulations to be broader than under the NLRA because the Department’s proposed definition would include organizations in which agricultural workers participate, whereas such organizations are excluded under the NLRA. The Department believes this broader definition is appropriate given the unique characteristics of the H-2A program. The Department seeks comment on the scope of this proposed definition. The Department also seeks comment on whether the definition should include additional criteria or protections in order to ensure that any such organization is not dominated, interfered with, or supported by employers, as would be prohibited by section 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2).

The Department also welcomes comments on whether other terms introduced by the proposed regulations should be defined in § 655.103(b), and on other definitions that the Department should consider.

*iii. Section 655.135(h) No Unfair Treatment*

The Department proposes to expand the scope of what constitutes prohibited unfair treatment under § 655.135(h) to better protect workers from intimidation or discrimination in response to worker advocacy. As detailed above, the Department believes that these protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). Workers’ rights cannot be secured unless they are protected from all forms of discrimination resulting from any worker’s attempt to advocate on behalf of themselves or their coworkers. The Department has long recognized that such protections are essential to the effective functioning of a complaints-based enforcement regime.

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*Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (agreeing with the Department's interpretation of the FLSA's anti-retaliation provision and explaining that Congress "chose to rely on information and complaints received from employees seeking to vindicate rights" and "effective enforcement could thus only be expected if employees felt free to approach officials with their grievances"); *see also* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2022-02, PROTECTING WORKERS FROM RETALIATION (Mar. 10, 2022).<sup>70</sup> Stated differently, an employer who is free to intimidate workers to discourage them from raising or reporting legal violations, or to retaliate against those who do so, interferes with the Department's ability to enforce the legal requirements of the H-2A statute and regulations. This is particularly true for workers in the H-2A program. Due to the temporary nature of their work; their geographic isolation and lack of independent transportation; their dependency on a single employer for work, housing, and other necessities, including access to food and water; language barriers; and, often, a lack of knowledge about their legal rights, H-2A workers are especially vulnerable to retaliation. This vulnerability makes H-2A workers less likely to assert their legal rights or to raise or report H-2A violations, including illegal or intolerable working conditions. *See* section IV.C.2.b of this preamble. And as set forth above, the availability of H-2A workers who are less likely to complain about such working conditions makes it less likely that H-2A workers will come together to seek better working conditions, and it is similarly less likely that workers in the United States will be able to organize with their fellow H-2A workers or otherwise seek improvements to their working conditions alongside H-2A workers. Thus, the

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<sup>70</sup> <https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf>.

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Department has determined that strengthening and expanding the regulations' existing protections against intimidation or discrimination in the H-2A program is necessary to prevent further adverse effect on the working conditions of workers in the United States.

Currently, the prohibition on unfair treatment provides that an employer "has not or will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person" who has engaged in certain enumerated protected activities pertaining to the H-2A program requirements, namely, filing a complaint, instituting a proceeding, testifying in a proceeding, or consulting with an attorney or legal assistance program regarding any H-2A violation, or exercising or asserting any right or protection under the H-2A program. 20 CFR 655.135(h)(1) through (5). The Department proposes to redesignate and expand current paragraphs (h)(1) through (h)(5) into proposed (h)(1)(i) through (h)(1)(vii). The Department also proposes a new category of protected activity, limited to those workers engaged in FLSA agriculture, at proposed § 655.135(h)(2). Finally, to help inform workers of their rights under the H-2A program, the Department is proposing to include the protections that would be afforded under proposed § 655.135(h) in the disclosures required on the job order.

*iv. Section 655.135(h)(1)(v) Consulting with Key Service Providers*

Recognizing the barriers that H-2A workers frequently face in accessing certain services (*see* section IV.C.2.b of this preamble), the Department proposes to broaden the range of service providers and advocates with whom consultation regarding the terms and conditions of employment under the H-2A program is explicitly protected. Specifically, the Department proposes to add a new paragraph (v) to the list of protected activities at § 655.135(h)(1), consulting with a "key service provider," as defined in proposed § 655.103(b), regarding matters

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under the H-2A program. This proposal would not be limited to persons engaged in FLSA agriculture. The Department notes that workers are already entitled to access and meet with many different service providers to discuss or assert rights under the H-2A program, without fear of retaliation for doing so, under the Department's current regulatory framework. *See, e.g.*, 20 CFR 655.135(e) and (h)(5). For example, under the current regulations, an employer may not retaliate against a worker because the worker goes to see a doctor to care for an injury the worker incurred while on the job, or because the worker consults a worker advocacy organization regarding the employer's failure to pay the wages promised in the job order. *Id.* The proposal here is intended to simply make these rights explicit. And because this explicit assurance would be included on the job order (Form ETA-790A), this clarification would help ensure that workers will be aware of this protection through the terms of the job order. The Department believes that clarifying protections for workers' consultation with such providers would increase the likelihood that workers will receive necessary services and help prevent the frequent isolation that renders workers more vulnerable to H-2A violations and other forms of labor exploitation, including worsening working conditions. The Department seeks comment on this proposal.

*v. Section 655.135(h)(1)(vi) Exercising or Asserting any Rights under the H-2A Program*

The Department proposes to redesignate current paragraph (h)(5), which protects any person from discrimination for exercising or asserting any rights protected or afforded under the H-2A program, to (h)(1)(vi). The Department does not propose any substantive changes to this paragraph. However, the Department notes that this category of protected activity would protect any person from any form of discrimination for asserting any rights or protections afforded under

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the H-2A program, including those rights and protections afforded under the Department's proposed paragraphs (m), (n), and (o) of this section.

*vi. Section 655.135(h)(1)(vii) Exercising Rights under Federal, State, or Local Laws*

The Department also proposes to clarify existing regulations by adding § 655.135(h)(1)(vii) to explicitly protect complaints, proceedings, and testimony under any applicable labor- or employment-related Federal, State, or local law or regulation, including those related to health and safety. This would explicitly prohibit employers from retaliating against any person who files a complaint, institutes or causes to be instituted any proceeding, or testifies or is about to testify in any proceeding under or related to any applicable Federal, State, or local labor- or employment-related law, rule, or regulation. The Department notes that these activities are already protected under the Department's current regulatory framework because employers already must comply with all applicable Federal, State, and local laws as a requirement of the H-2A program. *See* 20 CFR 655.135(e) and (h)(1), (5). The proposal here is intended to make these rights explicit, in order to better inform workers and employers of the protected rights under the H-2A program. Moreover, because there are Federal, State, and local labor- or employment-related laws and regulations that may apply to workers protected under the H-2A program (e.g., the Occupational Safety and Health Act, 29 U.S.C. ch. 15, or the FLSA, 29 U.S.C. 201 et seq.), explicitly prohibiting retaliation against persons who share information with or assist those seeking to enforce these other laws would better protect workers advocating for better working conditions and would help prevent adverse effect on workers in the United States.

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The Department emphasizes that nothing in this proposed rule is intended to preempt more protective local, State, or Federal laws, including labor and employment laws and regulations at the State level that expressly protect agricultural workers, as well as those that protect workers generally against discrimination, unsafe working conditions, or other adverse impacts, such as those referenced above. Moreover, the remedies provided for under this proposed regulation are not intended to be exclusive; if an agricultural worker has other remedies available under State or local law, the remedies contemplated under this proposal are not intended to displace them. The Department welcomes comments on how best to ensure that its proposals do not conflict with existing laws and regulations and how best to preserve available remedies under those laws, in particular State laws that provide for a system of collective bargaining for farmworkers and explicitly prohibit retaliation against farmworkers.

The Department seeks comments on this proposal.

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

The Department's current regulations, including current § 655.135(h), have long protected a worker's ability to communicate with the Department. In addition, the Department's H-2A regulations have long required employers to fully disclose in the job order the material terms and conditions of employment under the job opportunity, and have long prohibited employers from seeking to later alter those terms and conditions. *See* 20 CFR 655.103(b), 655.122(b) and (q); 29 CFR 501.5. However, in recent years, the Department has observed a troubling trend of H-2A employers imposing "side agreements" that purport to add or waive certain terms and conditions of employment as compared to those disclosed in the job order. For

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example, after terminating a group of workers without cause, one H-2A employer presented the workers with forms falsely asserting that the workers had left voluntarily, purporting to waive the workers' rights to the three-fourths guarantee. *WHD v. Sun Valley Orchards, LLC*, ARB No. 2020-18, 2021 WL 2407468, at \*10-11 (ARB May 27, 2021), *aff'd*, No. 1:21-cv-16625, 2023 WL 4784204 (D.N.J July 27, 2023), *appeal filed*. Other H-2A employers have required workers to sign arbitration agreements after the workers have arrived at the place of employment, without having disclosed such a requirement in the job order. *See, e.g., Martinez-Gonzalez v. Elkhorn Packing Co., LLC*, 25 F.4th 613 (9th Cir. 2022); *Magana-Muñoz v. West Coast Berry Farms, LLC*, No. 5:20-cv-02087, 2020 WL 3869188, at \*5 (N.D. Cal. July 9, 2020). These practices violate the Department's H-2A regulations and may mislead workers regarding their rights under the H-2A program, including their ability to communicate with the Department. Therefore, the Department takes this opportunity to reiterate its longstanding requirements relevant to these "side agreements."

First, the Department's H-2A regulations include robust disclosure requirements. Specifically, employers must disclose in the job order all material terms and conditions of employment. *See* 20 CFR 655.103(b) (defining "job order" as "[t]he document containing the material terms and conditions of employment"); 655.121(a)(4) (requiring H-2A job orders to meet the requirements specified for agricultural clearance orders under 20 CFR part 653, subpart F); 653.501(c)(1)(iv) and (3)(viii) (requiring agricultural clearance orders to include material terms and conditions of employment). Each job qualification and requirement listed in the job order must be bona fide, as well as normal and accepted among non-H-2A employers in the same or similar occupations. 20 CFR 655.122(b) (job qualifications and requirements). Finally, the



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employer must provide H-2A workers with a copy of the written work contract (at minimum, the terms of the job order) before the worker travels to the place of employment. 20 CFR 655.122(q) (disclosure of work contract). Such written disclosure must be made to workers in corresponding employment no later than the first day work commences. *Id.*

These requirements ensure that employers seeking to employ H-2A workers are adequately testing the local labor market to determine the availability of U.S. workers for the actual job opportunity and are not imposing inappropriate requirements that discourage otherwise qualified U.S. workers from applying. *See* 75 FR at 6901. These requirements also ensure that workers are apprised of the accurate terms and conditions of employment before accepting employment with the employer and, in the case of many workers, traveling great distances and at significant personal expense to do so. *Adm'r v. Frank's Nursery LLC*, ARB Nos. 2020-0015 and 2020-0016, 2021 WL 4155563, at \*3-4 (ARB Aug. 25, 2021) (describing the importance of disclosure to workers of all material terms and conditions of employment before the worker accepts the job offer), *aff'd*, No. 21-cv-3485, 2022 WL 2757373 (S.D. Tex. July 14, 2022).

Thus, pursuant to these requirements, an employer may *not* seek to add new material terms and conditions of employment after the worker arrives at the place of employment, even if such terms and conditions would otherwise be permissible if they had been disclosed in the job order. For example, even if a mandatory arbitration agreement would be a permissible term and condition of employment for a particular H-2A job opportunity if disclosed in the job order, it is a violation of the H-2A regulations for the employer to impose such a material term and condition of employment on the workers if it was not disclosed in the job order. *See Frank's*

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*Nursery*, 2022 WL 2757373, at \*3-4 (affirming WHD Administrator's determination of violation and assessment of a civil money penalty for employer's failure to disclose in the job order a drug testing policy); *see also Magana-Muñoz v. West Coast Berry Farms, LLC*, No. 5:20-cv-02087, 2020 WL 3869188, at \*5 (N.D. Cal. July 9, 2020) (discussing the Department's regulatory requirements for H-2A job orders and concluding that an arbitration agreement is a material term or condition of employment that must be disclosed in the job order); *cf. ETA v. DeEugenio & Sons #2*, OALJ No. 2011-TLC-00410, slip op. at 3-4 (OALJ June 13, 2011) (affirming CO's denial of labor certification because employer failed to demonstrate that arbitration and grievance clauses listed in job order were normal and accepted requirements among non-H-2A employers in the occupation); *ETA v. Bourne, et al.*, OALJ No. 2011-TLC-00399, slip op. at 9-11 (OALJ June 6, 2011) (same); *ETA v. Head Bros.*, OALJ No. 2011-TLC-00394 (OALJ May 18, 2011) (same); *but see ETA v. Frey Produce et al.*, OALJ No. 2011-TLC-403, slip op. at 6 (OALJ June 3, 2011) (concluding arbitration is a not a job "qualification or requirement").

Second, and in addition to the disclosure requirements, the Department's H-2A regulations prohibit *any* person from seeking to have a worker waive any right afforded under the H-2A program. 29 CFR 501.5. Thus, an employer may not—at any time—request that a worker waive or reduce any of the terms and conditions of employment disclosed in the job order or other rights under the H-2A program, such as the provision of meals as disclosed in the job order, the right to the three-fourths guarantee, the prohibition on the payment of fees, or the payment of the H-2A wage rate for hours spent engaged in corresponding employment. For example, through its enforcement experience, the Department has learned of H-2A employers presenting their entire workforces with side "opt-out" agreements under which the workers

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purport to waive their right to employer-provided meals on certain days, despite the employer's disclosure in the job order that meals will be provided every day. The regulations prohibit such practices. In addition, an employer may never seek to prevent a worker from engaging in activity protected under the H-2A regulations, such as filing a complaint with, speaking with, or cooperating with the Department. *See* 20 CFR 655.135(h); 29 CFR 501.4(a).

The Department is concerned that “side agreements” carry significant potential to mislead workers regarding their rights under the H-2A program, including the right to file complaints with and communicate with the Department. For example, an H-2A worker who is terminated without cause but is required to sign a form purportedly “resigning” the job may believe—incorrectly—that they may no longer file a complaint with the Department to enforce their right to the three-fourths guarantee or their right to the cost of return transportation and subsistence. Another worker may misunderstand a “side” arbitration agreement as preventing the worker from filing a complaint with the Department before first submitting the issue to the employer's arbitration procedures, even though an employee who agrees to arbitrate a statutory claim is not waiving any substantive rights under the statute. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). Moreover, an H-2A worker's agreement with their employer to arbitrate employment disputes does not limit the Department's ability to enforce the H-2A program's requirements. *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002); *Walsh v. Arizona Logistics, Inc.*, 998 F.3d 393, 396-97 (9th Cir. 2021) (same). Accordingly, where an H-2A employer's job order *does* include an arbitration clause that is otherwise permissible, the SWA and OFLC review the disclosure for actual or implied restrictions on workers' access to complaint systems and may require employers to include language in the job order affirmatively

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stating that the worker may not be prevented from filing complaints with the Department. For efficiency and clarity, and consistent with the other proposals in this NPRM that would serve to protect worker voice and better inform workers of their rights under the H-2A program, the Department is proposing to add standard language to the job order affirmatively stating that a worker may not be prevented from communicating with the Department of Labor or any other Federal, State or local governmental agencies regarding the worker's rights. The Department welcomes comments suggesting other means it can use to better inform workers of their rights and to better inform employers and workers alike of the longstanding limitations on "side agreements."

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

The Department proposes a new protected activity for any person engaged in FLSA agriculture at proposed § 655.135(h)(2), relating to self-organization and concerted activity, for those workers who are exempt from similar protections under the NLRA. As discussed above, the Department believes that these proposed protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). Specifically, the Department proposes at § 655.135(h)(2) to protect engaging in activities related to self-organization, including any effort to form, join, or assist a labor organization, as defined in proposed § 655.103(b); a secondary activity such as a secondary boycott or picket; or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions. The Department also proposes to protect a person's refusal to engage in any such activities.

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By proposing to add protections for such activities, the Department intends to prohibit an employer from intimidating, threatening, restraining, coercing, blacklisting, or in any manner discriminating against, any person engaged in FLSA agriculture for engaging, or refusing to engage, in activities related to self-organization, including, among other things, concerted activity for mutual aid or protection. The Department's proposed use of the terms "concerted activity" and "mutual aid or protection" draws upon the general body of case law from the Federal courts and the NLRB broadly construing similar language in the NLRA. However, the Department notes that these terms must ultimately be interpreted consistently with the statutory purpose of the INA and the H-2A program, including the need to prevent adverse effect on workers in the United States, and in light of the H-2A program's unique characteristics.

The Department proposes that concerted activity include employee activity "engaged in with or on the authority of other employees, and not solely by and behalf of the employee himself." *Meyers Indus. (Meyers I)*, 268 NLRB 493, 497 (1984), *remanded sub nom., Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985); *see also NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984). For example, concerted activity includes two or more employees presenting joint requests or grievances to their employers;<sup>71</sup> a series of "spontaneous individual pleas" from employees about shared concerns;<sup>72</sup> two or more workers circulating or signing a petition;<sup>73</sup> two or more workers striking or walking off the job;<sup>74</sup> participating in a concerted refusal to work in

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<sup>71</sup> *See, e.g., NLRB v. Sequoyah Mills, Inc.*, 409 F.2d 606, 608 (10th Cir. 1969).

<sup>72</sup> *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962).

<sup>73</sup> *See, e.g., Richardson Paint Co. v. NLRB*, 574 F.2d 1195, 1206 (5th Cir. 1978).

<sup>74</sup> *See, e.g., Case Farms of North Carolina, Inc.*, 353 NLRB 26 (2008), *enforced*, 2010 WL 1255941 (D.C. Cir. Mar. 3, 2010).

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unsafe or intolerably bad conditions;<sup>75</sup> two or more workers talking directly to their employer, to a government agency, or to the media about problems in their workplace;<sup>76</sup> or cooperating as a group with law enforcement investigations (including investigations by DOL).<sup>77</sup> The term concerted activity also includes worker organizing “outside the immediate employee-employer relationship” and “common cause” activity, including concerted activity “in support of employees of employers other than their own.” See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–65 (1978). These examples are intended to be illustrative and not exhaustive. The proposed regulation’s protections for concerted activity would apply to both workers that have joined a labor organization and those that have not. See *Indiana Gear Works v. NLRB*, 371 F.2d 273, 274 (7th Cir. 1967).

The Department proposes that the term concerted activity also encompass workers’ individual actions when they seek to initiate, induce, or prepare for group action, or when workers bring shared complaints to the attention of management. See *Meyers Indus. (Meyers II)*, 281 NLRB 882, 887 (1987) (citing *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)). For example, if an individual attempts to “enlist [] the support of his fellow employees” in shared activity, the worker’s attempt is protected regardless of whether other employees ultimately participate in ongoing efforts. *Whittaker Corp.*, 289 NLRB 933, 933 (1988); *Salt River Valley Water Users Ass’n*, 99 NLRB 849, 853 (1952) (“[G]roup action is not deemed a

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<sup>75</sup> See, e.g., *Washington Aluminum*, 370 U.S. at 17; *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 817–18 (5th Cir. 1981).

<sup>76</sup> See, e.g., *Case Farms*, 353 NLRB 26.

<sup>77</sup> See, e.g., *A.N. Elec. Corp.*, 276 NLRB 887, 889 (1985); *Squier Dist. Co. v. Int’l Bhd. of Teamsters, Local 7*, 801 F.2d 238, 242 (6th Cir. 1986).

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prerequisite to concerted activity for the reason that a single person's action may be the preliminary step to acting in concert.”). An individual's goal of initiating, inducing, or preparing for group activity can be inferred from the totality of the circumstances. *See Whittaker Corp.*, 289 NLRB at 934. For example, the fact that a person refers to the possibility of taking group action in a conversation with their co-workers, or the fact that a conversation among co-workers is about wages and working conditions, can support a finding that the conversation was aimed at inducing group action. *See id.*; *Jeanette Corp v. NLRB*, 532 F.2d 916, 918–20 (3d Cir. 1976) (holding that an employer rule prohibiting workers from discussing wages among themselves suppressed concerted activity). An individual's actions to enforce the terms of a CBA qualifies as concerted activity even if pursued singly, because those actions are a continuation of the concerted activity of negotiating. *See City Disposal Systems*, 465 U.S. at 830–31. Likewise, an employee is engaged in collective activity when an individual worker's actions are a “logical outgrowth” of an earlier protest by workers. *See, e.g., NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (workers' refusal to work additional hour was a logical outgrowth of earlier, collective protestations regarding the employer's reduction in scheduled hours); *Every Woman's Place*, 282 NLRB 413, 415 (1986) (single employee's call to WHD regarding overtime pay was a logical outgrowth of prior, collective complaints to supervisor regarding overtime without receiving any response).

The Department intends to define activity for “mutual aid or protection” to encompass activities for which “there is a link between the activity and matters concerning the workplace or employees' interests as employees.” *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). For example, agricultural employees' activity would be deemed to be for mutual aid or

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protection for the purposes of proposed § 655.135(h)(2) when it concerns wages, hours, benefits, working conditions, worker safety, workplace equity, housing conditions, worker voice, or other issues pertaining to their workplace or their interests as employees. Employee activity aimed at “channels outside the immediate employee-employer relationship,” or “in support of employees of employers other than their own” may also be for “mutual aid or protection.” *Eastex*, 437 U.S. at 565. For example, political and social advocacy may be for mutual aid or protection when it has a nexus to employees’ “interests as employees.” *Id.* at 566; *see also Kaiser Eng’rs*, 213 NLRB 108 (1974).

Although the terms “concerted activity” for “mutual aid or protection” would encompass secondary activity, such as secondary boycotts and pickets, the Department proposes to expressly list this among the protected activities related to self-organization in light of the differences between workers covered by the NLRA and those that would be covered by this proposed provision. The Department notes that, while the NLRA, as amended by the Taft-Hartley Act, prohibits many labor organizations from engaging in secondary boycotts or pickets, *see* 29 U.S.C. 158(b)(4), this prohibition would not apply to the agricultural employees to whom the Department’s proposed rule would apply, *see* 29 U.S.C. 152(3). Therefore, this proposed rule is consistent with the longstanding consensus under the NLRA that it is not unlawful for agricultural workers, or labor organizations composed exclusively of agricultural employees, to participate in secondary activity. *See Di Giorgio Fruit*, 191 F.2d at 647. However, the Department believes that it would benefit employees, employers, and the Department to reiterate this longstanding legal principle by making this principle clear in this proposed rule at § 655.135(h) and, therefore, on the job order. This clarity would help ensure that workers could



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refer to the job order to understand what activity is protected under the regulation. Likewise, this additional clarity would help employers comply with their obligations under the proposed rule. The Department believes that clearly explaining these obligations for both H-2A employers and workers would prevent unnecessary confusion and resulting disputes.

Additionally, the Department recognizes that this proposal to include activities related to self-organization as a protected activity may prompt questions about when and where an employer must permit the conduct of such activities. Under the proposed regulations, an employer could not prohibit activities related to self-organization or other concerted activities for the purpose of mutual aid or protection that occur during nonproductive time. Nonproductive time means any time the worker is not actively performing work, even if the worker remains on the clock or the time is otherwise compensable. For example, nonproductive time generally includes lunch breaks, rest breaks, and time spent riding as a passenger in a vehicle when being transported between worksites. Nonproductive time also includes any noncompensable time, such as time after the end of the worker's workday. Similarly, under the proposed regulations, an employer would be required to permit self-organization or other concerted activities for the purpose of mutual aid or protection in nonwork or mixed-use areas, even if such areas are on the employer's premises. For example, the employer would not be allowed to prohibit employees from meeting with one another after the end of the workers' workday to discuss wages or working conditions in the parking lot of the employer's establishment, insofar as employees would otherwise have access to the parking lot after the end of the workers' workday. Similarly, consistent with the proposed access provision at § 655.135(n), the employer would not be allowed to prohibit employees from meeting with one another, or with one or more

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representatives from a labor organization or with employee guests for such discussions in or around employer-furnished housing that occur outside of the workers' workday.

Furthermore, although an employer could establish reasonable work rules that limit discussions, meetings, and gatherings not related to the job while the worker is actively performing the work, the employer could not apply or enforce work rules selectively to discourage worker self-organization. For example, the employer may place reasonable restrictions on employees' use of personal devices while in the field. However, if the employer selectively applied such restrictions to certain individuals who the employer suspected were engaged in organizing, or only to those text messages or phone conversations that the employer perceived to be related to worker self-organization or other concerted activities while permitting them in other instances, such a practice would violate the proposed requirement at 20 CFR 655.135(h)(2). Similarly, while an employer could reasonably establish a work rule limiting personal conversations during productive working hours where such conversations would affect productivity, if the employer selectively enforced this work rule against employees for conversing about self-organization or other concerted activities, such a practice would be impermissible.

