INTERNATIONAL FRESH PRODUCE ASSOCIATION℠

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Re: Department of Labor NPRM Improving Protections for Workers in Temporary Agricultural Employment in the United States; Docket No. ETA–2023– 0003 RIN 1205–AC12

To Whom it May Concern:

On behalf of International Fresh Produce Association (IFPA), we appreciate the opportunity to comment on the proposed rule entitled "Improving Protections for Workers in Temporary Agricultural Employment in the United States" (RIN 1205-AC12, ETA-2023-0003) that was published in the Federal Register by the U.S. Department of Labor (Department) on September 15, 2023.

Established in 2022 and founded on a deep-seated history of leadership from the Produce Marketing Association and United Fresh Produce Association, our trade association represents over 2500 companies from every segment of the global fresh produce supply chain, including over 500 companies directly involved in the organic fresh fruit, vegetable, and floral supply chain. IFPA is committed to serving all sectors of the produce industry through government advocacy, global engagement, and expertise in food safety, technology, supply chain management, sustainability, marketing, and leadership. Through these efforts, IFPA will enable the produce industry to grow and drive increased fruit and vegetable consumption, including those organically produced, which is a vital cornerstone of public health. Critical to that growth is access to a stable workforce. The majority of H-2A workers are employed in fruits, vegetables, and horticultural specialty crops. Also, labor's share of the cost of production can run as high as 38 percent for fruit and tree nut farms and 29 percent for vegetables and melons.[1] As a result, the impacts of this

[1] U.S. Fruit and Vegetable Industries Try To Cope With Rising Labor Costs, USDA Economic Research Service, December 28, 2022 accessed at: https://www.ers.usda.gov/amber-waves/2022/december/u-s-fruit-and-vegetable-industries-try-to-cope-with-rising-labor-costs/

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proposed rule will be far reaching within our membership and allow IFPA to provide valuable input to the Department as it considers final policies.

Background:

IFPA members agree that worker safety and fair treatment are of the utmost importance. All issues related to their enforcement must be treated with the seriousness it deserves. Prior to our formation, the organizations that created IFPA - the Produce Marketing Association and the United Fresh Produce Association - adopted The Ethical Charter on Responsible Labor Practices in January 2018. Our industry undertook this effort because we share a vision for an industry framework on how to responsibly produce and source fresh fruits, vegetables, and flowers.

It is imperative that all workers in the fresh produce supply chain are treated fairly and with respect. It is also important that employers abide by all applicable laws and regulations. The good news, supported by factual evidence, is that a vast majority of farm employers not only comply with all regulations and employment related laws, but they go further to treat their employees like family. This is demonstrated by the high number of workers that return year after year to the same farm. It is also demonstrated by the Department's own Wage & Hour enforcement data showing that 71 percent of all violations found on vegetable farms occurred on only 5 percent of all the U.S. vegetable farms during fiscal years 2005–2019.[2] And in these cases of violations, IFPA supports strong enforcement against program violators and swift action to prevent worker exploitation. However, if finalized, this rule would penalize and place excessive regulatory burdens on the other 95% of those U.S. farms as well as the 5% of violators. Further concerning, these suggestions would create a regulatory environment where minor paperwork mistakes would result in increasing violations and fines rather than focusing enforcement on violations that improve employee's health and safety conditions.

Congress created the H-2A program to ensure farm employers have access to the labor they so critically need to harvest and prune their crops. Over the past few years, there has been increased usage of H-2A workers as a result of the further reduction of domestic citizens pursuing agricultural jobs. As the average domestic agriculture employee reaches an age that makes agricultural field work untenable, there are too few domestic workers taking these positions. Citing a USDA report, the Department appropriately notes that United States agricultural employment figures have remained stable, yet the H-2A program has grown considerably over the past decade.[3] This is a representation of the industry simply still needing those workers, not a reflection of participation. However, citing a worker advocate study surveying .001 percent of the H-2A workers during the relevant 4-year time period[4], the Department mistakenly determined that the cause of the growth of the H-2A program within the overall agricultural workforce was due to "worsening working conditions in agricultural employment" leading to a "decreasing number of domestic workers will to accept such work.[5]" IFPA fundamentally disputes this statement, noting first and foremost that the Department failed to provide any factual basis for this determination. Not to mention this type of rhetoric reflects a clear bias and prejudice against the agricultural employers and the daily, labor-intensive work needed in agriculture. A realistic explanation for the growth in the H-2A program is more likely

[2] https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/#epi-toc-21
[3] 88 Fed. Reg. 63787 (September 15, 2023)
[4] Report of the Visa Office, Nonimmigrant Visas Issued by Classification Fiscal Years 2016-2020 https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport_TableXV_B.pdf
[5] 88 Fed. Reg. 63788 (September 15, 2023)

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a result of an aging domestic agricultural workforce and a decrease in the number of migratory farmworkers.[6] Additionally, increased workforce immigration enforcement has led more employers to the H-2A program.[7] IFPA strongly encourages the Department to provide an adequate factual basis for determination as required under law, which the Department can then utilize to provide reasoning for its policy proposals to create protected activities and require increased employer disclosures. In consideration of this clear bias by the Department, IFPA calls upon the Department to recall these "suggestions" and instead propose a set of regulations generated from a place of factual information, through communication with all stakeholders, with an honest intention to improve foreign worker conditions in the US without creating a hostile regulatory environment for U.S. agriculture and American farmers.

General Comments:

The following is an extensive commentary on each of the Department's proposals; however, at the outset, our organization would like to specifically highlight two key presumptions that underpin the Department's proposal.

First, IFPA disagrees with the presumption that H-2A workers are more "vulnerable" due to their status as an H-2A worker. More than thirty times in the proposed rule, the Department calls the agricultural workforce "vulnerable" without providing a reasoned or factual basis for the assumption. The Department cites its "enforcement experience" but does not elaborate how its enforcement experience demonstrates a "widespread vulnerability" that could provide a reasonable basis for this premise.[8] The Department also attempts to use certain characteristics of the H-2A program to meet its regulatory burden. Specifically, the Department cites "the temporary nature of the work, frequent geographic isolation of the workers, and dependency on a single employer" and "dependency on a single employer for work, housing, transportation, and necessities."[9] It is unfathomable that the Department is utilizing its own extensive regulatory requirements as its rationale for more regulatory requirements on US businesses. Continuing the suggestions without factual support, the Department also attributes this "vulnerability" to the lack of union presence in agriculture yet fails to provide a basis on how a lack of union presence makes the workers vulnerable. The Department simply states it as fact without even attempting to provide a rational legal or economic argument that would meet its regulatory burden. Contrary to the Department's assumption, as the H2A program usage has grown, employers have developed a deeper understanding of the program and as a result continue to adopt protocols to ensure compliance, more transparent and efficient recruiting practices, as well as incentive packages for workers to return. This fact is confirmed by the Department's enforcement data showing that the majority of violations are from a small percentage of employers. Moreover, it is IFPA members' experience that the majority of H-2A workers return year after year to the same farm and are eager to recruit friends and family members into the program. Also, this program provides a significant financial opportunity for this critical workforce and their families, which is not accounted for by the Department within this proposal. There is a clear lack of evidence presented by the Department to support the accusations of vulnerability that appear to have driven the Department's entire rulemaking, and thus IFPA must reiterate the necessity of the Department to withdraw this proposal and start again from a point of transparency and evidence based proposed program improvements.