Nothing in this proposal would require or prohibit the adoption of any specific term of a collective bargaining agreement ultimately negotiated between the employer and the workers; rather, any such agreement would be subject to any applicable Federal, State, or local law. In addition, as noted above, the Department does not intend to preempt any applicable State laws or regulations that may regulate labor-management relations, organizing, or collective bargaining by agricultural workers. Moreover, the remedies provided for under this proposed regulation are

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not intended to be exclusive; if an agricultural worker has other remedies available under State or local law, the remedies contemplated under this proposal are not intended to displace them.

The Department seeks comments on the proposal to protect certain concerted activity related to self-organization in § 655.135(h)(2) with respect to workers who are engaged in FLSA agriculture. Specifically, the Department seeks comments on whether to expressly list secondary boycotts and pickets among the protected activities related to self-organization, the scope of the proposed protections and the proposed definitions of “concerted activity” and “mutual aid or protection,” the impact that expressly protecting such activity would have on the working conditions of H-2A workers, workers in corresponding employment, and agricultural workers in the United States more generally, and how this proposal would interact with State labor laws. The Department also welcomes comments on how best to ensure that its proposals do not conflict with existing State laws and regulations that provide for a system of collective bargaining for farmworkers and explicitly prohibit retaliation against farmworkers.

***ix. Section 655.135(m) Worker Voice and Empowerment***

The Department proposes a new employer obligation at § 655.135(m) that would include a number of protections that the Department has determined are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed, 8 U.S.C. 1188(a)(1), as discussed above, by protecting the rights of workers under the H-2A program to self-organization and concerted activity as proposed in § 655.135(h)(2). The employer's obligations under this proposed provision would apply only to workers engaged in FLSA agriculture. Specifically, the Department proposes to add requirements that an employer provide to a requesting labor organization the contact information of H-2A workers and workers in

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corresponding employment employed at the place(s) of employment; permit workers to designate a representative of their choosing to attend any meeting that may lead to discipline; refrain from captive audience meetings unless the employer provides certain information to ensure that such meeting is not coercive; and attest either that they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization, or that they will not do so and provide an explanation for why they have declined. The Department believes that these requirements would provide H-2A workers and workers in corresponding employment with important tools to allow them to more successfully organize and advocate for better working conditions from their employers and thereby prevent adverse effect on the working conditions of similarly employed workers in the United States. Finally, to help inform workers of their rights under proposed § 655.135(m), the Department is proposing to include these proposed protections in the disclosures required on the job order.

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

The Department proposes in § 655.135(m)(1) to require employers to provide worker contact information to a requesting labor organization. As explained further below, this proposal is similar to but more expansive than the “voter list” requirements under the NLRA, differing in various respects due to the unique characteristics of the H-2A workforce. Under this provision, employers would be required to provide to the labor organization a list of all H-2A workers and workers in corresponding employment engaged in agriculture as defined under the FLSA and employed at the place(s) of employment included within the employer’s H-2A Application. The proposed list would be in alphabetical order, and include each worker’s full name, date of hire, job title, work location address and ZIP code, and (if available to the employer) personal email,

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personal cellular number and/or profile name for a messaging application, home country address with postal code, and home country telephone number. The Department proposes to require the employer to update the list once per certification period, if requested by the labor organization. In addition, the proposed list would be provided to the requesting labor organization in a format agreed upon by the requesting labor organization and the employer and would be transmitted electronically.

The Department believes that this proposed requirement would significantly bolster the ability of workers to effectively self-organize and to engage in concerted activity protected under proposed § 655.135(h)(2), by ensuring that workers have access to information regarding the arguments both for and against organization, and that workers have access to information and resources necessary to engage in concerted activity regarding working conditions. Under the NLRA, the NLRB has long recognized the importance to organizing rights of workers' access to information regarding the arguments for and against organization, and has held that the rights to self-organization and to engage in concerted activity "necessarily encompass employees' rights to communicate with one another and with third parties" about organization and working conditions. *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) (quotations omitted) (citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) and *Eastex*, 437 U.S. at 565); *see also Oakwood Hosp. v. NLRB*, 983 F.2d 698, 701 (6th Cir. 1993); *Hutzler Bros. Co. v. NLRB*, 630 F.2d 1012, 1015 (4th Cir. 1980). To ensure the effective exercise of these rights, the NLRB has long required employers to provide worker contact information to unions in certain circumstances because this requirement improves the likelihood that workers will understand the arguments both for and against organization. *See* 29 CFR 102.62(d), 102.67(l); *RadNet Mgmt.*,

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*Inc. v. NLRB*, 992 F.3d 1114, 1122-23 (D.C. Cir. 2021) (provision of contact information to labor organizations is fundamental to effective exercise of organizing rights).

The Department's proposal here contains similar information requirements as those listed in the NLRB's requirements at 29 CFR 102.62(d), but is more expansive given the unique characteristics of the H-2A program, including the temporary and migrant nature of the workforce in which the majority of workers are exempt from the NLRA's protections and thus may be even less likely than NLRA-covered workers to be aware of the benefits of self-organization and engaging in concerted activity. Workers under the H-2A program also are often employed and housed in remote locations. In light of these characteristics, to better protect against adverse effect, the Department has tailored this proposal to the needs of the H-2A workforce. For example, the Department proposes to require the employer to provide available contact information for the worker in the worker's home country and for any messaging application the worker uses to communicate (e.g., "WhatsApp"). The Department also proposes to require that the contact list be updated once per season, if such an update is requested by the labor organization. The Department believes that, given the potential for organizing activities to occur at any time throughout the job order period (as opposed to a more time-limited event such as an election, as is the case in the context of the NLRB voter list requirements), allowing the union to request an updated list at the time of its choosing would best ensure that workers are able to receive information regarding the arguments both for and against organization, in the event of workforce turnover over the course of the work contract. However, the Department proposes to limit this ability to request an updated list to one time per season, to avoid unduly burdening the employer with complying with this request. The Department believes that this

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proposed requirement would significantly bolster the ability of workers to effectively self-organize and to engage in concerted activity by ensuring that workers have equal access to information regarding the arguments both for and against organization, and that workers have access to information and resources necessary to engage in concerted activity regarding working conditions.

The Department also recognizes that the ability to self-organize and to engage in concerted activity must be balanced against the workers' rights to the privacy of their personal information. In the context of the NLRA, the NLRB has reasoned that any privacy concerns raised by an employer providing employee contact information to unions are outweighed by the benefits and necessity of protecting the rights to self-organization and to engage in concerted activity. *RadNet Mgmt.*, 992 F.3d at 1122-23. Under the H-2A program, the importance of these benefits is arguably even greater and arises earlier in the organizing process for the reasons discussed above. Therefore, the Department believes it is imperative that labor organizations have access to the information they need to communicate with these workers effectively, and that this goal would outweigh any privacy concerns. However, the Department welcomes comment on whether it should include a worker "opt-out" provision, under which a worker could decline to have their contact information included in the list the employer would provide to the union, or if other protections for worker privacy may be warranted. The Department also welcomes comment on whether organizations other than labor organizations (defined as proposed in § 655.103(b)) also should be able to request this information, particularly in light of the unique circumstances of the H-2A program, such as "key service providers" as defined in proposed

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§ 655.103(b). The Department also requests comments regarding the best methods to ensure workers are adequately notified of these employer obligations.

Finally, the Department notes that nothing in this proposed provision would limit a worker's ability to gather coworkers' contact information to share both amongst themselves and with unions, which is central to effective rights to self-organize and engage in concerted activity. *Cf. Quicken Loans*, 830 F.3d at 548. Moreover, a worker's ability to gather and share coworker information with unions would be protected under proposed § 655.135(h)(2). For example, a worker who gathers coworkers' contact information and shares that information with a union so that the union can contact the workers regarding the benefits of unionization is engaging in protected, concerted activity and self-organization. Under proposed § 655.135(h)(2), an employer may not retaliate against the worker for gathering or sharing this information.

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

The Department proposes in § 655.135(m)(2) to require employers to permit workers to designate a representative of their choosing to attend any meeting between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline. Under the proposed provision, the employer also would have an obligation to permit the worker to receive advice and active assistance from the designated representative during any such meeting.

The Department believes that proposed § 655.135(m)(2) would significantly bolster the ability of H-2A and corresponding workers to engage in concerted activity as protected in proposed § 655.135(h)(2). In the context of the NLRA, it is well established that in a workplace covered by a CBA, an employer interferes with an employee's right to engage in concerted activities for mutual aid or protection under section 7 of the NLRA when the employer denies an



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employee's request that a union representative accompany the employee at an investigatory interview that the employee reasonably believes might result in disciplinary action. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 254, 267 (1975). As courts and the NLRB have explained, such a request by an employee constitutes concerted activity because the presence of a representative safeguards the interests of employees generally, not solely the particular employee's interest. *See id.* at 260-61.

In any workplace, union or nonunion, the presence of a representative at a meeting that may lead to discipline, and the ability of such representative to provide assistance and advice, gives the employee a witness, an advisor, and an advocate in a potentially adversarial situation, thus preventing the imposition of unjust discipline by the employer. Proposed § 655.135(m)(2) thus also helps ensure that workers have access to representation to assist in safeguarding workers against unjust termination under the Department's proposed definition of for cause termination. More generally, the ability to request a representative's presence at such a meeting enhances employees' ability to act in concert with their coworkers to protect their mutual interest in ensuring that their employer does not impose punishment unjustly. Courts have cited similar considerations in deeming reasonable the view that section 7 of the NLRA permits nonunion workers to designate a coworker to provide assistance during investigatory interviews that may lead to disciplinary action. *See Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001). The Department acknowledges that the NLRB has frequently shifted its position on whether section 7 applies in nonunion workplaces, but the Department's proposed regulations for the H-2A program apply independently of the NLRA, and would cover workers that are outside the NLRB's purview. Thus, any shifts in the NLRB's position would not alter proposed

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§ 655.135(m)(2).<sup>78</sup> Moreover, the need for a representative is particularly acute for workers in the H-2A program, given their unique vulnerabilities and dependence on the employer for meals, housing, and transportation.

Proposed § 655.135(m)(2) would not limit whom a worker may designate as a representative. For example, a worker may designate a coworker, an outside advocate, a representative from a labor organization (regardless of whether the worker is a member), or any other individual. The Department believes it is appropriate to permit workers to designate a broader scope of representatives than the representatives contemplated under section 7 of the NLRA. The benefits of a representative apply even where the representative is not employed by the employer, such as a legal aid advocate or member of the clergy, because a single worker's efforts to seek such assistance and advice broadly advances other workers' shared interest in preventing the imposition of unjust punishment. Moreover, in H-2A workplaces, it is impractical to limit such representatives to union representatives or coworkers. Due to low union density in agricultural workplaces, workers in H-2A workplaces will seldom have the ability to designate union representatives, and workers may face difficulties identifying trusted coworkers to serve as representatives because the temporary nature of the work may limit opportunities to develop

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<sup>78</sup> Compare, e.g., *Epilepsy Found. of Ne. Ohio*, 331 NLRB No. 92 (2000) (interpreting section 7 to extend the *Weingarten* rule to nonunion workplaces); *Materials Research Corp.*, 262 NLRB 1010 (1982) (same), with, e.g., *I.B.M. Corp.*, 341 NLRB 1288 (2004) (limiting *Weingarten* rights to employees covered by CBAs); *Sears, Roebuck & Co.*, 274 NLRB 230 (1985) (same). The Department recognizes that the workforce in the H-2A program is largely not unionized, and so the proposed regulation is not limited to workers that are members of a labor organization.

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relationships with coworkers and because the high incidence of retaliation in H-2A workplaces may discourage coworkers from involvement.

The Department proposes that the employer's obligation under § 655.135(m)(2) would apply in the context of "meetings between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline." Under this proposal, the scope of situations in which this obligation would apply is broader than the "investigatory interviews" in which a worker's right to a representative arises under section 7 of the NLRA. *See Weingarten*, 420 U.S. at 253, 257-58 (recognizing right to representative in "investigatory interview which the employee reasonably believed might result in disciplinary action"). The Department believes that, given the realities of employer-worker interactions in H-2A workplaces, it is appropriate to apply the employer's obligation under proposed § 655.135(m)(2) beyond such "investigatory interviews." Disciplinary action in H-2A workplaces may often occur in informal contexts or in worksite settings such as fields, and limiting employers' obligation to "investigatory interviews" may constrain workers' ability to designate representatives in such contexts or settings.

However, the Department welcomes comments regarding the scope of situations in which employers' obligation under proposed § 655.135(m)(2) should apply, including, for example, comments addressing whether this obligation should apply in all situations, not just meetings, that a worker may reasonably believe could involve or lead to discipline, including in situations where, for example, employers correct work techniques, give instructions, or provide training, or whether the obligation should apply in situations more analogous to the "investigatory interviews" addressed in *Weingarten*. The Department also seeks comment as to whether it should draw on sources other than *Weingarten*—including State, local, or other Federal law—in

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determining when this obligation should be applicable, and whether it should take into account any other considerations particular to workers in nonunion settings, or to agricultural workers and their interactions with their employers.

The Department also welcomes comments on how to ensure that workers are adequately informed of the employer's obligation to permit workers to request a representative and of the circumstances under which this obligation would arise. In a workplace covered by a CBA and the NLRA, workers may rely on their unions for information regarding when *Weingarten* rights apply, but the Department acknowledges that most agricultural workers are not unionized. The Department welcomes comments regarding the best methods to ensure adequate notification, including comments that address whether employers should be required to inform workers of their obligation to permit workers to request a representative and whether employers should be required to notify workers explicitly that a meeting may lead to discipline. For example, possible methods of notifying workers may include requiring that all job orders and job assurances shared with workers include information about the employer's obligation to permit workers to request a representative; requiring that employers provide other means of written notification in a language that workers understand; and/or requiring that employers provide oral notification in a language that workers understand and that employers maintain records of such oral notifications.

In addition to comments on the specific questions the Department has posed to commenters, the Department welcomes comments on the general question of how proposed § 655.135(m)(2) can best be implemented in the context of agricultural employment and the way agricultural workers and employers interact, including in the contexts of herding and range

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livestock production occupations subject to §§ 655.200-655.235 and itinerant animal shearing, commercial beekeeping, and custom combining occupations subject to §§ 655.300-655.304.

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

The Department proposes a new provision at § 655.135(m)(3) to prohibit employers from engaging in coercive speech to try to prevent workers from advocating for better working conditions on behalf of themselves and their coworkers. Specifically, the Department proposes to add new protections at § 655.135(m)(3) prohibiting coercive speech, sometimes referred to as “captive audience meetings” or “cornering.” As under section 7 of the NLRA, a worker’s right to engage, or not engage, in self-organization and concerted activity under proposed § 655.135(h)(2) would include the worker’s right to listen and the worker’s right to refrain from listening to employer speech concerning the worker’s exercise of those rights. The proposed regulation at § 655.135(m)(3) would thus 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. Such “captive audience meetings,” which would typically occur in the workplace during working hours, while the workers are on the clock (though they might also occur during travel to the worksite or in situations where workers are not on the clock), inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. The Department believes that such meetings are inherently coercive and should not be permitted.

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In the NLRB context, the Supreme Court has instructed that employer actions should be evaluated from the perspective of employees who are in a position of “economic dependence” and would necessarily pick up threatening implications “that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also Hill v. Colorado*, 530 U.S. 703, 717 (2000) (noting that within the employment relationship, persistent communication after refusal can become intimidation, and that persons have “a right to be free” from unwanted communication) (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970)). Here, H-2A workers and their employers do not have equal bargaining power, due in large part to H-2A workers’ significant economic dependence on their employers. The Department is concerned that H-2A workers should not be forced to listen to such employer speech under threat or potential threat of discipline—directly leveraging the workers’ dependence on their jobs.

The fact that such threats may arise in the context of employer speech would not immunize their unlawful coercive effect. Under the NLRA, the Supreme Court has made clear that threats fall outside the scope of employers’ NLRA-related speech rights and constitutional free-speech protections. *Gissel Packing*, 395 U.S. at 617-20. Nevertheless, employers frequently use explicit or implicit threats to force employees into meetings concerning unionization or other NLRA-statutorily protected activity. *See 2 Sisters Food Grp.*, 357 NLRB 1816, 1825 n.1 (2011) (Member Becker, dissenting in part) (citing study finding “that in 89 percent of [representation election] campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meeting[s] during the course of the campaign”). These same employers often carry out those

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threats by seeking to discharge or discipline employees who assert their right to refrain from listening by refusing to attend such mandatory meetings. The Department believes that employers should not be permitted to coerce H-2A workers in this way under this proposed rule, but instead should be required to honor H-2A workers' free choice and their rights to listen or to refrain from listening to such coercive speech.

The Department recognizes that employers generally have a right under the First Amendment to communicate their views to their employees. *See Gissel Packing*, 395 U.S. at 617. However, protecting workers' right to refrain from listening, as proposed § 655.135(h)(2) does, would not impair employers' constitutional freedom of expression. As the Supreme Court has recognized, "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). But "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Id.* at 537-38.

The Department therefore proposes to prohibit employers from engaging in coercive speech intended to oppose workers' protected activity unless the employer: a) explains the purpose of the meeting or communication; b) informs employees that attendance or participation is voluntary, and that they are free to leave at any time; c) assures employees that nonattendance or nonparticipation will not result in reprisals (including any loss of pay if the meeting or discussion occurs during their regularly scheduled working hours); and d) assures employees that attendance or participation will not result in rewards or benefits (including additional pay for attending meetings or discussions concerning their rights to engage in protected activity outside their regularly scheduled working hours).

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These safeguards were developed many years ago by the NLRB to avoid “the inherent danger of coercion” when an employer seeks to interfere with protected labor rights. *See Johnnie's Poultry Co.*, 146 NLRB 770, 774 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965). There, the NLRB recognized that inherent in the employment relationship is the understanding that employees cannot, without consequences, either refuse to comply with their employer's stated requirement (e.g., that they attend a meeting) or abandon their assigned work duties (e.g., by walking away from employer speech directed at them as they work). Therefore, the NLRB has crafted safeguards to ensure that workers' participation is voluntary at all times. *See, e.g., Johnnie's Poultry Co.*, 146 NLRB 770, 774 (1964) (providing safeguards required when employer questions employees about protected activity in order to prepare defense against unfair-labor-practice charges); *Struksnes Constr. Co.*, 165 NLRB 1062, 1062-63 (1967) (same for when employer conducts poll to ascertain whether union enjoys majority employee support); *Allegheny Ludlum Corp.*, 333 NLRB 734, 734 (2001) (same for when employer may lawfully include visual images of workers in anti-union campaign presentations), *enforced*, 301 F.3d 167 (3d Cir. 2002); *Sunbelt Rentals, Inc.*, 374 NLRB No. 24 (2022) (reaffirming *Johnnie's Poultry* rule).

The Department believes that such safeguards would appropriately protect employers' constitutional free speech right to express views, argument, or opinion concerning protected organizing activity without unduly infringing on the rights of workers to refrain from listening to such expressions as proposed in this rule. Therefore, to ensure that workers are not held captive to coercive employer speech about their protected activity, the Department proposes to adopt these sensible disclosures that an employer must convey to workers in order to make clear that



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their attendance at any meeting or discussion in work areas during working hours concerning their rights to engage in protected activity is truly voluntary. Note that no disclosures would need to be given when employers require workers to attend meetings on subjects other than their exercise of protected rights (e.g., work assignments for the day, tools, job training or safety instructions). But these safeguards would be required if, for example, the employer uses a regular daily meeting or a portion of that meeting to seek to dissuade employees from acting together to improve working conditions or safety or engaging in other protected concerted activity. The Department's approach is intended to protect both the workers' rights to engage in (or to refrain from engaging in) concerted activity under this proposed rule, and employers' speech concerning any such activity, without unduly infringing on either party's expression. It also seeks to make clear that an employer cannot retaliate against a worker (or provide rewards or benefits) for attending or refusing to attend a "captive audience" meeting or discussion concerning their rights to engage in protected activity, even if the meeting occurs during their regularly scheduled working hours.

The Department welcomes comments on this proposal, including, specifically, whether there are other ways to protect workers' rights to refrain from listening to employers' coercive speech, whether other safeguards or employer disclosures are appropriate, or how to most appropriately tailor the prohibition to avoid infringing on employer's free speech rights while protecting workers' right to engage in protected activity.

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

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The Department proposes in § 655.135(m)(4) to require employers to attest either that they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization, or that they will not do so and provide an explanation for why they have declined. This attestation will provide workers, worker advocates, and the public with valuable information about prospective employers in the H-2A program.

As noted in the proposed regulatory text, a labor neutrality agreement is an agreement between a labor organization and an employer in which the employer agrees not to take a position for or against a labor organizing effort. Such agreements are effective mechanisms to improve workers' organizing success, as they address the major impediments to successful organizing efforts: "intimidation and delay."<sup>79</sup>

As described above, coercive employer speech about collective bargaining or labor organizations can prevent workers from advocating for better working conditions on behalf of themselves and their coworkers. A labor neutrality agreement would protect workers from both coercive and non-coercive anti-organizing speech and provide workers with a free and fair choice about whether to organize. The Department believes that labor neutrality agreements negotiated between H-2A employers and labor organizations could help to correct the imbalance in bargaining power in the H-2A program that the Department has identified as having an adverse effect on agricultural workers in the United States.

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<sup>79</sup> See Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, Hartley, 22 BERKELEY J. EMP. & LAB. L. 369, 378-85 (2001).

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However, as also explained above, employers generally have the right under the First Amendment to communicate their views on unionization to their employees. *See Gissel Packing*, 395 U.S. at 617 (distinguishing lawful communications from threats or coercion). Thus, an employer's choice whether to bargain over any labor neutrality agreement at the request of a labor organization, and whether to ultimately enter into such an agreement, is entirely voluntary. The Department does not intend to oversee or monitor any bargaining that ultimately takes place, although an employer that chooses to agree to bargain in good faith yet fails to do so would violate this proposed regulation.

In general, if the employer chooses to bargain in good faith, doing so means that, upon request by a labor organization, the employer will meet at reasonable times and confer, in good faith, with respect to negotiating the terms of a proposed labor neutrality agreement. Good-faith bargaining must be at arm's length and must involve engaging in genuine efforts to reach an accord. *See, e.g., NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960); *NLRB v. Overnite Transp. Co.*, 938 F.2d 815, 821 (7th Cir. 1991). It means that the employer must approach bargaining with a good faith intention to reach an agreement, not just engage in "surface bargaining" or "going through the motions." *Overnite Transp. Co.*, 938 F.2d at 821-22. If requested by either party, the execution of a written contract incorporating any agreement reached is part of good faith bargaining. However, neither party is compelled to agree to a proposal or make concessions, and the Department will not, either directly or indirectly, "compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Id.* at 821 (quoting *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952)) (construing 29 U.S.C. 158(d)).

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The Department believes that disclosure and information about employers can be a powerful tool for workers, and throughout this proposed rule has sought to enhance transparency and increase workers' access to important information about the job opportunity and workers' rights. Therefore, knowing whether an employer has chosen to commit to bargain in good faith over a labor neutrality agreement, or not, can provide workers with important information about such employers. 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. Because this information would be disclosed on the job orders, workers would be able to use it to decide whether they want to work for certain employers. In addition, worker advocacy groups and labor organizations may be able to use this information to decide whether to engage with certain employers or whether workers for such employers might need additional assistance from key service providers.

The Department welcomes comments addressing any aspect of this proposed regulatory provision. In particular, the Department seeks comment on whether the organization with which an employer would bargain should be limited other than by the general requirement to bargain in good faith, such as by including only those labor organizations that are subject to the Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq. The Department also welcomes comments regarding whether this proposed requirement will, as intended, advance the goal of ensuring that H-2A workers have a free and fair choice over whether to exercise their freedom of association rights to join together and negotiate with their employer as one body.

***x. Section 655.135(n) Access to Worker Housing***

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The Department proposes the addition of a new provision, § 655.135(n), governing access to worker housing, which is intended to protect the right of association and access to information for H-2A workers and workers in corresponding employment and address the isolation that contributes to the vulnerability of some H-2A workers.

As set forth above in section IV.C.2.b of this preamble, the temporary nature of their work and dependency on a single employer for work, housing, transportation, and necessities, among other factors, make H-2A workers particularly vulnerable to labor exploitation, including violations of H-2A program requirements, dangerous working conditions, retaliation, and labor trafficking. Geographic isolation and employer-imposed limitations on workers' movements and communication exacerbate this vulnerability.

Studies by nongovernmental organizations highlight the vulnerability faced by H-2A workers and some employers' use of isolation and monitoring to control workers so that they do not feel they have any option but to accept substandard and illegal working conditions. Polaris, the organization that operates the National Human Trafficking Hotline, identified over 2,800 H-2A workers that were victims of labor trafficking between 2018 and 2020 (because human trafficking is notoriously underreported, it is extremely likely that more H-2A workers faced similar experiences). Polaris 2018-2020 Report at 7, 10. Similarly, Centro de los Derechos del Migrante conducted interviews with 100 H-2A workers between September 2019 and January 2020 and found that many experienced indicators of labor trafficking. For instance, 34 percent reported restrictions on their movement, such as not being permitted to leave employer-furnished housing or worksites and 32 percent described themselves as not feeling free to quit. CDM Report at 5. Both organizations described H-2A workers being subject to extreme isolation, such

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as being left in remote areas without transportation or means of communicating with others, requiring permission to leave employer-furnished housing, being deliberately limited in accessing their support systems, having their personal cellular phones and passports confiscated, and being denied access to other forms of communication. Polaris 2018-2020 Report at 19; CDM Report at 23-24; Farmworker Justice Report at 22, 33; *see also* Indictment, *U.S. v. Patricio*, No. 5:21-cr-00009 (S.D. Ga.) (describing H-2A workers being detained in a work camp surrounded by an electric fence and having their identification documents and personal cellular telephones confiscated).<sup>80</sup> Thus, the Department seeks to protect workers' rights to association and access to information both to make them less susceptible to labor exploitation, including trafficking, and to interrupt factors that permit the deterioration of working conditions for agricultural workers in the United States and thus have an adverse effect on workers in the United States similarly employed. 8 U.S.C. 1188(a)(1).

In light of these serious concerns, proposed § 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

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<sup>80</sup> In late 2021, the United States Attorney's Office for the Southern District of Georgia indicted 24 defendants on felony charges including human smuggling and forced labor. Defendants fraudulently used the H-2A program to smuggle agricultural workers into the United States from Mexico, Guatemala, Honduras, and other countries. Once in the United States, workers were forced to dig onions with their bare hands, earning \$0.20 for each bucket harvested, and were threatened with guns and violence. The workers were detained in crowded, unsanitary buildings with little or no food. *See* Press Release, U.S. Attorney's Off. for the S. Dist. of Ga., *Operation Blooming Onion Human Trafficking Investigation* (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>. *See also* Jessica Looman, *U.S. Dep't of Lab. Blog: Exposing the Brutality of Human Trafficking* (Jan. 13, 2022), <https://blog.dol.gov/2022/01/13/exposing-the-brutality-of-human-trafficking>.

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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 designed to protect worker safety or prevent interference with other workers' enjoyment of these areas. This protection would recognize that workers do not relinquish their rights to association or access to information simply by virtue of residing in employer-furnished housing. Nor could employers use the statutorily required provision of housing as a means to isolate or control their workforce by blocking their access to information and assistance from the outside. The proposed regulation would explicitly permit workers to invite guests or to accept (or reject) visitors wishing to speak with them. Because the right to invite or accept visitors is limited to housing areas and to time that is outside of workers' workday, the Department does not anticipate that this will disrupt employers' business operations.

Under the Department's proposed regulation, this protection is intended to apply to all housing furnished by the employer pursuant to the employer's statutory and regulatory obligations. While the Department anticipates that this protection would be the most beneficial for workers who reside in housing that is geographically isolated, it recognizes that even workers whose housing is more centrally located may be isolated by virtue of employer policies that limit their ability to leave housing or to interact with the public even during time that is outside of workers' workday. The Department is aware of instances in which employers used abusive restrictions to keep workers isolated and to restrict their access to services, for example, by forbidding workers to leave housing areas that may otherwise have been accessible except when being transported to work or for other limited purposes such as to buy groceries, or by retaining keys to worker housing or employing armed guards such that workers did not feel that they could

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leave or have guests. Regardless of whether housing is located in a remote or densely populated area, workers would benefit from a protected right to invite and accept visitors. The Department seeks comments on whether the protection in § 655.135(n)(1) should be limited to workers residing in certain types of employer-furnished housing or in certain locations.

Because workers typically reside in shared quarters, the Department recognizes the need to balance different workers' competing needs. It therefore proposes to permit reasonable restrictions designed to protect worker safety or to prevent interference with other workers' enjoyment of the housing. For example, it could be reasonable for an employer to limit visitors' access to shared sleeping quarters during sleeping hours, but to permit visitors in the common areas and outdoor spaces surrounding worker housing provided that they are quiet. Similarly, it could be reasonable for an employer to limit all visitor access during sleeping hours, provided that the employer does not use such a restriction to effectively bar most visitors. The Department seeks comments on what would constitute reasonable or unreasonable restrictions and other means of balancing different workers' interests in shared housing, as well as comments on visitor policies that may unduly hinder workers' rights to invite or accept guests.

The Department recognizes that the effectiveness of proposed § 655.135(n)(1) may be limited where H-2A workers are unaware of, or afraid to exercise, their right to invite or accept visitors in employer-furnished housing. To bolster the effectiveness of this proposed requirement, § 655.135(n)(2) would provide a narrow right of access to labor organizations, which have an incentive to report concerns of labor exploitation to the Department or other law enforcement agencies, as well as to provide information to workers on their rights under the H-2A program and to engage in self-organization. Specifically, where employer-furnished housing



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for H-2A workers and workers in corresponding employment who are engaged in FLSA agriculture is not readily accessible to the public, a labor organization would be permitted to access the common areas or outdoor spaces near worker housing for the purposes of meeting with workers during time that is outside of workers' workday for up to 10 hours per month.

The protections of paragraphs (n)(1) and (2) would be distinct, but would complement and bolster one another. Whereas the former would permit all resident H-2A workers and those in corresponding employment to invite or accept guests to their living quarters, as well as the common areas and outdoor spaces surrounding worker housing, the latter would permit labor organizations to, without explicit invitation, seek out workers only in the common areas and outdoor spaces surrounding worker housing in which H-2A workers and those in corresponding employment who perform FLSA agriculture reside. The former would permit workers to invite or accept guests during all time that is outside of workers' workday subject only to reasonable restrictions designed to balance their rights with the rights of other workers. The latter would limit labor organizations' access to 10 hours per month, an amount of time reasonable to make contact with new workers that may have started between labor organization visits. Finally, the latter would only apply in instances where the worker housing is on property or in a facility that is not readily accessible to the public such that labor organizations have limited alternatives for in-person meetings with workers. While the Department also proposes the means for labor organizations to request worker contact information, including, when available, workers' personal cellular telephone numbers, it does not consider this a substitute for in-person meetings since it is aware of multiple instances in which workers' personal cellular telephones have been seized by employers. *See also* Patricio Indictment at 23; Polaris 2018-2020 Report at 19. To help

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inform workers of their rights under this proposal, the Department is proposing to include the protections that would be afforded under proposed § 655.135(n) in the disclosures required on the job order.

The Department seeks comments on all aspects of this proposal. The Department is particularly interested in comments on proposed § 655.135(n)(2), such as those regarding the limitations placed on labor organizations' right of access, including the cap of 10 hours per month and how to understand when worker housing is not readily accessible to the public, how this would apply when workers engaged in FLSA agriculture share housing with workers not engaged in FLSA agriculture (§ 655.135(n)(2) applies only with respect to the former), whether the right of access in this provision should be expanded to provide similar access to some or all key service providers as defined in proposed § 655.103(b), and, if so, whether the Department should limit the scope of the catchall term "any other service providers to which an agricultural worker may need access." In addition, the Department is interested in comments on whether and how proposed § 655.135(n)(1) and (2) should apply with respect to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining).

Finally, the Department proposes corresponding edits to § 655.132(e)(1) to address instances in which the employer-furnished housing is provided by the fixed-site agricultural business ("grower") as part of its agreement with an H-2ALC. Under the current provision, where housing is owned, operated, or secured by the grower, the H-2ALC is required to include with its H-2A Application proof that the housing complies with the applicable standards set forth

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in § 655.122(d) and certified by the SWA. The Department proposes to add to this provision the requirement that the H-2ALC also provide with its H-2A Application proof that the grower has agreed to comply with the requirements of proposed § 655.135(n). In doing so, the Department seeks to ensure that the protections for access to worker housing would be met even where the H-2ALC fulfills its obligation to furnish housing through its agreement with its client grower. The Department welcomes comments on what would constitute the requisite proof that an H-2ALC would be required to submit with its application, as well as alternative means of ensuring compliance with the access protections where housing is provided directly by a grower.

*xi. Section 655.135(o) Passport Withholding*

The Department proposes to add a new paragraph (o) to § 655.135 to better protect workers from potential labor trafficking by directly prohibiting an employer from confiscating a worker's passport, visa, or other immigration or government identification documents. Under this proposal, the only exceptions to this prohibition would be where the worker has stated in writing: that the worker voluntarily requested that the employer keep these documents safe, that the employer did not direct the worker to submit such a request, and that the worker understands that the passport, visa, or other immigration or government identification document will be returned to the worker immediately upon the worker's request. Even where the worker has voluntarily requested that the employer safeguard such documents, the worker must be able to have ready access to the document, at least during regular business hours and at a location that does not meaningfully restrict the worker's ability to access the document. As detailed in section IV.C.2.b of this preamble, H-2A workers are extremely vulnerable to labor exploitation, and an employer taking or holding a worker's passport is an egregious act that can be a strong indication

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of such exploitation.<sup>81</sup> Labor trafficking, including the restriction of a worker's movements, harms not only the worker but also the agricultural workforce in the area by subjecting workers to depressed working conditions.<sup>82</sup> The current regulation at § 655.135(e) requires an employer to comply with all applicable Federal, State, and local laws. That section explicitly references the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, which amended the TVPA, Pub. L. 106-386 (2000), 18 U.S.C. 1592(a). The TVPA, as amended, prohibits the unlawful destruction, concealment, removal, confiscation or possession of another person's passport or other immigration documents, under the conditions set forth in that statute (e.g., with the intent to obtain forced labor in violation of 18 U.S.C. 1589). 18 U.S.C. 1592(a). The Department's current regulation at 20 CFR 655.135(e) thus provides that an employer may not hold or confiscate a worker's passport, visa, or other immigration documents, in compliance with the TVPA and other applicable laws. The Department added this explicit reference to the TVPA and passport withholding in the 2010 H-2A Final Rule, in response to a comment received on the issue, because the Department "recognize[d] the worker's right not to relinquish possession of his or her passport to the employer." *See* 75 FR 6923.

Despite the requirements of the current regulation at § 655.135(e), however, WHD has uncovered multiple instances of employers taking or withholding a worker's documents against

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<sup>81</sup> *See also* Polaris 2018-2020 Report at 26; CDM Report at 23-24; Farmworker Justice Report at 33; Indictment, *U.S. v. Patricio*, No. 5:21-cr-00009 (S.D. Ga.) (confiscation of identity documents used in scheme to traffic H-2A workers).

<sup>82</sup> *See, e.g.*, Jessica Looman, *U.S. Dep't of Lab. Blog: Exposing the Brutality of Human Trafficking* (Jan. 13, 2022), <https://blog.dol.gov/2022/01/13/exposing-the-brutality-of-human-trafficking>.

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the worker's wishes.<sup>83</sup> Under the current regulation, which is dependent upon compliance with the TVPA, it is often difficult for WHD to ascertain the intent of the employer each time a passport or document is withheld. Further, under the current regulation, it can be difficult for WHD to cite a violation for passport withholding absent a conviction of a trafficking offense by a law enforcement agency. As noted above, the Department believes it is important to prevent passport and document withholding to protect the workers subject to this practice from potential labor trafficking, as well as to protect other agricultural workers in the area from resulting adverse effects on working conditions, pursuant to 8 U.S.C. 1188(a)(1). Accordingly, to better address these issues, and pursuant to its authority under 8 U.S.C. 1188(a)(1), the Department proposes to flatly prohibit the taking or withholding of a worker's passport, visa, or other immigration or identification documents against the worker's wishes, independent of any other requirements under other Federal, State, or local laws, in a new paragraph at § 655.135(o). In addition, to promote compliance with and deter violations of this requirement, the Department proposes to include failure to comply with this assurance and obligation within the definition of violations subject to debarment under § 655.182(d)(1)(viii) and 29 CFR 501.20(d)(1)(viii). We note, however, that even under the current regulations, debarment may be appropriate due to passport withholding in certain circumstances. *See* 20 CFR 655.182(d)(1)(x) and 29 CFR 501.20(d)(1)(x). Finally, to help inform workers of their rights under this proposal, the

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<sup>83</sup> *See, e.g.,* Press Release, U.S. Dep't of Lab., *Federal court sentences South Carolina labor contractor, operators after investigation finds fraud, labor trafficking, abuses of farmworkers* (Aug. 3, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230803>.

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Department is proposing to include the protections that would be afforded under proposed § 655.135(o) in the disclosures required on the job order.

The Department recognizes that an employer and/or its agent(s) often facilitate a prospective H-2A worker's submission of the worker's passport, visa, or other identification documents to the United States Government for purposes of visa application, processing, or entry to the United States. Nothing in the current regulation at § 655.135(e), or in proposed § 655.135(o), is intended to prohibit such facilitation, provided that the worker voluntarily requests the employer's assistance in these processes and that the documents are returned to the worker immediately upon return by the United States Government.

The Department welcomes comments on this proposal, particularly regarding whether the Department should include any other requirements for application of the proposed exception to this prohibition, and whether the Department should include any additional exceptions to this prohibition.

### **3. Section 655.137, Disclosure of Foreign Worker Recruitment**

The Department proposes new disclosure requirements to enhance foreign worker recruitment chain transparency and bolster the Department's capacity to protect vulnerable agricultural workers from exploitation and abuse, as explained more fully below. As the Government Accountability Office (GAO) has explained, "[w]ithout accurate, accessible information about employers, recruiters, and jobs during the recruitment process, potential foreign workers are unable to effectively evaluate the existence and nature of specific jobs or the legitimate parties contracted to recruit for employers, potentially making them more vulnerable

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to abuse.”<sup>84</sup> More recently, the Department’s OIG released a report that emphasized the need for increased transparency in the recruiting chain to enhance the Department’s enforcement capabilities.<sup>85</sup> Concerns expressed by workers’ rights advocacy organizations and human trafficking prevention groups, in addition to the Department’s own experience in finding continuing abuses by foreign labor recruiters, also indicate the need for enhanced transparency to aid enforcement and protect vulnerable agricultural workers from predatory and abusive practices during the recruitment process. A recent report published by Polaris, an organization working to combat labor trafficking, notes that abuses by foreign labor recruiters continue, with workers reporting unlawful fees charged by “foreign labor recruiters, their employers, or their direct supervisors at their jobs,” and that additional transparency in the recruitment chain is needed to ensure the Department can identify, investigate, and hold accountable those employers and other entities who engage in abusive and unlawful behavior at various stages of the international recruitment process.<sup>86</sup> The Department’s proposed changes are also consistent with the assessment of organizations looking at migrant worker abuse globally. For example, the

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<sup>84</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 33-34 (2015; Rev. 2017), <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>85</sup> OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LAB., Rep. No. 06-21-001-03-321, OVERVIEW OF VULNERABILITIES AND CHALLENGES IN FOREIGN LAB. CERTIFICATION PROGRAMS (2020).

<sup>86</sup> POLARIS, HUMAN TRAFFICKING ON TEMPORARY WORK VISAS: A DATA ANALYSIS 2015-2017 12-13 (2018), <https://polarisproject.org/wp-content/uploads/2019/01/Human-Trafficking-on-Temporary-Work-Visas.pdf> (noting that workers continue to be charged unlawful fees, and stating there is “a general sense of confusion among victims as to the relationship between the person or agency who facilitated their recruitment and the person or company who would ultimately employ them” and “many victims were not sure to whom they had paid recruitment fees or why they had been required”).

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United Nations Office on Drugs and Crime, in a 2015 report entitled “The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons,” noted that recruitment systems are often “opaque,” and that a “[l]ack of evidence,” contributes to low levels of trafficking convictions for recruiters and recruitment agencies.<sup>87</sup>

Pursuant to its authority under the INA, the Department can regulate the conduct of U.S. employers using foreign labor certification programs and doing business with foreign labor recruiters. The INA expressly authorizes the Department to promulgate regulations governing recruitment. The Department may only issue a labor certification to an employer that has “complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary).” 8 U.S.C. 1188(c)(3)(A)(i). The INA states that “[t]he Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.” 8 U.S.C. 1188(g)(2). As the Department has noted in prior rulemaking, though there are limits to the liability the Department can impose on employers for

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<sup>87</sup> U.N. OFFICE ON DRUGS AND CRIME, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT RECRUITMENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS 23, 47 (2015), [https://www.unodc.org/documents/human-trafficking/2015/Recruitment\\_Fees\\_Report-Final-22\\_June\\_2015\\_AG\\_Final.pdf](https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf). See also INTERNATIONAL LABOUR ORGANIZATION, FAIR RECRUITMENT INITIATIVE, <http://www.ilo.org/global/topics/fair-recruitment/fri/lang--en/index.htm>; INTERNATIONAL LABOUR ORGANIZATION, GENERAL PRINCIPLES AND OPERATIONAL GUIDELINES FOR FAIR RECRUITMENT AND DEFINITION OF RECRUITMENT FEES AND RELATED COSTS (2019), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_536755.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf).



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the actions of recruiters abroad, the Department can regulate the conduct of recruiters in the H-2A program through enforcement of employer obligations to foreign workers, such as enforcement of the prohibition on imposition of recruitment fees. 73 FR 77110, 77160 (Dec. 18, 2008, suspended). Currently, employers must contractually forbid any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment from seeking payments or other compensation from prospective employees, in both the H-2A and H-2B programs, at 20 CFR 655.135(k) and 655.20(p), respectively. The H-2B regulations at §§ 655.9 and 655.20(aa) additionally require employers to provide copies of their agreements with foreign labor recruiters and disclose information about the foreign labor recruiters that have or will be engaged in connection with their H-2B applications. The Department proposes similar additional foreign labor recruiter disclosure requirements in the H-2A program, specifically to require, as a condition for approving an *H-2A Temporary Labor Certification*, that the employer identify any foreign labor recruiters, provide copies of the agreements between the employer and recruiter, and ensure the agreement clearly prohibits the foreign labor contractor or recruiter from seeking or receiving payments or other compensation from prospective employees. This proposed requirement to disclose information about the recruitment chain would assist the Department to carry out its enforcement obligations, protect vulnerable agricultural workers and program integrity, and ensure equitable administration of the H-2A program for law abiding employers.

In particular, the Department proposes a new § 655.137, *Disclosure of Foreign Worker Recruitment*, and a new § 655.135(p), *Foreign worker recruitment*, which are similar to §§ 655.9 and 655.20(aa) in the regulations governing disclosure of foreign worker recruitment in the H-2B

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program. Consistent with §§ 655.9(a) and 655.20(aa), proposed §§ 655.137(a) and 655.135(p) would require an employer and its attorney or agent, as applicable, 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. Consistent with the H-2B program, the proposed rule would require employers to provide a copy of the agreement at the time the employer files the H-2A Application. The Department does not propose revisions to § 655.135(k), which will continue to apply to employers that have engaged with agents and foreign labor recruiters, directly or indirectly, in international recruitment of H-2A workers and will continue to require the employer to contractually prohibit the recruiter(s) from seeking or receiving payment from any worker at any time. As such, the written contract(s) the employer submits under this proposed rule must contain this contractual prohibition on charging fees and the prohibition language must include the quoted language specified in § 655.135(k). At the time of collection, the Department will review the agreements to obtain the names of the foreign labor recruiters and government registration and license numbers, if any (for purposes of maintaining a public list, as described below), and to verify that these agreements include the required contractual prohibition against charging fees.<sup>88</sup> The Department may further review the agreements during the course of an audit

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<sup>88</sup> The Department uses all available tools to ensure that prohibited fees are not collected by employers, agents, recruiters, or facilitators. The Department has previously stated that an employer must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the worker recruited in exchange for access to the job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low

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examination or investigation. Certification of an employer's application that includes such an agreement does not indicate general approval of the agreement or the terms therein. Where the required contractual prohibition is not readily discernible, the Department may request further information to ensure that the contractual prohibition is included in the agreement. Agreements between the employer and the foreign labor recruiter will not be made public unless required by law. Consistent with the Department's current practice in the H-2B program, this proposal allows the Department to obtain the agreements, but the Department will only share with the public the identity of the recruiters, not the agreements in their entirety, as discussed further below.

Proposed §§ 655.137(b) and 655.135(p), consistent with the H-2B provisions at §§ 655.9(b) and 655.20(aa), would require an employer and its attorney or agent, as applicable, to disclose to the Department the identity (i.e., name and, if applicable, identification number) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2A workers for the job opportunities offered by the employer. If the

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fee, or continued to use a recruiter about whom the employer had received numerous credible complaints, could be an indication that the contractual prohibition was not bona fide. *See* 75 FR 6925-6926. The Department has similarly stated that, if it determines that the employer knew or reasonably should have known that the H-2A worker paid or agreed to pay a prohibited fee to a foreign labor contractor or recruiter, the employer may be in violation of 20 CFR 655.135(j). However, should the circumstances demonstrate that the employer made a good faith effort to ensure that prospective workers were not required to pay prohibited fees (such as inquiry of both workers and agents/recruiters/facilitators regarding the payment of such fees), the Department will take the circumstances into consideration in determining whether a violation occurred. *See* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN No. 2011-2, H-2A "PROHIBITED FEES" AND EMPLOYER'S OBLIGATION TO PROHIBIT FEES (May. 6, 2011), <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2011-2>.

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recruiter has a valid registration number or license number, which is issued by a government agency and authorizes the recruiter to engage in the solicitation or recruitment of workers, the employer must provide this unique identification information. Consistent with the H-2B program, the Department proposes to interpret the term “working for” to encompass any persons or entities engaged in recruiting prospective foreign workers for the H-2A job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter downstream in the recruitment chain. As explained more fully in the requisite PRA supporting statement accompanying this proposed rule, the Department proposes to gather the additional recruitment chain information when the employer files its application and will require the employer to submit a proposed Form ETA-9142A, *Appendix D*, that mirrors the Form ETA-9142B, *Appendix C*, and collects information about the identity and location of the recruiter(s) and recruitment organization(s) the employer used or will use to recruit foreign workers.

Proposed § 655.137(c), and corresponding language in § 655.135(p), would require the employer to update the foreign worker recruitment information disclosed in accordance with paragraphs (a) and (b) of § 655.137 with any changes to foreign labor recruiter contracts, loss or revocation of registration number, or change to the names and locations of people involved in recruitment after filing the H-2A Application, and to continue to make these updates until the end of the work contract period. The Department proposes to require the employer to maintain updates to the foreign labor recruiter information disclosed at the time of filing the H-2A Application and be prepared to submit the record to the Department, upon request. To clarify the employer's record retention obligation, proposed § 655.167(c)(8) would require the employer to

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maintain the foreign worker recruitment information required by § 655.137(a) and (b) for a period of 3 years, similar to the provisions at § 655.167(c) that require retention of information regarding recruitment of U.S. workers.

The proposed disclosure requirements encompass all agreements involving the whole recruitment chain that brings an H-2A worker to the employer's certified H-2A job opportunity in the United States. Employers, and their attorneys or agents, as applicable, are expected to provide these names and geographic locations to the best of their knowledge at the time the application is filed. The Department expects that, as a normal business practice, when completing the written agreement with the primary recruiting agent or recruiter, the employer will ask whom the recruiter plans to use to recruit workers in foreign countries, and whether those persons or entities plan to hire other persons or entities to conduct such recruitment, throughout the recruitment chain.

Consistent with current practice in the H-2B program, proposed § 655.137(d) provides for the Department's public disclosure of the names of the agents and foreign labor recruiters used by employers, as well as the identities and locations of all the persons or entities hired by or working for the primary recruiter in the recruitment of prospective H-2A workers, and the agents or employees of these entities. Determining the identity and location of persons hired by or working for the recruiter or its agent to recruit or solicit prospective H-2A workers—effectively acting as sub-recruiters, sub-agents, or sub-contractors—bolsters program integrity by aiding enforcement of provisions like § 655.135(k), which prohibits the seeking or receiving of recruitment fees. In addition, the proposed information collection requires additional disclosures relating to foreign worker recruitment that will bring a greater level of transparency to the H-2A

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worker recruitment process. By maintaining and making public a list of agents and recruiters, the Department will be in a better position to map international recruitment relationships, identify where and when prohibited fees are collected, ensure that contractual prohibitions on collecting prohibited fees are bona fide, and, when contractual prohibitions are not bona fide or do not exist, implement sanctions against and collect remedies from the appropriate entity. Finally, workers would be better protected against fraudulent recruiting schemes because they will be able to verify whether a recruiter is in fact recruiting for legitimate H-2A job opportunities in the United States. A list of foreign labor recruiters also will enhance transparency and aid enforcement by facilitating information sharing between the Departments and the public, and assist OFLC, other agencies, workers, and community and worker advocates to better understand the roles of recruiters and their agents in the recruitment chain, while permitting a closer examination of applications or certifications involving recruiters who may be engaged in improper behavior. Information about the identity of the international and domestic recruiters of foreign labor will also assist the Department in more appropriately directing its audits and investigations. For example, in the course of its enforcement, WHD sometimes reviews allegations from H-2A workers that they have been charged recruitment fees. Those workers, however, are frequently unaware of the contractual arrangements between the individuals alleged to have charged those fees and the recruitment agencies for which they may serve as sub-agents or sub-recruiters, and may only know the names, partial names, or nicknames of such individuals. This information would improve WHD's ability to identify individuals charging fees, connect such individuals' relationships with recruitment agencies contracted by the employer, determine whether all entities had contractually prohibited cost-shifting as required

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under 20 CFR 655.135(k), and hold the appropriate parties responsible. Such information would also improve WHD's ability to plan enforcement actions if, for example, a sub-recruiter working for multiple agencies or serving multiple employers is found, as a matter of practice, to be charging prohibited fees or otherwise engaging in conduct in violation of the requirements of the H-2A program. Finally, enhancing tools to strengthen enforcement of the prohibition on the collection of prohibited fees and other recruitment abuses also ensures that employers who comply with the H-2A program requirements are not disadvantaged by the actions of unscrupulous employers, such as those who pass recruitment fees on to workers.

Additionally, the proposed regulatory text includes a provision stating that the "Department may share the foreign worker recruitment information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in § 655.130(f)." The Department is considering making further revision to this regulation to allow the Department to share the foreign worker recruitment information it receives with the foreign government that has territorial jurisdiction over the recruiter for investigative or enforcement purpose. Under such a proposal, for example, if the Department discovers that a specific foreign labor recruiter's contracts allow for the illegal collection of recruitment fees, the Department may refer that foreign labor recruiter to its own government so that its government may take any appropriate investigative or enforcement action. As discussed above with regard to disclosure of information by recruiters generally, the Department believes sharing this information where appropriate would not only increase transparency throughout the international recruitment chain, but also help hold accountable those foreign labor recruiters who engage in improper conduct.

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The Department requests comment on whether to allow the sharing of recruitment information, including the contracts and agreements between agents and/or recruiters and employers, with foreign governments that have territorial jurisdiction over the agent or recruiter at issue for investigative or enforcement purpose. In particular, the Department is interested in public comment on the potential benefits of sharing this information, and the scope of the content that should be shared—for example, whether it should just be a referral of the names of certain recruiters for investigative or enforcement purposes, or entire contracts between recruiters and employers. In addition, because there is no mandated template for contracts between recruiters and employers—though there is some mandated language—the Department seeks comment on whether confidential business information is often included in these contracts, and whether there are concerns with disclosing the information or contracts to foreign governments. Comments explaining what typically may be found in these types of contracts would assist the Department in determining whether to make further revisions to allow the sharing of foreign worker recruitment information with foreign governments and what safeguards might need to be in place.

The Department believes the proposed disclosure requirements will increase transparency in the international recruitment chain, aid the Department in enforcement, and better protect foreign workers. The Department is soliciting public comments on its proposals and encourages commenters to provide suggestions for ways the Department can use this rulemaking to most effectively prevent worker exploitation and abuse during the international recruitment process, and ways the Department can use this rulemaking to better protect vulnerable agricultural workers from predatory recruiters.



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## **D. Labor Certification Determinations**

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

The Department proposes a technical change to § 655.167(c)(6) to update this paragraph's outdated cross-reference to the regulatory citation for the definition of "work contract." The Department proposes another technical change to § 655.167(c)(7) to add "to" before "DHS." As discussed above, the Department proposes a new record retention paragraph at § 655.167(c)(8) that would require the employer to maintain the foreign worker recruitment information required by § 655.137(a) and (b) for a period of 3 years, and a new § 655.167(c)(9) that would require the employer to retain the additional employment and job related information specified in paragraphs § 655.130(a)(2) and (3) for the 3-year period specified in § 655.167(b). The Department also proposes new paragraphs at § 655.167(c)(10) and (11) to require records of progressive discipline and termination for cause, as discussed more fully in the preamble section corresponding with § 655.122(n). Finally, the Department also proposes a new paragraph (c)(12) that requires the employer to retain evidence demonstrating the employer complied with proposed § 655.175(b)(2)(i), which would require employers with an unforeseen minor start date delay to notify the SWA and each worker to be employed under the approved H-2A Application of the delay.

## **E. Post-Certification**

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

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The Department proposes a new provision at § 655.175 that will address an employer's obligations in the event of a post-certification delay in the start of work more clearly and consistently with the Department's proposals for start date delay procedures at § 653.501(c). The Department's regulations currently conflate pre-certification requests to make minor amendments to the period of employment before the CO issues a final determination and post-certification requests for the CO's approval of a delay in the start date caused by unforeseeable circumstances; both types of requests are currently addressed in the pre-determination section of subpart B at § 655.145(b). For clarity, the Department proposes to separate the two types of requests and relocate the component of § 655.145(b) that addresses post-certification delays in the start of work from current § 655.145(b) to the new proposed provision at § 655.175. Consistent with the type of situations covered by proposed § 655.175, the new provision is included in the section of the regulations that addresses post-certification activities.

The Department proposes only minor conforming changes to the procedure in current § 655.145(b) that an employer must follow to request a minor amendment to the period of employment during the processing of the H-2A Application. These changes are intended to clarify the existing procedure for such amendments, and to better distinguish that procedure from the procedure an employer must follow if, after certification, it seeks to delay the start of work for reasons that the employer could not have foreseen. Currently, § 655.145(b) addresses both procedures and creates confusion with respect to the timeframes in which employers can request minor amendments. The Department proposes to revise the pre-determination amendments provision at § 655.145(b) so that it addresses only pre-determination amendments to the period

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of employment. To further distinguish the topics, the Department retains the term “amendment” in § 655.145(b) and uses the terms “delay” in § 655.175 and clarifies that post-certification changes are not permitted unless specified in this subpart (e.g., post-certification extensions continue to be permitted under § 655.170; a contract may be shortened by CO-approved mutual agreement under § 655.122(i)(1)(ii)).

As under the current rule, the new § 655.175 would permit delays in the start of work only when such a delay is minor and due to unforeseen circumstances and the employer's crops or commodities will be in jeopardy prior to expiration of an additional recruitment period. The Department proposes to define a “minor” delay in the start date as a delay of 14 calendar days or fewer, which eliminates ambiguity in the current text and aligns this provision with the conceptually similar provision at § 655.170(a), which limits “short-term” extensions to 2 weeks and does not require CO approval. As is the case for non-minor delays under the current rule, where the anticipated delay would be more than 2 weeks or indefinite and cannot be considered “minor,” the employer may withdraw the application and refile, using emergency processing under § 655.134, as applicable, to engage in recruitment for the job opportunity, which will begin on a newly identified start date. If the employer cannot employ workers under the terms and conditions promised beginning on the certified start date and can only offer a fraction of the work hours in the 2 weeks following the certified start date (e.g., the employer can offer only a single day of work, followed by several days without work or a similar offer of only minimal hours upon the worker's arrival, followed by an extended rest period), the Department will consider the employer's start date delayed and the employer will be required to comply with

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proposed § 655.175(b), including all housing, subsistence, and compensation obligations and the proposed obligation to provide notice of the delay to workers and the SWA, as explained below.

Consistent with proposed § 653.501(c) and current § 655.170(a), proposed § 655.175 would not require the employer to submit a delay request to OFLC for CO approval. Instead, in the event of a minor delay (no more than 14 calendar days), proposed § 655.175(b)(2)(i) would require the employer to notify the SWA and each worker to be employed under the approved H-2A Application of the delay at least 10 business days before the certified start date consistent with § 653.501(c), and proposed § 655.167(c)(12) would require the employer to retain evidence it provided this notice to each worker and to the SWA. As noted in the preamble explaining changes to § 653.501(c), employers are in the best position to contact and notify workers of changes to the date of need because the employer has already contracted to employ the workers and should have up-to-date contact information for each worker. The proposed notice obligation, together with the proposed definition of “minor delay” and the current and proposed obligations discussed below, will strike an appropriate balance between the employer’s need to respond to unforeseen exigent circumstances and the needs of agricultural workers to be apprised of changes to the terms and conditions of the job opportunity and compensated in accordance with the terms of employment the workers accepted.

Proposed paragraph (b)(1) modifies the requirements in current § 655.145(b) with respect to the employer’s subsistence obligations to workers in the event of a minor delay in the start of work. Specifically, paragraph (b)(1) requires 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

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without cost to the workers until work commences, except for days 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).<sup>89</sup> The employer must fulfill this subsistence obligation to the worker no later than the first date the worker would have been paid had they begun employment on time. Proposed § 655.175(b)(1) also would remind employers that, even in the event of a minor delay in the start of work, the employer must continue to comply with all other requirements under the certified H-2A Application, including but not limited to the provision of housing as described in the job order.

Proposed paragraph (b)(2)(ii) includes new compensation obligations in circumstances where the employer delays the start of work and fails to provide adequate notice of the delay to workers, similar to the existing provisions at § 653.501(c) and consistent with changes proposed to that section, explained above. Currently, an employer who seeks to delay the start date after certification is subject to the Wagner-Peyser Act provisions at § 653.501(c), which describe the process for providing notice to workers placed on the clearance order in the event of a delayed start date and an employer's obligations under the work contract in those circumstances. The Department's proposals related to § 653.501(c), including situations in which the start date is delayed, are discussed in greater detail above, in the preamble section dedicated to discussion of proposed changes to those provisions. Proposed § 655.175 retains the employer obligations currently provided under § 655.145(b) and these obligations continue to apply both to employers

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<sup>89</sup> The employer also would remain responsible for compliance with the distinct and existing inbound travel and subsistence obligations at 20 CFR 655.121(h)(1).

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who notify the SWA and workers as required in § 653.501(c) and those who do not comply with that notice requirement.

For the same reasons described in detail in the preamble discussing proposed changes to delayed start date obligations at § 653.501(c), the Department proposes to require employers to provide to each worker to be employed under the approved H-2A Application the applicable wage rate for each hour of the offered work schedule in the job order, for each day that work is delayed, for a period up to 14 calendar days, starting with the certified start date, if the employer fails to provide adequate notice of the delay. Under proposed § 655.175(b)(2)(ii), the employer's wage obligation would apply in any case where the employer fails to provide notice of the delayed start of work at least 10 business days prior to the certified start date. This obligation would apply in conjunction with the three-fourths guarantee at § 655.122(i), which would continue to require employers to guarantee to offer workers employment for a total number of work hours equal to at least three-fourths of the workdays of the total period, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later. However, under proposed § 655.175(b)(2)(iii), compensation paid to a worker under proposed paragraph (b)(2)(ii) of this section for any workday included within the time period described in § 655.122(i) would be considered hours offered to the worker when determining an employer's compliance with the § 655.122(i) three-fourths guarantee obligation. As proposed, an employer would be permitted to reduce the compensation owed to any worker(s) under proposed § 655.175(b)(2)(ii) by the amount of wages paid to the worker(s) for work performed within the time period described in proposed

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§ 655.175(b)(2)(ii), insofar as such wages are paid timely and such work is otherwise authorized by law. Wages for unauthorized work, including work performed by H-2A workers outside the location or duties certified in the job order, may not be credited. The Department believes this proposal will effectively address the hardship concern (discussed above in the preamble to section § 653.501(c)) by providing workers a source of income should the employer fail to provide such workers sufficient notice of a delay in the start of work, while continuing to allow the employer flexibility to delay the start of work for up to 14 calendar days if necessitated by 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.

Proposed § 655.175 and the proposed compensation obligations in situations where workers are not notified of a start date delay will better protect agricultural workers from financial hardship they are likely to experience should they travel or otherwise rely on the information included in the job order, only to discover upon arriving that work is not available to them. As workers' rights advocacy organization and SWA commenters noted during prior rulemaking, delayed start dates are harmful to workers, who value predictability and certainty in employment start dates, particularly where they turn down other work or must travel far to make themselves available to work at the time and place advertised in the job order. In addition, these commenters noted that farmworkers have expenses beyond housing and meals and cannot afford to lose expected pay for up to 2 weeks, should the actual start date be later than the first date of need offered. The Department has determined the housing and subsistence obligations in current § 655.145(b) (proposed § 655.175(b)(2)(i)) and the existing three-fourths guarantee at

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§ 655.122(i) are not sufficient to fully protect workers from the financial hardships associated with a delayed start date of work when such delays are not adequately communicated to the worker, particularly if a worker is required to travel a great distance to accept the job. The beginning of the certification period is a particularly vulnerable time for workers, who may have little or no savings as they await a first paycheck; delays in the start of work and resulting first paycheck exacerbate this vulnerability and can lead to financial hardships. Providing up to 2 weeks of wages, due at the time workers anticipate receiving their first paycheck had the work begun on time, provides a safety net for workers to support themselves when work is not available. Imposing these pay obligations in the event workers are not notified of a delayed start of work also may help to ensure growers accurately disclose the first date of need in the job order. The proposed changes also will increase the likelihood that workers will receive timely notification of any delay in the start of work and that employers maintain accurate records of notices they provide. Sanctions and remedies for an employer's failure to comply with the notice or compensation obligations required under proposed § 655.175 may include, as appropriate, the recovery of such compensation, the assessment of civil money penalties, revocation of the approved certification under § 655.181, and, if warranted, debarment of the employer under § 655.182.

The Department invites comment on all aspects of these proposed changes, including the proposed relocation of the provision addressing post-certification delays to a new provision at § 655.175 in the post-certification section of the rule and the proposed compensation provision applicable to all H-2A workers, recruited U.S. workers, and workers in corresponding



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employment who expected employment under the job order to begin on the certified start date, similar to current and proposed § 653.501(c)(5). Commenters are encouraged to provide input on the proposal to require notice to each worker and the SWA, rather than the CO, consistent with proposed changes to § 653.501(c); the proposed definition of “minor delay” at 14 calendar days and whether the final rule should require the employer to fulfill the obligations at § 655.175(b) in any case where it cannot offer full time work as specified in the job order for the 14-calendar-day period beginning on the certified start date (as opposed to solely when the employer fails to provide 10 days of notice, as proposed here); and the proposal to permit the employer to credit compensation paid under proposed § 655.175(b)(2)(ii) toward the employer’s three-fourths guarantee obligation.

## **F. Integrity Measures**

### **1. Section 655.182, Debarment**

*a. The Department Proposes Revisions to 20 CFR 655.182 to Shorten Appeal Times for Debarment Matters, and Shorten the Time to Submit Rebuttal Evidence to OFLC*

To help protect and uphold program integrity, and to further protect workers in the United States, the Department proposes to increase the speed with which debarments become effective by decreasing the time for parties to submit rebuttal evidence to OFLC, the time for parties to appeal Notices of Debarment to the OALJ, and the time for parties to appeal debarment decisions to the ARB from the OALJ. Reducing these timeframes will lead to faster final agency adjudications which will more efficiently prevent H-2A program violators from accessing this

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program. As a result of a more expedited debarment process, workers will be protected from further harm.

*b. OFLC Debarment Actions*

The Department proposes to amend § 655.182(f)(1) and (2) by reducing 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 receiving a Notice of Debarment does not file rebuttal evidence or request a hearing, the Notice of Debarment will take effect at the end of the 14-calendar-day period unless the party has requested, and the Administrator has granted, an extension of time to submit rebuttal evidence. Extensions of time may be granted only in limited circumstances as discussed further below.

This proposed change aligns with the timeframe provided in the Department's 2008 H-2A Final Rule. 73 FR 77110 (Dec. 18, 2008). The 2008 H-2A Final Rule provided 14 calendar days for parties to submit rebuttal evidence in response to a Notice of Intent to Debar, and if the party's rebuttal did not persuade the Administrator to terminate debarment proceedings, provided an additional 30-calendar-day period to appeal the Administrator's post-rebuttal Notice of Debarment. *Id.* at 77228. In the preamble to that rule, the Department stated, “[g]iven the severity of debarment and revocation, the short timeframes set forth in . . . [the ‘Administrative review and de novo hearing before an administrative law judge’ section] are neither necessary nor appropriate for these types of determinations.” *Id.* at 77184. At the time, 14 calendar days—twice as long as the 7-calendar-day timeframe permitted to appeal a denied application—was deemed a sufficient timeframe to submit evidence in rebuttal both in debarment and revocation procedures. *Id.* at 77187.

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Subsequently, in a 2009 NPRM, the Department proposed to eliminate the “Notice of Intent to Debar” and the opportunity to submit rebuttal evidence. 74 FR 45906, 45923 (Sept. 4, 2009). The Department ultimately decided not to eliminate the option to submit rebuttal evidence after considering comments that expressed concerns about due process. 75 FR 6884, 6938 (Feb. 12, 2010). In the final rule, the Department restored the option to submit rebuttal evidence, with a simultaneous option to appeal, but adopted a 30-calendar-day timeframe instead of the prior rule’s 14-calendar-day period for submission of rebuttal evidence. The Department did not explicitly state that 30 calendar days was more appropriate than 14 calendar days or otherwise explain why it now considered 30 calendar days an appropriate timeframe for submitting rebuttal evidence in a debarment proceeding. *Id.* at 6938. The 2010 H-2A Final Rule noted that it had intended in the corresponding NPRM to propose changes to the OFLC debarment procedures to ensure “that the procedures [were] consistent with the WHD debarment procedures,” which, at the time, allowed for 30 days to appeal. 74 FR at 45923, 45963; 75 FR at 6938. It also noted that the opportunity for parties to provide rebuttal evidence is “better suited to the method of OFLC investigations” and parallels OFLC revocation procedure, without addressing the now-different timeframes for submitting rebuttal evidence in a revocation proceeding (i.e., 14 days) and in a debarment proceeding (i.e., 30 days). 75 FR at 6938. While the Department continues to believe the ability to submit rebuttal evidence is necessary, it does not consider the 30-calendar-day timeframe appropriate for either OFLC or WHD debarment actions.

The benefits to expediting the debarment procedures and more quickly removing violating parties from the program far outweigh the limited benefits of providing 30 calendar days for rebuttal or appeal. Not only does more quickly removing violating parties from the

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program better protect workers, but it also reduces the time the debarred parties spend awaiting a final order regarding their status. In addition, reducing the period of time better aligns with the timeframe available to submit rebuttal evidence under OFLC's revocation procedure (i.e., 14 days). As both revocation and debarment serve similar purposes—to protect workers—the Department has determined that it is appropriate to align the two rebuttal periods. The increased use of electronic recordkeeping, as well as the ability to submit documentation via email, means that the shortened 14-calendar-day timeframe to submit rebuttal documentation should not be overly burdensome.

Nevertheless, to continue to ensure due process for parties and to allow adequate time to establish a record, the Department proposes permitting parties to request an extension of time to submit rebuttal evidence in a new regulatory provision at § 655.182(f)(2). The option to request an extension of time to submit rebuttal evidence would be available to a party who shows good and substantial cause necessitating additional time. The proposal would require the request to be made in writing, with detailed information and supporting documentation, and to be received by the OFLC Administrator within 14 calendar days of the date the Notice of Debarment was issued. If the OFLC Administrator determines that the party has established good and substantial cause, the Administrator could grant one extension of time to submit rebuttal evidence. As specified in proposed paragraph (f)(2)(iii), good and substantial cause may include, but is not limited to, health-related emergencies, catastrophic fire- or weather-related incidents, or other similar conditions that are wholly outside the party's control and hinder a party's ability to respond in a timely manner. Should the OFLC Administrator deny the one-time extension request, such denial is not appealable.

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In addition, for the reasons stated above, the Department also proposes to shorten the timeframes to appeal the OFLC Administrator's Notice of Debarment, in lieu of submitting rebuttal evidence; to appeal the OFLC Administrator's final determination, after review of rebuttal evidence; and for all parties to request review by the ARB from 30 days to 14 calendar days in § 655.182(f)(1), (2), (3), and (5)(i). The Department's proposal would not permit a party to request an extension of time to appeal the OFLC Administrator's Notice of Debarment. A party need only submit a written request for review to appeal a debarment decision to an ALJ; they are not required to gather or provide additional records (as they would to submit a rebuttal), or to draft a full legal brief, and therefore the request itself should not be burdensome. Shortening the time to request review by the ARB to 14 calendar days should also not be burdensome for the same reasons.

As described fully in the discussion of section 29 CFR 501.20, the Department proposes conforming revisions to WHD's regulations governing the timeframe to appeal WHD determinations involving debarment as well.

The Department welcomes comments on this proposal, including specific examples of how the proposed changes may affect the regulated community.

## **V. Discussion of Proposed Revisions to 29 CFR Part 501**

The Department proposes revisions to the regulations at 29 CFR part 501, which set forth the responsibilities of WHD to enforce the legal, contractual, and regulatory obligations of employers under the H-2A program. The Department proposes these amendments concurrent with and to complement the changes ETA proposes to its regulations in 20 CFR part 655, subpart B, governing the certification of temporary employment of nonimmigrant workers employed in

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temporary or seasonal agricultural employment. As with the proposed revisions to ETA's regulations, the proposed revisions to 29 CFR part 501 focus on strengthening protections for agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators. The Department invites comments on all of these proposed revisions.

#### **A. Section 501.3 Definitions**

The Department proposes to add definitions of the terms *key service provider* and *labor organization* in § 501.3(a), to conform to the proposed addition of these terms to the definitions in 20 CFR 655.103(b) and for the reasons set forth in the discussion of proposed 20 CFR 655.135(h). The Department also proposes to remove the definition of the term *successor in interest* from § 501.3(a), to conform to and for the reasons described in the discussion of proposed 20 CFR 655.104. Finally, the Department proposes to add a new § 501.3(d), defining the term *single employer*, to conform to and for the reasons described in the discussion of proposed 20 CFR 655.103(e).

#### **B. Section 501.4 Discrimination prohibited**

The Department proposes revisions to § 501.4(a) to conform to proposed changes to 20 CFR 655.135(h) that would expand and strengthen the Department's existing anti-retaliation provisions. The reasons for this proposal are described fully in the discussion of proposed 20 CFR 655.135(h). The Department does not propose any revisions to § 501.4(b) regarding WHD investigations and enforcement of § 501.4.

#### **C. Section 501.10 Severability**

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As set forth in the discussion of proposed 20 CFR 655.190, the Department proposes a new § 501.10, that would explain that if any provision of 29 CFR part 501 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from 29 CFR part 501 and shall not affect the remainder thereof.

The Department seeks comments both on the substance and scope of this proposed severability clause and requests the public's views on any other issues related to severability, such as whether the rule in general includes provisions amenable to severability; whether specific parts of the rule could operate independently; whether the benefits of the rule would continue to justify the costs should particular provisions be severed; or whether individual provisions are essential to the entire rule's workability.

#### **D. Sections 501.20, 501.33, 501.42 Debarment and revocation**

The Department proposes revisions to WHD's regulations at §§ 501.20, 501.33, and 501.42, with respect to debarment, to maintain consistency with and implement various proposed changes to ETA's debarment regulation at 20 CFR 655.182. These proposed changes are described briefly here, and described fully in the section-by-section analysis of 20 CFR part 655, subpart B.

##### **1. Successors in interest**

The Department proposes revisions to existing § 501.20(a) and (b) to conform to proposed 20 CFR 655.104 and 655.182 regarding the effect of debarment on successors in

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interest. As explained fully in the discussion of proposed 20 CFR 655.104, any WHD debarment of an employer, agent, or attorney applies to any successor in interest to that debarred entity, and under this proposed rule, WHD need not issue a new notice of debarment to a successor in interest to a debarred employer, agent, or attorney. However, as reflected in proposed new paragraph § 501.20(j), WHD would be permitted, but not required, to identify any known successor(s) in interest in a notice of debarment issued to an employer, agent, or attorney.

## **2. Passport withholding**

The Department proposes a conforming revision to § 501.20(d)(1)(viii) to include within the definition of a violation, for purposes of debarment, a violation of the proposed prohibition on passport withholding at 20 CFR 655.135(o), as described fully in the discussion of proposed 20 CFR 655.135(o).

## **3. Timeline to appeal WHD debarment determinations**

For consistency with and conformance to the Department's proposal under 20 CFR 655.182 to expedite debarment processing, the Department proposes to shorten the timeframe to appeal any WHD determination seeking debarment from 30 calendar days to 14 calendar days as well. Any determination seeking a debarment, including for example, determinations which also include civil money penalties, would be subject to the shortened timeframe. Determinations by the WHD Administrator that *do not* include debarment, but only include, for example, an assessment of civil money penalties or the payment of back wages, would retain a 30-calendar-day timeframe for appeal.

In shortening the appeal timeframes for matters involving debarments, the Department seeks to bolster program integrity and help protect workers from further harm. Debarment is a



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remedy for a substantial violation of the program and if a determination has been made that this is appropriate, then it is also appropriate to expedite the process by which a party is ultimately prohibited from using the program. If the WHD Administrator has determined in a particular case that debarment is *not* necessary, then the original timeframe of 30 calendar days to appeal will apply.

Specifically, under proposed § 501.20(e), the debarment would take effect 14 calendar days from the Notice of Debarment, unless a request for review is properly filed within 14 calendar days of the Notice of Debarment.

Under proposed § 501.33, the regulatory text in current paragraph (a) would be redesignated to (a)(1) and amended to note that the 30-calendar-day timeframe would apply when seeking review of a WHD determination, except for those determinations involving debarment. A newly added paragraph (a)(2) would state clearly that any person desiring review of a WHD determination involving debarment shall make their written request no later than 14 calendar days after the date of the notice referred to in § 501.32.

Finally, under proposed § 501.42, the regulatory text in paragraph (a) would be revised to clarify that a decision of an ALJ *not* involving debarment would still require appeal to the ARB within 30 calendar days, while newly added text would state that any decision involving debarment would be required to be appealed to the ARB within 14 calendar days. The Department proposes further conforming edits to these sections.

The Department is also considering whether the timeframe to appeal all determinations in this subpart, not only those involving debarments, should be shortened from 30 to 14 calendar days. In particular, the Department is concerned that different timeframes to appeal different

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types of determinations (i.e., 30 days to appeal a determination assessing civil money penalties, but not debarment, versus 14 days to appeal a determination assessing civil money penalties *and* debarment) may result in confusion and employers missing appeal deadlines. The Department also believes that a shortened appeal timeframe of 14 calendar days may better ensure that back wages are paid timely to workers, and that 14 calendar days may be sufficient to appeal any determination, not only those determinations involving debarment. The Department seeks comment as to whether the shortened timeframe of 14 calendar days should apply to all determinations of the WHD Administrator, not simply those determinations involving debarment.

#### **E. Section 501.33 Request for hearing**

The Department proposes revisions to § 501.33(b), governing the contents of a request for review of a WHD determination before the OALJ, to make explicit that issues not raised for review in such requests would be deemed waived. The Department's current regulations make explicit that administrative exhaustion is required before a party may seek judicial review, and that the party requesting a hearing before the OALJ must "[s]pecify the issue or issues stated in the notice of determination giving rise to such request" and "[s]tate the specific reason or reasons why the person requesting the hearing believes such determination is in error." 29 CFR 501.33(b)(2) and (3). Despite these provisions, parties frequently attempt to raise new issues on appeal, whether before the OALJ, the ARB, or a Federal court, that were not raised in the party's request for a hearing. However, under relevant case law, issue exhaustion requirements are applicable and appropriate under the H-2A administrative review procedures. *See. Sun Valley Orchards*, 2021 WL 2407468, at \*7; ; *Sandra Lee Bart*, ARB No. 2018-0004, slip op. at 6-7

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(ARB Sept. 22, 2020); *see also Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021) (“Typically, issue-exhaustion rules are creatures of statute or regulation” but where the “regulations are silent, . . . courts decide whether to require issue exhaustion based on an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.”) (quotation omitted).

Without explicit regulatory text codifying that issue exhaustion applies, courts and the Department may be required to expend significant resources considering or defending against issues that are ultimately deemed to have been waived. Similarly, parties have asserted that they lacked notice that issues not raised in a request for hearing before the OALJ may be deemed waived. The Department thus proposes an explicit issue exhaustion provision that will better inform parties of the potential consequences of failing to raise an issue in requests for review of a WHD determination (i.e., that issues not included cannot be raised later in the ALJ proceedings or on review of any ALJ decision before the ARB or in Federal court), as well as better preserve agency and judicial resources.

Accordingly, the Department proposes to revise § 501.33(b)(2) to make clear that any issue not raised in a party's request for a hearing before the OALJ ordinarily will be deemed waived in any further proceedings. The proposed language is modeled on similar provisions in OSHA's whistleblower regulations governing the procedures for administrative review of OSHA's findings in those contexts. *See, e.g.*, 29 CFR 1982.110(a). As OSHA has explained, including such a requirement in the Department's regulations is intended to provide clear and timely notice to all parties that issue exhaustion may apply, thus alerting the parties to the need to raise any and all issues and objections before the agency to preserve them for further review. *See, e.g.*, 80 FR 69115, 69128 (Nov. 9, 2015). The Department welcomes comments on this proposal.

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## **VI. Administrative Information**

### **A. Executive Order 12866: Regulatory Planning and Review; Executive Order 14094: Modernizing Regulatory Review; and Executive Order 13563: Improving Regulation and Regulatory Review**

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. 58 FR 51735 (Oct. 4, 1993). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$200 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order 88 FR 21879 (Apr. 11, 2023). This proposed rule is a significant regulatory action under section 3(f)(4) of Executive Order 12866, as amended by Executive Order 14094.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that

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maximize net benefits. 76 FR 3821 (Jan. 21, 2011). Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. *Id.*

### Outline of the Analysis

Section VI.A.1 describes the need for the proposed rule, and section VI.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section VI.A.3 explains how the provisions of the proposed rule would result in quantified costs and transfer payments, and presents the calculations the Department used to estimate them. In addition, section VI.A.3 describes the unquantified transfer payments and unquantified cost savings of the proposed rule, and a description of qualitative benefits. Section VI.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfer payments of the proposed rule. Finally, section VI.A.5 describes the regulatory alternatives that were considered during the development of the proposed rule.

### Summary of the Analysis

The Department estimates that the proposed rule would result in costs and transfer payments. As shown in Exhibit 1, the proposed rule is expected to have an annualized cost of \$2.03 million and a total 10-year quantifiable cost of \$14.24 million, each at a discount rate of 7 percent.<sup>90</sup> The proposed rule is estimated to result in annual transfer payments from H-2A

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<sup>90</sup> The proposed rule would have an annualized cost of \$1.98 million and a total 10-year cost of \$16.92 million at a discount rate of 3 percent in 2021 dollars.

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employers to H-2A employees of \$12.81 million and total 10-year transfer payments of \$89.95 million at a discount rate of 7 percent.<sup>91</sup>

| <b>Exhibit 1: Estimated Monetized Costs and Transfer Payments of the Proposed Rule (2021 \$millions)</b> |              |                          |
|--|--------------|--------------------------|
|  | <b>Costs</b> | <b>Transfer Payments</b> |
| Undiscounted 10-Year Total   | \$19.51      | \$123.83                 |
| 10-Year Total with a Discount Rate of 3%   | \$16.92      | \$107.19                 |
| 10-Year Total with a Discount Rate of 7%   | \$14.24      | \$89.95                  |
| 10-Year Average  | \$1.95       | \$12.38                  |
| Annualized at a Discount Rate of 3%  | \$1.98       | \$12.57                  |
| Annualized with at a Discount Rate of 7%   | \$2.03       | \$12.81                  |

The total cost of the proposed rule is associated with rule familiarization, worker contact information, and application additions. Transfer payments are the results of the elimination of the 2-week delay in effectiveness of the AEWB after publication. See the costs and transfer payments subsections of section VI.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some costs, transfer payments, cost savings, and benefits of the proposed rule. Unquantified transfer payments include compensation to workers under proposed § 655.175(b)(2)(ii) in cases where the start date is delayed without sufficient notice and clarifying that piece rate should be included in the prevailing wage determination. Unquantified cost-savings include the Department's ability to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or

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<sup>91</sup> The proposed rule would have annualized transfer payments from H-2A employers to H-2A employees of \$12.57 million and a total 10-year transfer payments of \$107.19 million at a discount rate of 3 percent in 2021 dollars.

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attorneys. Unquantified benefits include better protection from inappropriate termination, protection for worker advocacy, reduction in risk of injury during employer-sponsored transportation, reduction in improper holding of passports or other immigration documents and enhanced integrity and enforcement. The Department describes them qualitatively in section VI.A.3 (Subject-by-Subject Analysis). The Department seeks public comments and inputs on all aspects of the economic analysis presented here. In addition, the Department requests public inputs about this rule's impact on labor costs and production of agricultural products.

### **1. Need for Regulation**

The Department proposes provisions in this NPRM that will strengthen protections for agricultural workers and enhance the Department's enforcement capabilities against fraud and program violations. The Department has determined the proposed revisions will help prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not gain from their violations or contribute to economic and workforce instability by circumventing the law. It is the policy of the Department to maintain robust protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. The Department has determined through program experience, recent litigation, challenges in enforcement, comments on prior rulemaking, and reports from various workers' rights advocacy organizations that the proposals in this NPRM are necessary to strengthen protections for agricultural workers, ensure that employers, agents, attorneys, and labor recruiters comply with the law, and enhance the Department's ability to monitor compliance and investigate and pursue remedies from program violators.

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The proposed rule aims to address some of the comments that were beyond the scope of the 2022 H-2A Final Rule and concerns expressed by workers' rights advocacy groups, labor unions, and organizations that combat human trafficking. It also seeks to respond to recent court decisions and program experience indicating a need to enhance the Department's ability to enforce regulations related to foreign labor recruitment, and to improve accountability for successors-in-interest and employers who use various methods to attempt to evade the law and regulatory requirements, and to enhance worker protections for a vulnerable workforce, as explained further in the section-by-section analysis above.

The Department can use this rulemaking to better protect the rights and liberties, health and safety, and wages and working conditions of agricultural workers and best safeguard the integrity of the H-2A program, while continuing to ensure that responsible employers have access to willing and available agricultural workers and are not unfairly disadvantaged by employers that exploit workers and attempt to evade the law.

## **2. Analysis Considerations**

The Department estimated the costs and transfer payments of the proposed rule relative to the existing baseline (i.e., the current practices for complying, at a minimum, with the H-2A program as currently codified at 20 CFR part 655, subpart B, and 29 CFR part 501).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (i.e., costs, benefits, and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2024 through 2033) to ensure it captures major costs, benefits, and transfer payments that accrue over time.



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The Department expresses all quantifiable impacts in 2021 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A-4.

Exhibit 2 presents the number of affected entities that are expected to be impacted by the proposed rule.<sup>92</sup> The average number of affected entities is calculated using OFLC certification data from 2016 through 2021. The Department provides this estimate and uses it to estimate the costs of the proposed rule.

| <b>Exhibit 2: Number of Unique Employers by Type</b> |               |
|--|---------------|
| <b>Fiscal Year (FY)</b>                              | <b>Number</b> |
| 2016   | 6,713         |
| 2017   | 7,187         |
| 2018   | 7,902         |
| 2019   | 8,391         |
| 2020   | 7,785         |
| 2021   | 9,442         |
| Average  | 7,903         |

*a. Growth Rate*

The Department estimated growth rates for certified H-2A workers based on FY 2012-2021 H-2A program data, presented in Exhibit 3.

| <b>Exhibit 3: Historical H-2A Program Data</b> |                          |
|--|--------------------------|
| <b>FY</b>                                      | <b>Workers Certified</b> |
| 2012   | 85,248                   |
| 2013   | 98,814                   |

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<sup>92</sup> *Performance Data*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

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|      |         |
|------|---------|
| 2014 | 116,689 |
| 2015 | 139,725 |
| 2016 | 165,741 |
| 2017 | 199,924 |
| 2018 | 242,853 |
| 2019 | 258,446 |
| 2020 | 275,430 |
| 2021 | 317,619 |

The geometric growth rate for certified H-2A workers using the program data in Exhibit 3 is calculated as 17.9 percent. This growth rate, applied to the analysis timeframe of 2024 to 2033, would result in more H-2A certified workers than projected employment of workers in the relevant H-2A SOC codes by BLS.<sup>93</sup> Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012-2021 H-2A program data to forecast workers and unique employers, and estimated geometric growth rates based on the forecasted data. The Department conducted multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.<sup>94</sup> Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and unique employers through 2033. Then, a geometric growth rate was calculated using the forecasted data

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<sup>93</sup> Comparing BLS 2030 projections for combined agricultural workers (SOC 45-2000) with a 17.9 percent growth rate of H-2A workers yields estimated H-2A workers that are about 127 percent greater than BLS 2030 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at <https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm>.

<sup>94</sup> The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria goodness of fit measure.

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from each model and an average was taken across each model. This resulted in an estimated growth rate of 6.3 percent for H-2A certified workers.

To estimate the growth rate for unique employers, the Department uses FY 2016 – FY 2021 data on unique employers. The use of FY 2016 as the first year is chosen due to data availability on calculated unique employers. The Department calculates a compound annual growth rate based on FY 2016 unique employers (6,713) and the FY 2021 unique employers (9,442). The result is an estimate of 7.1 percent annual growth rate.<sup>95</sup>

The estimated annual growth rates for unique employers (7.1 percent) and workers (6.3 percent) were applied to the estimated costs and transfers of the proposed rule to forecast participation in the H-2A program.<sup>96</sup>

#### *b. Compensation Rates*

In section VI.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 4 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector human resources (HR) specialists (SOC code 13-1071).<sup>97</sup> Wage rates are adjusted to reflect total compensation, which includes

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<sup>95</sup> Calculation:  $7.1\% = (9,442 \div 6,713)^{(1 \div 5)} - 1$ .

<sup>96</sup> Final forecasted estimates of H-2A employer participation: 8,464 in 2023, 9,065 in 2024, 9,708 in 2025, 10,398 in 2026, 11,136 in 2027, 11,927 in 2028, 12,774 in 2029, 13,681 in 2030, 14,652 in 2031, and 15,692 in 2032.

<sup>97</sup> *May 2021 National Occupational Employment and Wage Estimates: 13-1071 – Human Resources Specialists*, BUREAU OF LAB. STATS., <https://www.bls.gov/oes/current/oes131071.htm>.

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nonwage factors such as overhead and fringe benefits (e.g., health and retirement benefits). We use an overhead rate of 17 percent<sup>98</sup> and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.<sup>99</sup> For State and local employees, we use a fringe benefits rate of 62 percent.<sup>100</sup> We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

| <b>Exhibit 4: Compensation Rates (2021 dollars)</b>       |                    |                                  |                               |                           |  |
|---|--------------------|----------------------------------|-------------------------------|---------------------------|--|
| <b>Position</b>   | <b>Grade Level</b> | <b>Base Hourly Wage Rate (a)</b> | <b>Loaded Wage Factor (b)</b> | <b>Overhead Costs (c)</b> | <b>Hourly Compensation Rate d= a + b + c</b> |
| <i>Private Sector Employees</i>                           |                    |                                  |                               |                           |  |
| HR Specialist   | N/A                | \$34.00                          | \$14.28<br>(\$34.00 x 0.42)   | \$5.78 (\$34.00 x 0.17)   | \$54.06                                      |
| <i>State Government Employees<sup>101</sup></i>           |                    |                                  |                               |                           |  |
| Educational, guidance, and career counselors and advisors | N/A                | \$29.09                          | \$18.01<br>(\$29.09 x 0.619)  | \$4.95 (\$29.09 x 0.17)   | \$52.05                                      |

<sup>98</sup> Cody Rice, WAGE RATES FOR ECONOMIC ANALYSES OF THE TOXICS RELEASE INVENTORY PROGRAM, U.S. ENV'T PROT. AGENCY (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>99</sup> *Employer Costs for Employee Compensation*, BUREAU OF LAB. STATS. (2021), <https://www.bls.gov/news.release/ecec.toc.htm>. Ratio of total compensation to wages and salaries for all private industry workers.

<sup>100</sup> *Employer Costs for Employee Compensation*, BUREAU OF LAB. STATS. (2022), <https://www.bls.gov/news.release/ecec.toc.htm>. Ratio of total compensation to wages and salaries for all State and local government workers.

<sup>101</sup> As part of the discontinuation of services provision of the proposed rule, there will be changes to the number of field checks that will occur. The Department assumes that a single educational, guidance, and career counselor and advisor from the SWA will conduct the site visits.

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### **3. Subject-by-Subject Analysis**

The Department's analysis below covers the estimated costs, transfer payments, and qualitative benefits of the proposed rule. In accordance with Circular A-4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. This proposed rule includes the cost of rule familiarization, application additions, and worker contact information, and transfer payments associated with the elimination of the 2-week delayed effective date of the AEW.

#### *a. Costs*

The following section describes the quantified and unquantified costs of the proposed rule.

#### *i. Quantified Costs*

The following sections describes the quantified costs of rule familiarization, application addition, and worker contact information provisions of the proposed rule.

#### *A. Rule Familiarization*

When the proposed rule takes effect, H-2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. New employers in each subsequent year would need to familiarize themselves with current regulations regardless of this proposed rule.

To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H-2A employers (7.1 percent) to the number of unique H-2A employers (7,903) to determine the number of unique H-2A applicants impacted in the first year. The number of

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unique H-2A employers (8,464) was multiplied by the estimated amount of time required to review the rule (1 hour). The Department requests public comments and inputs regarding this estimate. This number was then multiplied by the hourly compensation rate of HR specialists (\$54.06 per hour). This calculation results in a one-time undiscounted cost of \$457,570 in the first year after the proposed rule takes effect. The annualized cost over the 10-year period is \$53,641 and \$65,148 at discount rates of 3 and 7 percent, respectively.

### *B. Application Additions*

Once the proposed rule takes effect, H-2A employers will need to fill out additional information on the H-2A Application (such as individual owners' names, home addresses, phone, date of birth, identifying information for all managers/labor supervisors; DBA information; identifying info for recruiters, including those the petitioner directly hires and all employees, contractors, agents, including the name and information for direct contacts to the workers; address for worker housing; and names/contact information of recruiters or hiring agents), which will impose a yearly cost as the additional time is required for every application for certification.

To estimate the yearly cost of the application additions, the Department applied the growth-rate of H-2A employers (7.1 percent) to the current number of unique certified H-2A employers (7,903) to determine the number of unique H-2A employers in the first year (8,464). The number of unique certified H-2A employers in the first year is then multiplied by the growth rate again to determine the number of unique certified H-2A employers in the second year. This process is repeated each year to determine the total number of unique certified H-2A employers every year during the study period. Since it is assumed that only a single HR specialist per

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employer will incur the additional time investment, the estimated total yearly cost can be estimated by multiplying the total number of unique certified H-2A employers (8,464) by the HR specialist hourly wage rate (\$34.00 per hour), the loaded wage factor and the overhead rate for the private sector (1.59), and the estimated additional time taken to gather and enter the information on a yearly basis (2 hours on average). The Department requests public comments and inputs regarding this estimate. Lastly, this value is multiplied by the growth rate of unique employers (7.1 percent) to the  $n$ th power, with  $n$  being equal to the period year. The result is \$915,140 in the first year, an undiscounted average cost over a 10-year period of \$1,270,386, and discounted annualized costs of \$1,286,884, and \$1,308,447 at rates of 3 and 7 percent respectively.

### *C. Worker Contact Information*

This provision of the proposed rule would require employers to provide worker contact information (a list of all H-2A workers and workers in corresponding employment employed at the place(s) of employment within the employer's application) to a requesting labor organization. Employers must make this disclosure upon the request of a labor organization, and must update the disclosure, again upon the request of the labor organization, up to one time per work contract period. The Department assumes that on average each employer will need to respond to requests from one labor organization and that responding to the initial request and one request for an updated list will take 1 hour each year. The Department requests public comments and inputs regarding this estimate.

To determine the total additional costs of this provision, the Department used the average number of unique certified H-2A employers (7,903) and applied the unique employer growth rate

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(7.1 percent) and assumed that the number of labor organizations that would request employee lists from each employer is one. The Department then multiplied the number of requests by the estimated time to respond to each request per year (1 hour). This number was then multiplied by the hourly compensation rate of an HR specialist (\$34.00) and the loaded wage factor and the overhead rate for the private sector (1.59) to obtain the total cost of the worker contact information provision. This results in the estimated total cost for this provision in the first year of \$457,570. This process is repeated each year resulting in an undiscounted average annual cost of \$635,193 and discounted annualized costs of \$643,442, and \$654,223 at discount rates of 3 and 7 percent respectively. The Department seeks public comments and inputs on its assumptions on the number of labor organizations that would request employee lists from each H-2A employer and the estimated time to respond per year.

*ii. Unquantified Costs*

*A. Transportation: Seat belts for drivers and passengers*

As part of the proposed rule, employers would have to ensure seat belts are provided for drivers and passengers in transportation vehicles, used to transport H-2A and corresponding workers, that were required by U.S. Department of Transportation regulations to be manufactured with seat belts. This could impose both a one time and annual cost to those employers who had previously, lawfully modified or removed seat belts in such vehicles and would be required to reinstall or retrofit seat belts to comply with the proposed rule through the cost of installing the necessary seat belts and the decreased fuel efficiency of transportation vehicles caused by the additional weight of the seat belts. The Department does not have data to estimate the number of seat belts to be retrofitted, or in the alternative vehicles that would need



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to be purchased, to provide seat belts for drivers and passengers in the above scenario. The Department seeks public comment on data and information that would support estimating this cost, including whether vehicle owners or users may lawfully modify or remove a seatbelt where the vehicle is required by DOT regulations to be manufactured with that seatbelt.

*b. Unquantified Cost Savings*

The following section describes the unquantified cost savings of the proposed rule.

*i. Successors in Interest*

Once the proposed rule takes effect, the Department would be able to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or attorneys. Currently, the Department must first issue a separate notice of debarment to the successor in interest, and go through a lengthy administrative hearing and review process, before it may deny an application filed by or on behalf of a successor. The proposed rule would therefore result in cost savings from not having to go through the process to debar successors in interest but instead apply the predecessor's debarment to the successor. The Department lacks detailed data on the length of time necessary to enter a final order of debarment against successors under the current regulations, and the annual number of successor debarments and as a result is unable to accurately quantify this cost savings. The Department seeks public comment on data that would support estimating this cost savings.

*c. Transfer Payments*

The following section describes the transfer payments of the proposed rule.

*i. Quantified Transfer Payments*

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This section discusses the quantifiable transfer payments related to revisions to the elimination of the 2-week effective date delay for AEWWR publication. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H-2A workers. H-2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.<sup>102</sup> Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.

*A. Elimination of the 2-week effective date delay for AEWWR publication*

Currently, the Department publishes the AEWWR as soon as data is available, typically in the middle of December. There is then a 2-week delay until the AEWWR is effective, typically January 1st of the following year. Once the proposed rule takes effect, the 2-week delay until the AEWWR is effective will be removed and the AEWWR will be effective immediately. Therefore, employers that employ workers during the 2-week period from mid-December to early January will see a transfer to employees due to the elimination of the 2-week delay of wage increases from the AEWWR publication.

To estimate the transfer, the Department first uses FY 2020 and FY 2021 H-2A certification data to calculate the weighted average increase in AEWWR from one year to the

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<sup>102</sup> Revisions to the elimination of the 2-week effective date delay for AEWWR publication will also result in wage transfers from U.S. employers to workers in corresponding employment but the Department is not able to quantify this transfer due to the lack of data for workers in corresponding employment and their wages.

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next.<sup>103</sup> The Department weights the average by the number of workers in each State with employment between December 14th and the end of the year to account for regional differences in employment during December. The result is an average increase in the AEW by \$1.09. The Department then calculates the average number of days worked between December 14 and the end of the year (11.87) using the FY 2020 and FY 2021 H-2A certification data. Finally, the Department estimates the average annual number of workers with work during this period using the H-2A certification data (89,208).<sup>104</sup>

The Department determines the total amount of the transfers by multiplying the 2-year weighted AEW difference for end-of-year employment (1.09), the 2-year average number of days worked between December 14 and the end of year (11.87), the number of work hours in a day (8), and the number of H-2A workers during this period (89,208). To determine the transfers for every year in the 10-year period, the total number of H-2A workers during the period is multiplied by the growth rate of H-2A workers (6.3 percent). The same process is repeated for every year in the period. The total undiscounted average annual transfers associated with this provision is \$12,382,839 and the discounted annualized transfers are \$12,566,020, and \$12,806,284 at discount rates of 3 and 7 percent respectively.

#### *ii. Unquantified Transfer Payments*

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<sup>103</sup> H-2A disclosure data may be accessed at <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

<sup>104</sup> The Department uses the 6.3 percent growth rate of H-2A workers (6.3) percent to produce final forecasted estimates of H-2A workers: 89,208 in 2023, 94,837 in 2024, 100,821 in 2025, 107,183 in 2026, 121,136 in 2027, 128,780 in 2028, 136,906 in 2029, 145,545 in 2030, 14,652 in 2031, and 154,729 in 2032.

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This section discusses the unquantifiable transfer payments related to the reverse of the 14-day grace period to start dates, and piece rates.

#### *A. Reverse of the 14-day Grace Period for Start Dates*

Currently, if an employer fails to contact the SWA of a start date change at least 10 days ahead, it must offer work hours and pay wages to each farmworker who followed the procedure to contact the SWA for updated start date information for the first week. If the employer requests a start date delay after workers have departed for the place of employment, the employer must provide housing and subsistence. After the proposed rule takes effect, employers that do not notify both the SWA and the worker at least 10 days before the anticipated start date, would be required to pay workers the hourly rate for the hours listed on the job order for each day work is delayed up to 2 weeks resulting in a transfer from employers to employees. The Department is unable to quantify this transfer because it lacks detailed data on the prevalence of job delays, the number of employees impacted by these delays, and the number of hours impacted by the delays on average, or the number of hours employers must spend contacting employees and as a result is unable to accurately quantify this transfer. The Department seeks public comment on data that would support estimating this transfer payment.

#### *B. Piece Rates*

This proposed rule clarifies language within 20 CFR 655.120(a) & .122(l) to make clear that the employer is required to advertise and pay the highest of the AEW, prevailing hourly wage or piece rate, CBA rate, or Federal or State minimum wage, or any other wage rate the employer intends to pay. The Department is unable to quantify this transfer because it lacks data on the frequency of instances when employers will have to pay higher wages as a result of

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including and considering applicable piece rates in job offers. The Department seeks public comment on data that would support estimating this transfer payment.

*d. Unquantified Benefits*

*i. Termination for Cause*

This rule proposes that workers would only be terminated for cause for a failure to meet productivity standards or failure to comply with employer policies and procedures, and only if the termination was justified and reasonable. The designation of a termination as being for cause strips workers of essential rights to which they would otherwise be entitled—specifically the three-fourths guarantee, payment for outbound transportation, and, if a U.S. worker, the right to be contacted for re-hire in the following season—and therefore it is essential that workers not be deprived of these rights using inconsistent or unfair procedures. The proposed rule would require fairness in disciplinary and termination proceedings if the termination were to be designated as being for cause, which would prevent workers from being unjustly stripped of certain rights under the H-2A program. The Department lacks data on the numbers of terminations for cause each year and whether those terminations were justified and reasonable, and the number of hours required by employers to document termination proceedings as defined by this proposed rule.

*ii. Protections for worker advocacy and self-organization*

The Department's proposal would provide stronger protections for workers protected by the H-2A program to advocate for better working conditions on behalf of themselves and their coworkers and would prevent employers from suppressing this activity. These protections would help prevent adverse effect on the working conditions of similarly employed agricultural workers in the United States and would increase the likelihood of worker advocacy and organizing while

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protecting those workers from intimidation and retaliation by employers. There are additional benefits for workers and employers. Wages for nonunion workers are higher in industries where a larger share of workers are union members.<sup>105</sup> Unions also help close the gender pay gap and ensure worker advocacy protection and equitable pay for women because collectively bargained wages and pay scales are transparent and apply equally to workers in the same job.<sup>106</sup> In sum, protection for worker advocacy and self-organization provides unquantifiable benefits to workers under the H-2A program.

Unions also complement the Department's enforcement efforts in preventing wage-related violations and in ensuring workplace safety and health. Unions play a central role in curbing wage-related violations by negotiating contractual guarantees of workers' wages and a process for enforcing these guarantees. Unions also encourage State and local legislation to protect wages<sup>107</sup> and help low-wage, vulnerable workers understand their rights and report violations. Additionally, a recent study of NLRB and OSHA data shows that union certification has positive effects on the rate of OSHA safety and health inspections, the share of inspections carried out in the presence of a union representative, violations cited, and penalties assessed.<sup>108</sup>

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<sup>105</sup> BLS News Release, *Union Members—2022*. BUREAU OF LAB. STATS., <https://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>106</sup> Wendy Chun-Hoon, *U.S. Dep't of Lab. Blog: Want Equal Pay? Get a Union*, [https://blog.dol.gov/2022/02/15/want-equal-pay-get-a-union?\\_ga=2.66102894.1387872399.1678980555-949551915.1678980555](https://blog.dol.gov/2022/02/15/want-equal-pay-get-a-union?_ga=2.66102894.1387872399.1678980555-949551915.1678980555).

<sup>107</sup> Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community—Labor Coalitions Win Victories in State Houses?*, 52 URB. AFF. REV. 780-807 (2016), <https://doi.org/10.1177/1078087415608008>.

<sup>108</sup> Aaron Sojourner & Jooyoung Yang, *Effects of Unionization on Workplace-Safety Enforcement: Regression-Discontinuity Evidence*, INST. OF LAB. ECON., IZA Discussion Papers 9610 (2015), <https://ideas.repec.org/p/iza/izadps/dp9610.html>.

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Although the Department lacks data on how to quantify the benefits of such increased worker protections, the proposed regulations should increase workers' dignity and safety and should improve the working conditions for all agricultural workers employed by H-2A employers.

*iii. Transportation: seat belts for drivers and passengers*

Once the proposed rule takes effect, employer-provided transportation would be required to have seat belts available for all workers transported, if those vehicles were required by DOT regulations to be manufactured with seat belts. Seat belt use reduces the severity of crash-related injuries and deaths. The Department lacks data on the baseline number of crashes, whether those vehicles involved in crashes were equipped with seat belts and the occupants were using seat belts and subsequent injuries or fatalities involving vehicles transporting H-2A workers and therefore is not able to estimate the benefit from reduced fatalities or injuries. The benefit from reducing even a single fatality or serious injuries is significant. The value of a statistical life (VSL) that would measure the benefit of avoiding a fatality is estimated to be \$11.8 million.<sup>109</sup> Recent NHTSA reports suggest avoiding injury crashes can be highly beneficial, with estimates

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<sup>109</sup> The VSL is used by DOT to value fatalities associated with vehicle crashes. The VSL is based upon the base year's VSL adjusted for the annual change in the Consumer Price Index. DEP'T OF TRANSP., DEPARTMENTAL GUIDANCE ON VALUATION OF A STATISTICAL LIFE IN ECONOMIC ANALYSIS, <https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis>.

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that avoiding a critical injury crash is worth \$3.8 million (32 percent of a fatality) and avoiding minor injuries is worth \$63,000 (0.5 percent of a fatality), respectively.<sup>110</sup>

*iv. Protection against passport and other immigration document withholding*

To better protect this vulnerable workforce from potential labor trafficking, the Department proposes to flatly prohibit an employer, including through its agents or attorneys, from taking or withholding of a worker's passport, visa, or other immigration or identification documents against the worker's wishes, independent of any other requirements under other Federal, State, or local laws, in a new provision at 20 CFR 655.135(o). This proposal would help ensure that H-2A workers are less likely to be subject to labor exploitation and thus it safeguards the health, safety, and dignity of those workers and also prevents the depression of working conditions for the local agricultural workforce. The Department seeks comments on how it can quantify these benefits.

*v. Enhanced integrity and enforcement capabilities*

The Department proposes reduced time frames to submit appeal requests for debarment matters and a reduced timeframe to submit rebuttal evidence to OFLC. This would lead to faster final agency adjudications and thereby better protect and uphold program integrity and agricultural workers by more efficiently and effectively preventing H-2A program violators from accessing the program. The Department seeks comments on how it can quantify these benefits.

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<sup>110</sup> Based on MAIS4 and MAIS1 injury per crash costs estimated by NHTSA in Table 1-9. Summary of Comprehensive Unit Costs, THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE CRASHES, 2019 (REVISED), NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (2023), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813403>.



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#### **4. Summary of the Analysis**

Exhibit 5 summarizes the estimated total costs and transfer payments of the proposed rule over the 10-year analysis period. The Department estimates the annualized costs of the proposed rule at \$2.21 million and the annualized transfer payments (from H-2A employers to employees) at \$12.81 million, each at a discount rate of 7 percent. Unquantified transfer payments include reverse of the 14-day grace period for start dates and clarifying that piece rate should be included in the prevailing wage determination. Unquantified cost-savings include the Department's ability to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or attorneys. Unquantified benefits include better protection from inappropriate termination, protection for worker advocacy, reduction in risk of injury during employer sponsored transportation, reduction in improper holding of passports or immigration documents, and enhanced integrity and enforcement. The Department requests public comments and inputs on this rule's potential distributional impacts and ripple effects in the economy.

**Exhibit 5: Estimated Monetized Costs and Transfer Payments of the Proposed Rule (2021 \$millions)**

| <b>Year</b> | <b>Costs</b> | <b>Transfer Payments</b> |
|-------------|--------------|--------------------------|
| 2024        | \$1.83       | \$9.26                   |
| 2025        | \$1.4787     | \$9.84                   |
| 2026        | \$1.57       | \$10.46                  |
| 2027        | \$1.69       | \$11.12                  |
| 2028        | \$1.81       | \$11.83                  |
| 2029        | \$1.93       | \$12.57                  |
| 2030        | \$2.07       | \$13.37                  |
| 2031        | \$2.22       | \$14.21                  |
| 2032        | \$2.38       | \$15.11                  |
| 2033        | \$2.54       | \$16.06                  |

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**Exhibit 5: Estimated Monetized Costs and Transfer Payments of the Proposed Rule (2021 \$millions)**

| Year                                     | Costs   | Transfer Payments |
|--|---------|-------------------|
| Undiscounted 10-Year Total               | \$19.51 | \$123.83          |
| 10-Year Total with a Discount Rate of 3% | \$16.92 | \$107.19          |
| 10-Year Total with a Discount Rate of 7% | \$14.24 | \$89.95           |
| 10-Year Average                          | \$1.95  | \$12.38           |
| Annualized with a Discount Rate of 3%    | \$1.98  | \$12.57           |
| Annualized with a Discount Rate of 7%    | \$2.03  | \$12.81           |

**5. Regulatory Alternatives**

The Department considered a regulatory alternative to this proposed rule's proposal to make updated AEWRs effective on the date of publication in the *Federal Register*. Under the alternative proposal, AEWRs would become effective 7 calendar days after publication in the *Federal Register*. This proposal would have been a compromise between the immediate effective date proposed in this rule and the current effective date, which can be as many as 14 calendar days after the Department publishes the updated AEWRs in the *Federal Register*. The benefit of the alternative proposal is that it would continue to provide employers a short window of time to adjust payroll or recordkeeping systems or make any other adjustments that may be necessary after the Department's announcement of update AEWRs, while providing a shorter adjustment window than under the current rule. However, the Department determined the disadvantages of a 7-calendar-day implementation period for updated AEWRs outweighed any potential benefits. Although this alternative would require employers to begin paying agricultural workers at least the newly required higher wage within a calendar week of the date the updated AEWRs are

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published in the *Federal Register*, it would not ensure that workers are paid at least the wage rate determined to prevent adverse effect for all hours worked. Further, unlike the possible 14-day period in the current rule, the 7-calendar-day period would not correspond with a typical 2-week pay period; potentially creating more logistical challenges than it obviates. As the Department has explained in prior rulemaking, the duty to pay an updated AEW during the employment period if it is higher than other required wage sources is not a new employer obligation. The Department recognizes that AEW adjustments may alter employer budgets, but the Department believes the difference in the impact<sup>111</sup> on budget and payroll planning between the proposed immediate effective date and a 7-day period after publication is outweighed by the benefits to agricultural workers noted above. Moreover, as the Department noted in the 2010 H-2A Final Rule, employers are aware of the annual AEW adjustment and the Department encourages employers to continue to include the annual adjustment in their contingency planning to allow flexibility to account for any possible wage adjustments.<sup>112</sup>

The Department also considered two regulatory alternatives to the employee contact information proposal, with respect to the proposed requirement that employers provide a labor organization with an updated employee contact list once per season, if requested. First, the Department considered a more stringent alternative, requiring the employer to provide the requesting labor organization with an updated list, if requested, up to once per month. This

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<sup>111</sup> The wage transfer under this alternative would be approximately half of the impact of the proposed rule's proposal to make updated AEWs effective on the date of publication in the *Federal Register* (\$12.81 million at a discount rate of 7 percent).

<sup>112</sup> See 87 FR 61660, 61688 (Oct. 12, 2022) (quoting 75 FR 6884, 6901 (Feb. 12, 2010)).

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alternative would best ensure that the labor organization has accurate contact information for those workers actually employed by the employer throughout the entire job order period, and therefore would best ensure that workers who may have an interest in or against organizing have access to relevant information. However, this alternative would impose significantly more burden on the employer to comply. Second, the Department considered a less stringent alternative, that would not require the employer to provide any updates to the requesting labor organization; in other words, the requesting labor organization would be entitled to one list per season, without any updates. This alternative would be the least burdensome of the three, but would be less likely to ensure that all eligible workers have access to information regarding organization. The Department therefore chose to propose that the employer provide a one-time per season update, if requested, as the Department believes this alternative best balances the need for workers to receive information regarding arguments both for and against organization against unduly burdening the employer with providing multiple updates to the employee contact list.

## **B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement**

### **Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in**

#### **Agency Rulemaking**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, requires agencies to determine whether regulations will have a significant economic impact on a substantial number of small entities. The Department certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. The Department presents the basis for this certification in the analysis below.

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## **1. Description of the Number of Small Entities to Which this Proposed Rule Will**

### **Apply**

#### *a. Definition of Small Entity*

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of December 19, 2022, to classify entities as small.<sup>113</sup> SBA establishes separate standards for individual 6-digit North American Industry Classification System (NAICS) industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.<sup>114</sup>

#### *b. Number of Small Entities*

The Department collected employment and annual revenue data from the business information provider Data Axle<sup>115</sup> and merged those data into the H-2A certification data for FY2020 and FY2021. This process allowed the Department to identify the number and type of small entities in the H-2A certification data as well as their annual revenues. The Department determined the number of unique employers in the FY2020 and FY2021 certification data based

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<sup>113</sup> SBA *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (December 19, 2022), <https://www.sba.gov/document/support--table-size-standards>.

<sup>114</sup> See <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act> for details.

<sup>115</sup> Data Axle (Aug. 2023), <https://www.data-axle.com>.

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on the employer name and city. The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H-2A employers in the FY2020 and FY2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were small (80.5 percent).<sup>116</sup> These unique small entities had an average of 11 employees and average annual revenue of approximately \$3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle. The Department's analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,085 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 6 shows the number of unique H-2A small entities employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

| <b>Exhibit 6: Number of H-2A Small Employers by NAICS Code</b> |  |                            |                |                      |
|--|--|----------------------------|----------------|----------------------|
| <b>6-Digit NAICS</b>   | <b>Description</b>                             | <b>Number of Employers</b> | <b>Percent</b> | <b>Size Standard</b> |
| 111998   | All Other Miscellaneous Crop Farming           | 611                        | 29%            | \$1.0 million        |
| 444220   | Nursery, Garden Center, and Farm Supply Stores | 162                        | 8%             | \$12.0 million       |
| 561730   | Landscaping Services                           | 134                        | 6%             | \$8.0 million        |

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<sup>116</sup> SBA *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), <https://www.sba.gov/document/support--table-size-standards>.

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|        |  |       |      |                |
|--------|--|-------|------|----------------|
| 445230 | Fruit and Vegetable Markets  | 127   | 6%   | \$8.0 million  |
| 424480 | Fresh Fruit and Vegetable Merchant Wholesalers                     | 84    | 4%   | 100 employees  |
| 111339 | Other Noncitrus Fruit Farming                                      | 78    | 4%   | \$1.0 million  |
| 112990 | All Other Animal Production  | 57    | 3%   | \$1.0 million  |
| 424930 | Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers | 51    | 2%   | 100 employees  |
| 424910 | Farm Supplies Merchant Wholesalers                                 | 41    | 2%   | 200 employees  |
| 484230 | Specialized Freight (except Used Goods) Trucking, Long-Distance    | 39    | 2%   | \$30.0 million |
|        | All Other <sup>117</sup>   | 701   | 33%  | -              |
|        | Total  | 2,085 | 100% | -              |

## 2. Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (i.e., the current practices for complying, at a minimum, with the H-2A program as currently codified at 20 CFR part 655, subpart B) to this proposed rule. As discussed in previous sections, the Department estimates impacts using historical certification data and therefore simulates the

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<sup>117</sup> Size standards vary by NAICS code.

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impacts of the proposed rule to each actual employer in the H-2A program rather than using representative data for employers within a given sector. The Department estimated the costs of (a) time to read and review the proposed rule, (b) the time to send employee lists to labor organizations upon request, (c) the time required to complete H-2A applications due to application additions, and (d) wage transfers due to the removal of the 2-week effective date delay from the AEWB publication. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that 2,085 unique small entities, would incur a one-time cost of \$54.00 to familiarize themselves with the rule, an annual cost of \$54.00 to send employee contact lists to labor organizations, and a per application cost of \$108.00 to complete H-2A applications.<sup>118</sup>

In addition to the cost of rule familiarization, employee contact lists, and application additions above, each small entity will have an increase in the wage costs due to the revisions to the wage structure. To estimate the wage impact for each small entity we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity, the Department calculated total wage impacts of the proposed rule in CY 2020 and CY 2021 based on each certification for employment between December 14th and the end of the year, and the annual increase in AEWB. The Department estimates the wage impact to all small entities is \$826 on average.<sup>119</sup> Many of the small entities have no wage impact from the proposed rule

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<sup>118</sup> Calculation:  $(\$34.00 + \$34.00(0.42) + 34.00(0.17)) * 1 = \$54.00$ .  $\$34.00 (1.59) * 1 = \$54.00$ .  $\$34.00 (1.59) * 2 = \$108.00$ .

<sup>119</sup> In CY 2020 the average wage impact to all small entities is \$620 and in CY 2021 \$1,032.



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because they do not have workers employed at the end of December. Of small entities with wage impacts, their average wage impact is \$2,567.<sup>120</sup>

The Department determined the proportion of each small entity's total revenue that would be impacted by the costs of the proposed rule to determine if the proposed rule would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage impact introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact.<sup>121</sup> This threshold is also consistent with that sometimes used by other agencies.<sup>122</sup>

Exhibit 7 provides a breakdown of small entities by the proportion of revenue affected by the costs of the proposed rule. Of the 2,085 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, 0.7 percent of employers are estimated to have more than 3

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<sup>120</sup> In CY 2020 the average wage impact small entities with wage impacts is \$1,937 and in CY 2021 \$3,191.

<sup>121</sup> See, e.g., NPRM, *Increasing the Minimum Wage for Federal Contractors*, 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex*, 81 FR 39108 (June 15, 2016).

<sup>122</sup> See, e.g., Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II*, 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

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percent of their total revenue impacted in the first year based on 2020 data and 2 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2021 data. Based on the findings presented in Exhibit 7, the proposed rule does not have a significant economic impact on a substantial number of small H-2A employers.

| <b>Exhibit 7: Cost Impacts as a Proportion of Total Revenue for Small Entities</b> |                            |                 |                 |                 |                  |                  |
|--|----------------------------|-----------------|-----------------|-----------------|------------------|------------------|
| <b>Proportion of Revenue Impacted</b>  | <b>2020, by NAICS Code</b> |                 |                 |                 |                  |                  |
|  | <b>111998</b>              | <b>444220</b>   | <b>561730</b>   | <b>445230</b>   | <b>All Other</b> | <b>Total</b>     |
| < 1%   | 594<br>(97.2%)             | 162<br>(100.0%) | 133<br>(99.3%)  | 127<br>(100.0%) | 1,028<br>(97.8%) | 2,044<br>(98.0%) |
| 1% - 2%  | 12 (2.0%)                  | 0 (0.0%)        | 1 (0.7%)        | 0 (0.0%)        | 10 (1.0%)        | 23 (1.1%)        |
| 2% - 3%  | 2 (0.3%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 2 (0.2%)         | 4 (0.2%)         |
| 3% - 4%  | 1 (0.2%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 1 (0.1%)         | 2 (0.1%)         |
| 4% - 5%  | 1 (0.2%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 4 (0.4%)         | 5 (0.2%)         |
| > 5%   | 1 (0.2%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 6 (0.6%)         | 7 (0.3%)         |
| <b>Total &gt;3%</b>  | <b>3 (0.5%)</b>            | <b>0 (0.0%)</b> | <b>0 (0.0%)</b> | <b>0 (0.0%)</b> | <b>11 (1.0%)</b> | <b>14 (0.7%)</b> |
| <b>Proportion of Revenue Impacted</b>  | <b>2021, by NAICS Code</b> |                 |                 |                 |                  |                  |
|  | <b>111998</b>              | <b>444220</b>   | <b>561730</b>   | <b>445230</b>   | <b>All Other</b> | <b>Total</b>     |
| < 1%   | 564<br>(92.3%)             | 161<br>(99.4%)  | 131<br>(97.8%)  | 127<br>(100.0%) | 1,010<br>(96.1%) | 1,993<br>(95.6%) |
| 1% - 2%  | 20 (3.3%)                  | 1 (0.6%)        | 2 (1.5%)        | 0 (0.0%)        | 14 (1.3%)        | 37 (1.8%)        |
| 2% - 3%  | 8 (1.3%)                   | 0 (0.0%)        | 1 (0.7%)        | 0 (0.0%)        | 5 (0.5%)         | 14 (0.7%)        |
| 3% - 4%  | 4 (0.7%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 4 (0.4%)         | 8 (0.4%)         |
| 4% - 5%  | 5 (0.8%)                   | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 4 (0.4%)         | 9 (0.4%)         |
| > 5%   | 10 (1.6%)                  | 0 (0.0%)        | 0 (0.0%)        | 0 (0.0%)        | 14 (1.3%)        | 24 (1.2%)        |
| <b>Total &gt;3%</b>  | <b>19 (3.1%)</b>           | <b>0 (0.0%)</b> | <b>0 (0.0%)</b> | <b>0 (0.0%)</b> | <b>22 (2.1%)</b> | <b>41 (2.0%)</b> |

### **C. Paperwork Reduction Act**

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification, which allow employers to bring foreign labor into the United States on a seasonal or other temporary basis under the H-2A program. The Department uses the collected

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information to determine if employers are meeting their statutory and regulatory obligations.

This information is subject to the PRA, 44 U.S.C. 3501 et seq. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid control number. *See* 5 CFR 1320.5(a) and 1320.6. The Department obtained OMB approval for this information collection under Control Number 1205-0466.

This information collection request (ICR), concerning OMB Control Number 1205-0466, includes the collection of information related to the Department's temporary agricultural labor certification determination process in the H-2A program. The PRA helps ensure that requested data is provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

On October 25, 2018, as part of its ongoing effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater oversight in the H-2A program, the Department published a 60-day notice announcing its proposed revisions to the collection of information under OMB Control Number 1205-0466 in the *Federal Register* in connection with the proposed rule *Temporary Agricultural Employment of H-2A Nonimmigrants*

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in the United States, 84 FR 36168 (July 26, 2019).<sup>123</sup> See 83 FR 53911. The Department published a final rule on October 12, 2022.<sup>124</sup> See 87 FR 61660.

The Department now proposes additional revisions to this information collection, covered under OMB Control Number 1205-0466, to further revise the information collection tools based on regulatory changes proposed in this NPRM. The additional proposed revisions to Form ETA-9142A and appendices and Form ETA-790/790A and addenda will align information collection requirements with the Department's proposed regulatory framework and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, and promote greater efficiency and transparency in the review and issuance of labor certification decisions under the H-2A visa program. For example, the Department proposes a new Form ETA-9142A, Appendix C, *H-2A Owner, Operator, Manager and Supervisor Information*, to implement proposed § 655.130(a), which would require employers to provide the identity,

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<sup>123</sup> For administrative purposes only, the Department submitted the July 2019 NPRM's ICR under OMB Control Number 1205-0537. OMB authorized the NPRM's ICR as OMB Control Number 1205-0537 due to the Department's separate renewal of the ICR under OMB Control Number 1205-0466, which currently expires on October 31, 2025. In March 2023, the Department submitted a nonmaterial change request to transfer the burden from this OMB control number (1205-0537) to the existing OMB control number for the H-2A Foreign Labor Certification Program (1205-0466) and proceeded to discontinue the use of OMB Control Number 1205-0537.

<sup>124</sup> The current Form ETA-790/790A, *H-2A Agricultural Clearance Order*, and addenda, provide language to employers to disclose necessary information regarding the material terms and conditions of the job opportunity. A copy of Form ETA-790/790A is now integrated with the Form ETA-9142A for purposes of the Department's temporary agricultural labor certification determination; the CO reviews the Form ETA-790/790A in combination with Form ETA-9142A when the employer submits Form ETA-9142A to the NPC.

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location, and contact information of all persons who are the owners, operators, managers, and supervisors of the agricultural business. Additionally, the Department proposes a new Form ETA-9142A, Appendix D, *Foreign Labor Recruiter Information*, to implement proposed § 655.137(b), which would require the employer, and its attorney or agent (as applicable), to provide the identity and location of all persons and entities hired by or working for the recruiter or agent, and any of the agent(s) or employee(s) of those persons and entities, to recruit prospective foreign workers for the H-2A job opportunities offered by the employer under an *H-2A Application for Temporary Employment Certification*, Form ETA-9142A.

#### **Overview of Information Collections Proposed by This NPRM**

*Title of Collection:* H-2A Temporary Agricultural Employment Certification Program.

*Type of Review:* Revision of a Currently Approved Information Collection.

*OMB Control Number:* 1205-0466.

*Description:* This NPRM proposes to require 1) all agents who file H-2A applications on behalf of employers to demonstrate that a bona fide relationship exists between them and the employer; 2) agents who are Farm Labor Contractors to provide a copy of their Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Certificate of Registration; 3) employers to prohibit in a written contract any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers, from seeking or receiving payments or other compensation from prospective employees; 4) employers to determine the appropriate wage to offer, advertise, and pay workers to perform the agricultural services or labor in preparing the

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Form ETA-790A; 5) that the job order submitted to the SWA and Department must meet the content standards set forth in 20 CFR 653, Subpart F and 20 CFR 655.122; 6) completion of the Form ETA-9142A when an employer seeks a temporary labor certification to employ nonimmigrant workers under the H-2A visa classification; and 7) employers operating as H-2A Labor Contractors (H-2ALCs) must provide additional documentation at the time of filing the Form ETA-9142A. .

*Affected Public:* Individuals or Households, Private Sector – businesses or other for-profits, Government, State, Local, and Tribal Governments.

*Form(s):* ETA-9142A, H-2A Application for Temporary Employment Certification; ETA-9142A – Appendix A; ETA-9142A – Final Determination: H-2A Temporary Labor Certification Approval; ETA-790/790A, H-2A Agricultural Clearance Order; ETA-790/790A – Addendum A; ETA-790/790A – Addendum B; ETA-790/790A – Addendum B; ETA-9142A, Appendix C; ETA-9142A, Appendix D

*Obligation to Respond:* Required to Obtain or Retain Benefits.

*Estimated Total Annual Respondents:* 467,843.

*Estimated Total Annual Responses:* 14,586.

*Estimated Total Annual Burden Hours:* 102,864.74.

*Estimated Total Annual Other Burden Costs:* \$0.

Regulations Sections: Subpart F of part 655.

Agency: DOL – ETA.

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*Title of Collection:* Agricultural Recruitment System Forms Affecting Migrant and Seasonal Farmworkers.

*Type of Review:* Revision of a Currently Approved Information Collection.

*OMB Control Number:* 1205-0134.

*Description:* This NPRM proposes to revise Agricultural Clearance Order Form, ETA Form 790B, which will be attached to the Agricultural Clearance Order Form, ETA Form 790 (see OMB Control Number 1205-0466). ETA Form 790B is only used for employers who submit clearance orders requesting U.S. workers for temporary agricultural jobs, which are not attached to requests for foreign workers through the H-2A visa program (non-criteria clearance orders). ETA is including the estimated burden to the public for the completion of ETA Form 790 as it relates to those employers seeking to place non-criteria job orders through the ARS in addition to the estimated burden for ETA Form 790B because employers would fill out both forms.

*Affected Public:* State Governments, Private Sector: Business or other for-profits, not-for-profit institutions, and farms.

*Obligation to Respond:* Required to Obtain or Retain Benefits.

*Estimated Total Annual Respondents:* 5,112.

*Estimated Total Annual Responses:* 5,112.

*Estimated Total Annual Burden Hours:* 2,981.84.

*Estimated Total Annual Other Burden Costs:* \$0.

*Regulations Sections:* Subpart F of part 653.

*Agency:* DOL-ETA.

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The Department invites comments on all aspects of the PRA analysis. Comments that are related to a specific form or a specific form's instructions should identify the form or form's instructions using the form number (e.g., ETA-9142A or Form ETA-790/790A) and should identify the particular area of the form for comment. A copy of the proposed revised information collection tools can be obtained by contacting the office listed below in the addresses section of this notice. Written comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

The Department is particularly interested in comments that:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, and the agency's estimates associated with the annual burden cost incurred by respondents and the government cost associated with this collection of information;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.



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Comments submitted in response to this notice will be considered and summarized or included in the ICR the Department will submit to OMB for approval; they will also become a matter of public record. Commenters are encouraged not to submit sensitive information (e.g., confidential business information or personally identifiable information such as a Social Security number).

#### **D. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, codified at 2 U.S.C. 1501 et seq.) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

This proposed rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of title II of

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the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

#### **E. Executive Order 13132 (Federalism)**

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132,<sup>125</sup> it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

The Department has reviewed this proposed rule in accordance with E.O. 13175<sup>126</sup> and has determined that it does not have tribal implications. This proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and tribal governments.

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<sup>125</sup> E.O. 13132, *Federalism*, 64 FR 43255 (Aug. 10, 1999).

<sup>126</sup> E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249 (Nov. 9, 2000).

## **List of Subjects**

20 CFR Part 651

Employment, Grant programs—labor.

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

20 CFR Part 658

Administrative practice and procedure, Employment, Grant programs—labor, Reporting and recordkeeping requirements.

29 CFR Part 501

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor proposes to amend 20 CFR parts 651, 653, 655, and 658 and 29 CFR part 501 as follows:

### **Title 20: Employees' Benefits**

#### **Employment and Training Administration**

**PART 651 – GENERAL PROVISIONS GOVERNING THE WAGNER-PEYSER  
ACT EMPLOYMENT SERVICE**

1. The authority citation for part 651 continues to read as follows:

29 U.S.C. 49a; 38 U.S.C. part III, 4101, 4211; Secs. 503, 3, 189, Pub. L. 113-128, 128 Stat. 1425 (Jul. 22, 2014).

2. Amend § 651.10 by revising the definition for *employment-related laws* and adding definitions for *agent*, *criteria clearance order*, *discontinuation of services*, *farm labor contractor*, *joint employer*, *non-criteria clearance order*, *successor in interest*, and *week* as follows:

**§ 651.10 Definitions of terms used in this part and parts 652, 653, 654, and 658 of this chapter.**

\* \* \* \* \*

*Agent* means a legal entity or person, such as an association of employers, or an attorney for an association, that is authorized to act on behalf of the employer for purposes of recruitment of workers through the clearance system and is not itself an employer or joint employer, as defined in this section, with respect to a specific job order.

\* \* \* \* \*

*Criteria clearance order* means a clearance order that is attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter.

\* \* \* \* \*

*Discontinuation of services* means that an employer, agent, farm labor contractor, joint employer, or successor in interest, as defined in this part, cannot participate in or

receive any Wagner-Peyser Act employment service provided by the ES to employers pursuant to parts 652 and 653 of this chapter.

\* \* \* \* \*

*Employment-related laws* means those laws and implementing regulations that relate to the employment relationship, such as those enforced by the Department's WHD, OSHA, or by other Federal, State, or local agencies.

\* \* \* \* \*

*Farm labor contractor* means any person or entity, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal farmworker (MSFW).

\* \* \* \* \*

*Joint employer* means where two or more employers each have sufficient definitional indicia of being an employer of a worker as defined in this part, they are, at all times, joint employers of that worker. An employer that submits a job order to the ES clearance system as a joint employer, is a joint employer of any worker placed and employed on the job order during the period of employment anticipated, amended, or otherwise extended in accordance with the order.

\* \* \* \* \*

*Non-criteria clearance order* means a clearance order that is not attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter.

\* \* \* \* \*

*Successor in interest* – A successor in interest includes any 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. A successor in interest to an employer, agent, or farm labor contractor may be held liable for the duties and obligations of that employer, agent, or farm labor contractor for purposes of recruitment of workers through the ES clearance system or enforcement of ES regulations. The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or farm labor contractor is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same facilities;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (7) Similarity in machinery, equipment, and production methods;
- (8) Similarity of products and services;
- (9) The ability of the predecessor to provide relief; and

(10) For purposes of discontinuation of services, the involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

\*\*\*\*\*

*Week* means 7 consecutive calendar days.

\*\*\*\*\*

**PART 653 - SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT  
SERVICE SYSTEM**

3. The authority citation for part 653 continues to read as follows:

Secs. 167, 189, 503, Public Law 113-128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

4. Amend § 653.501 by adding paragraph (b)(4), revising paragraphs (c)(3), (c)(3)(i) and (iv), and (c)(5) and removing and reserving paragraphs (d)(4), (7), and (8) to read as follows:

**§ 653.501 Requirements for processing clearance orders.**

\* \* \* \* \*

(b) \* \* \*

(4) Prior to placing a job order into intrastate or interstate clearance, ES staff must consult the Department's Office of Foreign Labor Certification and Wage and Hour Division debarment lists, and the Department's Office of Workforce Investment discontinuation of services list.

(i) If the employer requesting access to the clearance system is currently debarred from participating in the H-2A or H-2B foreign labor certification programs, the SWA must initiate discontinuation of services pursuant to part 658, subpart F, of this chapter.

(ii) If the employer requesting access to the clearance system is currently discontinued from receiving ES services under § 658.503 of this chapter by any State, the SWA must not approve the clearance order for placement into intrastate or interstate clearance.

(iii) For purposes of this paragraph (b)(4), “employer” has the meaning given in § 658.500(b) of this chapter.

(c) \* \* \*

(3) SWAs must ensure that the employer makes the following assurances in the clearance order:

(i) The employer will provide to workers referred through the clearance system the number of hours of work cited in paragraph (c)(1)(iv)(D) of this section for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 business days prior to the original date of need (pursuant to paragraph (c)(3)(iv) of this section).

\* \* \* \* \*

(iv) The employer will notify the order-holding office or SWA immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment, or other factors have changed the terms and conditions of employment. If there is a change to the date of need, the employer will notify the order-holding office or SWA, and each worker who has been placed on the clearance order using the contact information the worker provided to the employer, in writing (email and other forms of electronic written notification are acceptable) at least 10 business days prior to the original date of need. The employer must maintain records of the notification and the date



notification was provided to the order-holding office or SWA and workers for 3 years. If the employer does not properly notify the order-holding office or SWA and workers at least 10 business days prior to the original date of need, the employer will provide housing and subsistence to all workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences, and, consistent with paragraph (c)(5) of this section, will pay the placed workers for the hours listed on the clearance order, at a rate consistent with paragraph (c)(5) of this section, for each day work is delayed up to 2 weeks or provide alternative work.

\* \* \* \* \*

(5) If there is a change to the anticipated date of need and the employer fails to notify the order-holding office or SWA and all workers placed on the clearance order at least 10 business days prior to the original date of need the employer must provide housing and subsistence to all workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences, and must pay the placed workers the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or State minimum wage, or an applicable prevailing wage, or for criteria orders the rate of pay required under 20 CFR part 655, subpart B, for each day work is delayed up to 2 weeks starting with the originally anticipated date of need or provide alternative work if such alternative work is stated on the approved clearance order. If an employer fails to comply under this paragraph the order-holding office must process the information as an apparent violation pursuant to § 658.419 of this chapter and may refer an apparent violation of the employer's payment obligation under this paragraph to the Department's Wage and Hour Division.

(d) \* \* \*

(4) [Reserved]

\* \* \* \* \*

(7) [Reserved]

(8) [Reserved]

\* \* \* \* \*

## **PART 655 - TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

5. The authority citation for part 655 continues to read as follows:

Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

6. Amend § 655.103 by revising paragraph (b) to add definitions for *key service provider* and *labor organization*, and remove the definition for *successor in interest* and adding paragraph (e).

**§ 655.103 Overview of this subpart and definition of terms.**

\* \* \* \* \*

(b) \* \* \*

\* \* \* \* \*

*Key service provider.* A health-care provider; a community health worker; an education provider; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; and any other service provider to which a worker may need access.

*Labor organization.* Any organization of any kind, or any agency or employee representation committee or plan, in which workers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

\* \* \* \* \*

(e) *Definition of single employer for purposes of temporary or seasonal need and contractual obligations.* Separate entities will be deemed a single employer (sometimes referred to as an “integrated employer”) for purposes of assessing temporary or seasonal need and for enforcement of contractual obligations if they meet the definition of single employer. Under the definition of single employer, a determination of whether separate entities are a single employer is not determined by a single factor, but rather the entire

relationship is viewed in its totality. Factors considered in determining whether two or more entities consist of a single employer include:

- (1) Common management;
- (2) Interrelation between operations;
- (3) Centralized control of labor relations; and
- (4) Degree of common ownership/financial control.

7. Add § 655.104 to subpart B to read as follows:

**§ 655.104 Successors in interest.**

(a) *Liability of successors in interest.* Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or this subpart, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances.

(b) *Definition of successors in interest.* A successor in interest includes 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. The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same facilities;
- (3) Continuity of the work force;

- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (7) Similarity in machinery, equipment, and production methods;
- (8) Similarity of products and services;
- (9) The ability of the predecessor to provide relief; and
- (10) For purposes of debarment, the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

(c) *Effect of debarment on successors in interest.* When an employer, agent, or attorney is debarred under § 655.182 or 29 CFR 501.20, any successor in interest to the debarred employer, agent, or attorney is also debarred. No application for H-2A workers may be filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney, subject to the term limits set forth in § 655.182(c)(2). If the CO determines that an application for H-2A workers was filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney during the period of debarment as set forth in § 655.182(c)(2), the CO will issue a NOD pursuant to § 655.141 or deny the application pursuant to § 655.164, as appropriate depending upon the status of the *H-2A* application, solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. If the OFLC Administrator determines that a certification for H-2A workers was issued to a successor in interest to a debarred employer, the OFLC Administrator may revoke the certification pursuant to § 655.181(a). The employer, agent, or attorney

may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at § 655.171.

8. Amend § 655.120 by revising paragraphs (a) and (b)(2) and (3) to read as follows:

**§ 655.120 Offered wage rate.**

(a) *Employer obligation.* (1) Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of:

(i) The AEW;R;

(ii) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;

(iii) The agreed-upon collective bargaining wage;

(iv) The Federal minimum wage;

(v) The State minimum wage; or

(vi) Any other wage rate the employer intends to pay.

(2) Where the wage rates set forth in paragraph (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 offer and advertise all of these wage rates in its recruitment. The employer's obligation to pay the highest of these wage rates is set forth at § 655.122(l)(2).

(b) \* \* \*

(2) The OFLC Administrator will publish a notice in the *Federal Register*, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEW. The updated AEWs will be effective as of the date of publication of the notice in the *Federal Register*.

(3) If an updated AEW for the occupational classification and geographic area is published in the *Federal Register* during the work contract, and the updated AEW is higher than the highest of the previous AEW; a prevailing wage for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area; the agreed-upon collective bargaining wage; the Federal minimum wage; or the State minimum wage, the employer must pay at least the updated AEW beginning on the date the updated AEW is published in the *Federal Register*.

\* \* \* \* \*

9. Amend § 655.122 by revising paragraphs (h)(4), (i)(1)(ii), (l), and (n) to read as follows:

**§ 655.122 Contents of job offers.**

\* \* \* \* \*

(h) \* \* \*

(4) *Employer provided transportation.* (i) All employer-provided transportation must comply with all applicable local, State, or Federal laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver's licensure, and vehicle insurance required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128.

(ii) The employer shall not operate any employer-provided transportation that is required by the U.S. Department of Transportation regulations, including 49 CFR 571.208, to be manufactured with seat belts, unless all passengers and the driver are properly restrained by seat belts meeting standards established by the U.S. Department of Transportation, including 49 CFR 571.209 and 49 CFR 571.210.

(iii) The job offer must include a description of the modes of transportation (e.g., type of vehicle) that will be used for inbound, outbound, daily, and any other transportation.

(iv) If workers' compensation is used to cover transportation in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and it must have property damage insurance.

(i) \* \* \*

(1) \* \* \*

(i) For purposes of this paragraph (i)(1), a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract.

(ii) In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.



\* \* \* \* \*

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the highest wage rate set forth in § 655.120(a)(1).

(1) The employer must calculate workers' wages using the wage rate that will result in the highest wages for each worker in each pay period. When calculating wages based on an hourly wage rate, the calculation must reflect every hour or portion thereof worked during a pay period. The wages actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job order.

(2) Where the wage rates set forth in § 655.120(a)(1) include both hourly and non-hourly wage rates, the employer must calculate each worker's wages, in each pay period, using the highest wage rate for each unit of pay, and pay the worker the highest of these wages for that pay period. The wage actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job offer.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(4) If applicable, the employer must state in the job order:

(i) That overtime hours may be available;

(ii) The wage rate(s) to be paid for any such overtime hours;

(iii) 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, and whether overtime wage rates will vary between places of employment; and

(iv) Where the overtime pay is required by law, the applicable Federal, State, or local law requiring the overtime pay.

\* \* \* \* \*

(n) *Termination for cause or abandonment of employment.* (1) If a worker is terminated for cause or voluntarily abandons employment before the end of the contract period, and the employer notifies the NPC, and DHS in the case of an H-2A worker, in writing or by any other method specified by the Department in a notice published in the Federal Register or specified by DHS not later than 2 working days after such termination for cause or abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section, and, in the case of a U.S. worker, the employer will not be obligated to contact that worker under § 655.153.

(2) A worker is terminated for cause when the employer terminates the worker for failure to meet productivity standards or failure to comply with employer policies or rules.

(i) An employer may terminate a worker for cause only if all of the following conditions are satisfied:

(A) The employee has been informed (in a language understood by the worker) of the policy, rule, or productivity standard, or reasonably should have known of the policy, rule, or productivity standard;

(B) If the termination is for failure to meet a productivity standard, such standard is disclosed in the job offer;

(C) Compliance with the policy, rule, or productivity standard is within the worker's control;

(D) The policy, rule, or productivity standard is reasonable and applied consistently;

(E) The employer undertakes a fair and objective investigation into the job performance or misconduct; and

(F) The employer engages in progressive discipline to correct the worker's performance or behavior.

(ii) Progressive discipline is 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. Disciplinary measures should be proportional to the failure but may increase in severity if the failure is repeated, and may include immediate termination for egregious misconduct. Prior to each disciplinary measure, the employer must notify the worker of the infraction and allow the worker to present evidence in their defense. Following each disciplinary measure, except where the appropriate disciplinary measure is termination, the employer must provide relevant and adequate instruction to the worker, and the employer must afford the worker reasonable time to correct the behavior or to meet the productivity standard following such instruction. The employer must

document each disciplinary measure, evidence the worker presented in their defense, and resulting instruction, and must clearly communicate to the worker that a disciplinary measure has been imposed.

(iii) A worker is not terminated for cause where the termination is: contrary to a Federal, State, or local law; for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; because of discrimination on the basis of race, color, national origin, age, sex (including sexual orientation or gender identity), religion, disability, or citizenship; or, where applicable, where the employer failed to comply with its obligations under § 655.135(m)(4) in a meeting that contributed to the termination.

(iv) The employer bears the burden of demonstrating that any termination for cause meets the requirements of § 655.122(n)(2).

(3) Abandonment will be deemed to begin after a worker fails to report to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(4) The employer is required to maintain records described in this section for not less than 3 years from the date of the certification.

(i) Records of notification to the NPC, and to DHS in the case of an H-2A worker, of termination for cause or abandonment.

(ii) Disciplinary records, including each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker.

(iii) Records indicating the reason(s) for termination of any worker, including disciplinary records as described in § 655.122(n)(4)(ii) and § 655.167.

\* \* \* \* \*

10. Amend § 655.130 by revising paragraph (a) to read as follows:

**§ 655.130 Application filing requirements.**

\* \* \* \* \*

(a) *What to file.* (1) An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification*, all supporting documentation and information required at the time of filing under §§ 655.131 through 655.137, and, unless a specific exemption applies, a copy of Form ETA-790/790A, submitted as set forth in § 655.121(a).

(2) The *Application for Temporary Employment Certification* must include the employer's legal name, trade name(s), and a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted by prospective U.S. applicants for employment. For each employer of any worker employed under this application, the *Application for Temporary Employment Certification* must include the identity, location, and contact information of all persons who are the owners of that entity.

(3) For each place of employment identified in the job order, the *Application for Temporary Employment Certification* must include the identity, location, and contact information of all persons and entities, if different than the employer(s), who are the operators of the place of employment, and of all persons who manage or supervise any

worker employed under this application, regardless whether those managers or supervisors are employed by the employer or another entity.

(4) If the information specified in paragraphs (a)(2) and (3) changes during the work contract period, the employer must update its records to reflect the change. The employer must continue to keep this information up to date until the end of the work contract period, including any extensions. The employer must retain the updated information in accordance with § 655.167(c)(9) and must make this updated information available in the event of a post-certification audit or upon request by the Department. The Department may share the information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in § 655.130(f).

\* \* \* \* \*

11. Amend § 655.132 by revising paragraph (e)(1) to read as follows:

**§ 655.132 H-2A labor contractor filing requirements.**

\* \* \* \* \*

(e) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(1) All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA and that the fixed-site agricultural business has agreed to comply with the requirements at § 655.135(n); and

\* \* \* \* \*

12. Amend § 655.135 by revising the introductory paragraph, revising paragraph (h), and adding paragraphs (m), (n), (o), and (p) to read as follows:

**§ 655.135 Assurance and obligations of H-2A employers.**

An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and of 29 CFR part 501 and must make each of the following additional assurances:

\* \* \* \* \*

(h) *No unfair treatment.* (1) The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(i) Filed a complaint under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(ii) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(iii) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(v) Consulted with a key service provider on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(vi) Exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188; or

(vii) Filed a complaint, instituted or caused to be instituted any proceeding, or testified or is about to testify in any proceeding under or related to any applicable Federal, State, or local laws or regulations, including safety and health laws.

(2) With respect to any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f), the employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has engaged in activities related to self-organization, including: any effort to form, join, or assist a labor organization; a secondary activity such as a secondary boycott or picket; or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions; or refused to engage in any or all of such activities.

\* \* \* \* \*



(m) *Worker voice and empowerment.* With respect to any H-2A worker or worker in corresponding employment engaged in agriculture as defined and applied in 29 U.S.C. 203(f), employed at the place(s) of employment included in the *Application for Temporary Employment Certification*, the employer agrees to:

(1) Provide to a requesting labor organization a complete list of H-2A workers and workers in corresponding employment employed at the place(s) of employment included in the *Application for Temporary Employment Certification* within 1 week of the request. The list will be in alphabetical order (last name first) and will show the worker's full name, date of hire, job title, work location address and ZIP code, and if available, personal email address, personal cellular telephone number and/or profile name for a messaging application used by the worker to communicate, home country address with postal code, and home country telephone number. The list will be provided in an agreed-upon format and transmitted electronically. The employer must update the worker contact list upon the labor organization's request, but no more than once within the period of employment listed in the job order.

(2) Permit workers to designate a representative to attend any meeting between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline and permit workers to receive advice and active assistance from the designated representative during any such meeting. Where such meetings are held at a worker's place of employment or other privately owned property, workers' designated representatives must be given access to the place of employment or property as needed to attend and participate.

(3)(i) Refrain from engaging in coercive employer speech intended to oppose workers' protected activity unless the employer:

(A) Explains the purpose of the meeting or communication;

(B) Assures workers that attendance or participation is voluntary, and that they are free to leave at any time;

(C) Assures workers that nonattendance or nonparticipation will not result in reprisals (including any loss of pay if the meeting or discussion occurs during their regularly scheduled working hours); and

(D) Assures workers that attendance or participation will not result in rewards or benefits (including additional pay for attending meetings or discussions concerning their rights to engage in protected activity outside their regularly scheduled working hours).

(ii)(A) Obtain affirmative consent from a worker to talk to that worker in work areas during working hours concerning their rights to engage in protected activity, and

(B) Assure the worker that such discussions are entirely voluntary and that they may end the meeting or discussion at any time without loss of pay (either by leaving or by asking the employer to stop).

(4) Attest that the employer will either:

(i) Bargain in good faith with a requesting labor organization over the terms of a proposed labor neutrality agreement, meaning an agreement in which the employer agrees to not take a position for or against a labor organizing effort; or

(ii) Not bargain in good faith with a requesting labor organization over the terms of a proposed labor neutrality agreement and provide an explanation for why it has declined to do so.

(n) *Access to worker housing.* (1) 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 the workers' workday subject only to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas.

(2) Where employer-furnished housing in which any H-2A worker or worker in corresponding employment engaged in agriculture as defined and applied in 29 U.S.C. 203(f) resides is located on property or in a facility not readily accessible to the public, a labor organization must not be denied access to the common areas or outdoor spaces near such housing for the purpose of meeting with workers, provided that such meetings occur outside of the workers' workday and do not exceed a total of 10 hours per month.

(o) *Passport withholding.* During the period of employment that is the subject of the *Application for Temporary Labor Certification*, the employer may not hold or confiscate a worker's passport, visa, or other immigration or government identification document *except* where the worker states in writing that: the worker voluntarily requested that the employer keep these documents safe, the employer did not direct the worker to submit such a request, and the worker understands that the passport, visa, or other immigration or government identification document will be returned to the worker immediately upon the worker's request.

(p) *Foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with § 655.137(a) by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2A

workers, and the identity and location of the persons and entities hired by or working for the agent or recruiter and any of the agents and employees of those persons and entities, to recruit foreign workers. Pursuant to § 655.130(a), the agreements and information must be filed with the *Application for Temporary Employment Certification*. The employer must update this documentation in accordance with § 655.137(c).

13. Add § 655.137 to subpart B to read as follows:

**§ 655.137 Disclosure of foreign worker recruitment.**

(a) If the employer engaged an agent or foreign labor recruiter, directly or indirectly, in international recruitment, the employer, and its attorney or agent, as applicable, must provide copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunity, as specified in § 655.135(p). These agreements must contain the contractual prohibition against charging fees as set forth in § 655.135(k).

(b) The employer, and its attorney or agent, as applicable, must provide all recruitment-related information required in the *Application for Temporary Employment Certification*, as defined in § 655.103(b), which includes the identity and location of all persons and entities hired by or working for the recruiter or agent, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H-2A job opportunity.

(c) The employer must continue to keep the foreign labor recruiter information referenced in paragraphs (a) and (b) up to date until the end of the work contract period. The employer must retain the updated information in accordance with § 655.167(c)(8) and must make this updated information available in the event of a post-certification

audit or upon request by the Department. The Department may share the foreign worker recruitment information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in § 655.130(f).

(d) The Department of Labor will maintain a publicly available list of agents and recruiters (including government registration numbers, if any) who are party to the agreements employers submit, as well as the persons and entities the employer identified as hired by or working for the recruiter and the locations in which they are operating.

14. Amend § 655.145 by revising the section heading and revising paragraph (b) to read as follows:

**§ 655.145 Pre-determination amendments to applications for temporary employment certification.**

\* \* \* \* \*

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment before the CO issues a final determination. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

15. Amend § 655.167 by revising paragraphs (c)(6) and (7) and adding paragraphs (c)(8) through (12) to read as follows:

**§ 655.167 Document retention requirements of H-2A employers.**

\* \* \* \* \*

(c) \* \* \*

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in § 655.103(b) and specified in § 655.122(q).

(7) If applicable, records of notice to the NPC and to DHS of the abandonment of employment or termination for cause of a worker as set forth in § 655.122(n).

(8) Written contracts with agents or recruiters as specified in § 655.137(a) and the identities and locations of persons hired by or working for the agent or recruiter and the agents and employees of these agents and recruiters, as specified in § 655.137(b).

(9) The identity, location, and contact information of all persons who are the owners of each employer, as specified in § 655.130(a)(2), and the identity, location, and contact information of all persons and entities who are the operators of the place of employment (if different than the employers) and of all persons who manage or supervise any worker employed under the application, as specified in § 655.130(a)(3).

(10) If applicable, disciplinary records, including each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker.

(11) If applicable, records indicating the reason(s) for termination of any worker, including disciplinary records described in § 655.122(n)(4)(ii) and § 655.167, relating to the termination as set forth in § 655.122(n).

(12) If applicable, evidence demonstrating the employer notified the SWA and each worker of an unforeseen minor delay in the start date of need, as specified in § 655.175(b)(2)(i).

\* \* \* \* \*

16. Add § 655.175 to subpart B to read as follows:

**§ 655.175 Post-certification changes to applications for temporary employment certification.**

(a) *No post-certification changes.* The *Application for Temporary Employment Certification* may not be changed after certification, except where authorized in this subpart. The employer is obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with its certification.

(b) *Post-certification changes to the first date of work.* Where the work under the approved *Application for Temporary Employment Certification* will not begin on the first date of need certified and will be delayed for a period of no more than 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, the employer need not withdraw an approved *Application for Temporary Employment Certification*, provided the employer complies with the obligations at paragraphs (b)(1) and (2) of this section.

(1) In the event of a minor delay (no more than 14 calendar days), the employer must 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, daily subsistence in

the same amount required during travel under § 655.122(h)(1), except for days for which the worker receives compensation under paragraph (b)(2)(ii) of this section. The employer must fulfill this subsistence obligation to the worker no later than the first date the worker would have been paid had they begun employment on time. Employers must comply with all other requirements of the certified *Application for Temporary Employment Certification* beginning on the first date of need certified, including but not limited to housing under § 655.122(d).

(2)(i) In the event of a minor delay (no more than 14 calendar days), the employer must notify the SWA and each worker to be employed under the approved *Application for Temporary Employment Certification* of the delay at least 10 business days before the certified start date of need. The employer must contact the worker in writing (email and other forms of electronic and written notification are acceptable), using the contact information the worker provided to the employer. The employer must retain evidence of such notification under § 655.167.

(ii) If the employer fails to provide timely notification required under paragraph (b)(2)(i) of this section to any worker(s), the employer must pay such worker(s) the same rate of pay required under this subpart B, for each hour of the offered work schedule in the job order, for each day that work is delayed, for a period up to 14 calendar days. The employer must fulfill this obligation to the worker no later than the first date the worker would have been paid had they begun employment on time.

(iii) For purposes of an employer's compliance with the three-fourths guarantee under § 655.122(i), any compensation paid to a worker under paragraph (b)(2)(ii) of this



section for any workday included within the time period described in § 655.122(i) will be considered hours offered to the worker.

17. Amend § 655.181 by revising paragraph (a)(1) to read as follows:

**§ 655.181 Revocation.**

(a) \* \* \*

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process, including because the certification was issued in error to a debarred employer, including a successor in interest, during the period of debarment as set forth in § 655.182(c)(2);

\* \* \* \* \*

18. Amend § 655.182 by revising paragraphs (a), (b), (d)(1)(viii), (f)(1) through (4), and (f)(5)(i) to read as follows:

**§ 655.182 Debarment.**

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501 subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H-2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* (1) No application for H-2A workers may be filed by or on behalf of a debarred employer, or by an employer represented by a

debarred agent or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If such an application is filed, it will be denied without review.

(2) No application for H-2A workers may be filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If the CO determines that such an application is filed, the CO will issue a NOD pursuant to § 655.141 or deny the application pursuant to § 655.164, as appropriate depending upon the status of the *Application for Temporary Employment Certification*, solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. The employer, agent, or attorney may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at § 655.171.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(viii) A violation of the requirements of § 655.135(j), (k), or (o);

\* \* \* \* \*

(f) \* \* \*

(1) *Notice of debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, or attorney, the OFLC Administrator will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a

hearing within 14 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 14-day period.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of paragraph (f)(3) of this section. The party must request a hearing within 14 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency action and the debarment will take effect at the end of the 14-calendar-day period.

(i) The OFLC Administrator may grant one extension of the time period for filing rebuttal evidence for any party that has shown good and substantial cause.

(ii) If the party seeks to request a one-time extension of time to submit rebuttal evidence, the party must make the request in writing to the OFLC Administrator and the written request for extension must be received by the OFLC Administrator within 14 calendar days of the date the Notice of Debarment is issued. Such a request must be made in writing to the OFLC Administrator.

(iii) Only requests that include detailed information and supporting documentation describing the good and substantial cause that has necessitated the one-

time extension request may be granted. Good and substantial cause may include, but is not limited to, health-related emergencies, catastrophic fire- or weather-related incidents, or other similar conditions that are wholly outside the party's control and hinder the party's ability to respond with rebuttal evidence within the required timeframe. A denial of a one-time extension request is not appealable.

(3) *Hearing.* The recipient of a Notice of Debarment may request a debarment hearing within 14 calendar days of the date of a Notice of Debarment or the date of a final determination of the OFLC Administrator after review of rebuttal evidence submitted pursuant to paragraph (f)(2) of this section. To obtain a debarment hearing, the debarred party must, within 14 calendar days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street NW, Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 14 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 14 calendar days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 calendar days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately to the parties to the debarment hearing by means normally assuring next-day delivery. The ALJ's decision is the final agency action, unless either party, within 14 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) \* \* \*

(i) Any party wishing review of the decision of an ALJ must, within 14 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ will be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

\* \* \* \* \*

19. Add § 655.190 to subpart B to read as follows:

**§ 655.190 Severability.**

If any provision of this subpart is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the

provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from this subpart and shall not affect the remainder thereof.

20. Amend § 655.210 by adding paragraph (g)(3) to read as follows:

**§ 655.210 Contents of herding and range livestock job orders.**

\* \* \* \* \*

(g) \* \* \*

(3) If applicable, the employer must state in the job order:

(i) That overtime hours may be available;

(ii) The wage rate(s) to be paid for any such overtime hours;

(iii) 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, and whether overtime wage rates will vary between place(s) of employment; and

(iv) Where the overtime pay is required by law, the applicable Federal, State, or local law requiring the overtime pay.

\* \* \* \* \*

**PART 658 – ADMINISTRATIVE PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE**

21. The authority citation for part 658 continues to read as follows:

Secs. 189, 503, Pub. L. 113-128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B.

22. Amend § 658.500 by revising to read as follows:

**§ 658.500 Scope and purpose of subpart.**

(a) This subpart contains the regulations governing the discontinuation of services provided by the ES to employers pursuant to parts 652 and 653 of this chapter.

(b) For purposes of this subpart only, where the term “employer” is used, it refers to employers, agents, farm labor contractors, joint employers, and successors in interest to any employer, agent, farm labor contractor, or joint employer, as defined at § 651.10.

23. Amend § 658.501 by revising paragraphs (a)(1) and (2), (a)(4) through (8), and (b) and removing paragraph (c) to read as follows:

**§ 658.501 Basis for discontinuation of services.**

(a) \* \* \*

(1) Submit and refuse to correct or withdraw job orders containing terms and conditions which are contrary to employment-related laws;

(2) Submit job orders and refuse to provide assurances, or refuse to withdraw job orders that do not contain assurances, required pursuant to the Agricultural Recruitment System for U.S. Workers at part 653, subpart F, of this chapter;

\* \* \* \* \*

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency, including those who are currently debarred from participating in the H-2A or H-2B foreign labor certification programs pursuant to § 655.73, § 655.182, 29 CFR 501.20, or 29 CFR 503.24;

(5) Are found to have violated ES regulations pursuant to § 658.411 or 658.419;

(6) Refuse to accept qualified workers referred through the clearance system for criteria clearance orders filed pursuant to 20 CFR part 655, subpart B;

(7) Refuse to cooperate in field checks conducted pursuant to § 653.503 of this chapter; or

(8) Repeatedly cause the initiation of the procedures for discontinuation of services pursuant to paragraphs (a)(1) through (7) of this section.

(b) If an ES office or SWA has information that an employer participating in the ES may not have complied with the terms of its current or prior temporary labor certification, under, for example the H-2A and H-2B visa programs, SWA officials must determine whether there is a basis under § 658.501(a) for which the SWA must initiate procedures for discontinuation of services. SWA officials must simultaneously notify the OFLC National Processing Center of the alleged non-compliance.

24. Amend § 658.502 by revising paragraphs (a) and (b) and removing paragraphs (c) and (d) to read as follows:

**§ 658.502 Notification to employers of intent to discontinue services.**

(a) Except as provided in paragraph (b) of this section, where the SWA determines that there is an applicable basis for discontinuation of services under § 658.501(a)(1) through (8), the SWA must notify the employer in writing that it intends to discontinue the provision of ES services in accordance with this section and must provide the reasons for proposing discontinuation of services.

(1) Where the decision is based on § 658.501(a)(1), the SWA must specify the date the order was submitted, the job order involved, and the terms and conditions contrary to employment-related laws and the laws involved. The SWA must notify the



employer in writing that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the terms and conditions are not contrary to employment-related laws; or

(ii) Withdraws the terms and conditions and resubmits the job order in compliance with all employment-related laws; or

(iii) If the job is no longer available, makes assurances that all future job orders submitted will be in compliance with all employment-related laws.

(2) Where the decision is based on § 658.501(a)(2), the SWA must specify the date the order was submitted, the job order involved, the assurances involved, and explain how the employer refused to provide the assurances. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Resubmits the order with the required assurances; or

(ii) If the job is no longer available, makes assurances that all future job orders submitted will contain all assurances required pursuant to the Agricultural Recruitment System for U.S. Workers at part 653, subpart F, of this chapter.

(3) Where the decision is based on § 658.501(a)(3), the SWA must specify the terms and conditions the employer misrepresented or the assurances with which the employer did not fully comply, and explain how the employer misrepresented the terms or conditions or failed to comply with assurances on the job order. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that terms and conditions of employment were not misrepresented; or

(ii) Provides adequate evidence that there was full compliance with the assurances made on the job orders; or

(iii) Provides adequate evidence that it has resolved the misrepresentation of terms and conditions of employment or noncompliance with assurances and provides adequate assurance that specifications on future orders will accurately represent the terms and conditions of employment and that there will be full compliance with all job order assurances.

(4) Where the decision is based on § 658.501(a)(4), the SWA must provide evidence of the final determination, including debarment. For final determinations, the SWA must specify the enforcement agency's findings of facts and conclusions of law as to the employment-related law violation(s). For final debarment orders, the SWA must specify the time period for which the employer is debarred from participating in one of the Department's foreign labor certification programs. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the enforcement agency's determination is not final because, for example, it has been stayed pending appeal, overturned, or reversed; or

(ii) Provides adequate evidence that, as applicable:

(A) The Department's debarment is no longer in effect; and

(B) The employer has completed all required actions imposed by the enforcement agency as a consequence of the violation, including payment of any fines or restitution to remediate the violation; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on § 658.501(a)(5), the SWA must specify which ES regulation the employer has violated and must provide basic facts to explain the violation. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the employer did not violate ES regulations;  
or

(ii) Provides adequate evidence that appropriate restitution has been made or remedial action taken; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(6) Where the decision is based on § 658.501(a)(6), the SWA must indicate that the employer filed the job order pursuant to § 655, subpart B, and specify the name of each worker the SWA referred and the employer did not accept. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the workers were accepted; or

(ii) Provides adequate evidence that the workers were not available to accept the job; or

(iii) Provides adequate evidence that the workers were not qualified; or

(iv) Provides adequate evidence that the workers were referred after the time period described in § 655.135(d) elapsed; or

(v) Provides adequate evidence that:

(A) After refusal, the employer accepted the qualified workers referred, or

(B) Appropriate restitution has been made or other remedial action taken; and

(vi) Provides assurances that qualified workers referred in the future will be accepted or, if the time period described in § 655.135(d) has lapsed, provides assurances that qualified workers referred on all future criteria clearance orders will be accepted.

(7) Where the decision is based on § 658.501(a)(7), the SWA must explain how the employer did not cooperate in the field check. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that it did cooperate; or

(ii) Immediately cooperates in the conduct of field checks; and

(iii) Provides assurances that it will cooperate in future field checks.

(8) Where the decision is based on § 658.501(a)(8), the SWA must list and provide basic facts explaining the prior instances where the employer has repeatedly caused initiation of discontinuation proceedings. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days provides adequate evidence that the SWA's initiation of discontinuation in prior proceedings was unfounded.

(b) SWA officials must discontinue services immediately in accordance with § 658.503, without providing the notice described in this section, if an employer has met any of the bases for discontinuation of services under § 658.501(a) and, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this section would cause substantial harm to workers.

25. Amend § 658.503 by revising paragraphs (a) and (b) and adding paragraphs (c), (d), (e), and (f) to read as follows:

**§ 658.503 Discontinuation of services.**

(a) Within 20 working days of receipt of the employer's response to the SWA's notification under § 658.502(a), or at least 20 working days after the SWA's notification has been received by the employer if the SWA does not receive a response, the SWA must notify the employer in writing of its final determination. If the SWA determines that the employer did not provide a satisfactory response in accordance with § 658.502(a), the SWA's notification must specify the reasons for its determination and state that the discontinuation of services is effective 20 working days from the date of the notification. The notification must also state that the employer may request reinstatement or appeal the determination by requesting a hearing pursuant to § 658.504, and that a request for a hearing stays the discontinuation pending the outcome of the hearing. If the employer does not request a hearing, the SWA must also notify the ETA Office of Workforce Investment of any final determination to discontinue ES services within 10 working days of the date the determination becomes effective.

(b) Where the SWA discontinues services immediately under § 658.502(b), the SWA's written notification must specify the facts supporting the applicable basis for

discontinuation under § 658.501(a), the reasons that exhaustion of the administrative procedures would cause substantial harm to workers, and that services are discontinued as of the date of the notification. The notification must also state that the employer may request reinstatement or appeal the determination by requesting a hearing pursuant to § 658.504, and that a request for a hearing relating to immediate discontinuation does not stay the discontinuation pending the outcome of the hearing. Within 10 working days of the date of issuance, the SWA must also notify the ETA Office of Workforce Investment of any determination to immediately discontinue ES services.

(c) If the SWA discontinues services to an employer that is subject to Federal Contractor Job Listing Requirements, the SWA must notify the ETA regional office immediately.

(d) If the SWA discontinues services to an employer based on a complaint filed pursuant to § 658.411, the SWA must notify the complainant of the employer's discontinuation of services.

(e) If the SWA discontinues services to an employer, the employer cannot participate in or receive Wagner-Peyser Act ES Services provided by the ES, including by any SWA, to employers pursuant to parts 652 and 653 of this chapter. From the date of discontinuance, the SWA that issued the determination must remove the employer's active job orders from the clearance system. No SWA may process any future job orders from the employer or provide any other services pursuant to parts 652 and 653 of this chapter to the employer unless services have been reinstated under § 658.504.

(f) SWAs must continue to provide the full range of ES and other appropriate services to workers whose employers experience discontinuation of services under this subpart.

26. Amend § 658.504 by revising paragraphs (a), (b), and (c) and removing paragraph (d) to read as follows:

**§ 658.504 Reinstatement of services.**

(a) Where the SWA discontinues services to an employer under § 658.502(b) or § 658.503, the employer may submit a written request for reinstatement of services to the SWA or may, within 20 working days of receiving notice of the SWA's final determination, appeal the discontinuation by submitting a written request for a hearing.

(b) If the employer submits a written request for reinstatement of services to the SWA:

(1) Within 20 working days of receipt of the employer's request for reinstatement, the SWA must notify the employer of its decision to grant or deny the request. If the SWA denies the request for reinstatement, it must specify the reasons for the denial and notify the employer that it may request a hearing, in accordance with paragraph (c), within 20 working days.

(2) The SWA must reinstate services if:

(i) The employer provides adequate evidence that the policies, procedures, or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar circumstances are not likely to occur in the future; and

(ii) The employer provides adequate evidence that it has responded to all findings of an enforcement agency, SWA, or ETA, including payment of any fines or restitution to

remediate the violation, which were the basis of the discontinuation of services, if applicable.

(c) If the employer submits a timely request for a hearing:

(1) The SWA must follow the procedures set forth in § 658.417.

(2) The SWA must reinstate services to the employer if ordered to do so by a State hearing official, Regional Administrator, or Federal Administrative Law Judge as a result of a hearing offered pursuant to paragraph (c)(1) of this section.

(d) Within 10 working days of the date of issuance, the SWA must notify the ETA Office of Workforce Investment of any determination to reinstate ES services, or any decision on appeal upholding a SWA's determination to discontinue services.

## **Title 29: Labor**

### **Office of the Secretary of Labor**

#### **PART 501 - ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT**

27. The authority citation for part 501 continues to read as follows:

8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114-74 at § 701.

28. Amend § 501.3 by revising paragraph (a) to add the definitions of *key service provider* and *labor organization*, and remove the definition of *successor in interest* and adding paragraph (d) to read as follows:

#### **§ 501.3 Definitions.**

(a) \* \* \*



\* \* \* \* \*

*Key service provider.* A health-care provider; a community health worker; an education provider; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; and any other service provider to which a worker may need access.

*Labor organization.* Any organization of any kind, or any agency or employee representation committee or plan, in which workers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

\* \* \* \* \*

(d) *Definition of single employer for purposes of temporary or seasonal need and contractual obligations.* Separate entities will be deemed a single employer (sometimes referred to as an “integrated employer”) for purposes of assessing temporary or seasonal need and for enforcement of contractual obligations if they meet the definition of single employer. Under the definition of single employer, a determination of whether separate entities are a single employer is not determined by a single factor, but rather the entire relationship is viewed in its totality. Factors considered in determining whether two or more entities consist of a single employer include:

- (1) Common management;
- (2) Interrelation between operations;
- (3) Centralized control of labor relations; and
- (4) Degree of common ownership/financial control.

29. Amend § 501.4 by revising paragraph (a) to read as follows:

**§ 501.4 Discrimination prohibited.**

(a)(1) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(i) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(ii) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(iii) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(v) Consulted with a key service provider on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(vii) Filed a complaint, instituted or caused to be instituted any proceeding, or testified or is about to testify in any proceeding under or related to any applicable Federal, State, or local laws or regulations, including safety and health laws.

(2) With respect to any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f), a person may not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and may not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has engaged in activities related to self-organization, including: any effort to form,

join, or assist a labor organization; a secondary activity such as a secondary boycott or picket; or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions; or refused to engage in any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

\* \* \* \* \*

30. Add § 501.10 to subchapter A to read as follows:

**§ 501.10 Severability.**

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision or sub-provision shall be severable from this part and shall not affect the remainder thereof.

31. Amend § 501.20 by revising paragraphs (a), (b), (d)(1)(viii), and (e) and adding paragraph (j) to read as follows:

**§ 501.20 Debarment and revocation.**

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H-2A workers, workers in corresponding employment,

or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* (1) No application for H-2A workers may be filed by or on behalf of a debarred employer, or by an employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c)(2) of this section. If such an application is filed, it will be denied without review.

(2) No application for H-2A workers may be filed by or on behalf of a successor in interest, as defined in 20 CFR 655.104, to a debarred employer, agent, or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If the CO determines that such an application is filed, the CO will issue a NOD pursuant to 20 CFR 655.141 or deny the application pursuant to 20 CFR 655.164, as appropriate depending upon the status of the *Application for Temporary Employment Certification*, solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. The employer, agent, or attorney may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at 20 CFR 655.171.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(viii) A violation of the requirements of 20 CFR 655.135(j), (k), or (o);

\* \* \* \* \*

(e) *Procedural requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds

for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a timeframe under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 14 calendar days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 14 calendar days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

\* \* \* \* \*

(j) *Successors in interest.* When an employer, agent, or attorney is debarred under this section, any successor in interest to the debarred employer, agent, or attorney is also debarred, regardless of whether the successor is named or not named in the notice of debarment issued under paragraph (a) of this section.

32. Amend § 501.33 by revising paragraphs (a), (b)(2), and (c) to read as follows:

**§ 501.33 Request for hearing.**

(a)(1) Any person desiring review of a determination referred to in § 501.32, including judicial review, except any determination that includes debarment, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(2) Any person desiring review of any determination that includes debarment, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 14 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) \* \* \*

(2) Specify the issue or issues stated in the notice of determination giving rise to such request (any issues not raised in the request ordinarily will be deemed waived);

\* \* \* \* \*

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraphs (a)(1) or (a)(2) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

\* \* \* \* \*

33. Amend § 501.42 by revising paragraph (a) to read as follows:

**§ 501.42 Procedures for initiating and undertaking review.**

(a) A respondent, WHD, or any other party wishing review, including judicial review, of a decision of an ALJ not including debarment must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. A respondent, WHD, or any other party wishing review, including judicial review, of a decision of an ALJ involving debarment must, within 14 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of any decision (whether involving debarment, or not) within 30 calendar days after receipt of a timely filing of the petition, the decision of the ALJ will be deemed the final agency action. If within 30 calendar days of the date of a decision not involving debarment, or within 14 calendar days of the date of a decision involving debarment no petition has been received, the decision of the ALJ will be deemed the final agency action.

\* \* \* \* \*

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Julie A. Su,

Acting Secretary of Labor.