Second, IFPA opposes the Department's proposal to create a new category of protected activity via regulation. Throughout this rulemaking, the Department simply picks and chooses which legal authorities meet the policy goal

[6] USDA Economic Research Service, Farm Labor https://www.ers.usda.gov/topics/farm-economy/farm-labor/#recent
[7] Department of Homeland Security, ICE; HIS FY 18 Achievements Worksite Enforcement; fhttps://www.ice.gov/features/worksite-enforcement
[8] 88 Fed. Reg. 63753 FN8
[9] Id. At 63788; 63789

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of union expansion and disregards the provisions of those laws that do not fit said objective. The Department fails to identify a clear legal authority for this particular rulemaking, including its many individual parts, each of which is extremely consequential for the regulated community. In fact, this aspect of the regulatory proposal is grounded in statutory schemes that explicitly exempt farm workers. Congress exempted farmworkers from certain provisions under the National Labor Relations Act (NLRA) because it recognized the administrative burden that union activity would have on food production in the United States.[10] In the preamble, the Department repeatedly pulls provisions from the NLRA for individual policy changes yet claims that the NLRA exemption does not preempt the proposed changes.[11] Also, it improperly relies on case law granting authority to states; each distinguishable from the current proposal where a federal regulator is attempting to assert authority over an exempt population.[12] Moreover, the Department is suggesting a significant increase of its own authority under the Immigration and Nationality Act (INA) by including proposals that are a clear and gross overreach of regulatory authority. The Department fails to provide a factual basis to demonstrate an adverse effect on U.S. workers necessary to justify the proposals related to "protected activity" (e.g., disclosure of employee personal information, access to employer-owned housing to labor organizations, releasing employer decisions related to labor neutrality agreements) under the INA. What remains unanswered throughout the entire Department proposal is how greater access for labor organizations to foreign-citizen workers in the H2A program will improve conditions for U.S. workers elsewhere.[13] Essentially, the Department fails to identify the statutory authority and a rational basis to justify this expansion of union access that exceeds the access given to unions in domestic worker settings.

The Department has not been granted an unlimited power to make statutory rules on all manner of subjects. This attempt to craft massive, complex, and nearly limitless new powers for the Department goes well beyond what has been articulated in statute and what has been identified as proper statutory authority by the Department. The Department should abandon this regulatory expedition and stick to its core statutory duties. See, e.g., West Virginia v. EPA, 142 S. Ct. 2587 (2022).

Proposed Regulations Governing Wagner-Peyser Act Employment Service and Discontinuation of Services (Parts 651, 653, and 658).

IFPA opposes the proposed revisions to the employment services regulations and believes it could have grave impact on employers' access to the H-2A program. The ability to access employment services is mandatory for participation in the H-2A program. The proposed revisions to employment services regulations, if finalized, would have devasting impacts on program access for employers acting in good faith and result in additional processing costs and delays, and prevent compliant employers from receiving critical services.

Definitional Expansion

[10] Id. At 63789
[11] Id at 63793
[12] See *San Diego Bldg. Trades Council V. Garmon*, 359 U.S. 236 (1959); *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380 (1986); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573 (D. Minn. 1977); *Int'l Ass'n of Machinists & Aero. Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976); *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249 (9th Cir. 1982)

[13] Id. At 63754

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The Department proposes to add agents (which includes attorneys), farm labor contractors, joint employers, and successors in interest to the entities that are subject to discontinuation of services.[14] IFPA opposes the inclusion of "agent," "farm labor contractor," or "joint employer" in this section. This expansion will have far reaching negative implications. As the Department is aware, farmers turn to agents and attorneys to assist in the processing of their H-2A clearance orders, certifications, and petitions. The role these third parties play in the process is invaluable to farm employers, specifically small farm employers without staff or expertise to undertake the process. Farm employers and these third-parties have an agency relationship limiting employers ability to take preventative action prior to facing the dire consequences outlined in this proposal.

IFPA has concerns regarding the upstream impact on other employers whose agent, FLC, or attorney has been subject to a discontinuation of services. As proposed, a discontinued third party would be prevented from gaining access to employment services on behalf of any other clients in any other state. This would impact farm employers all over the country who, in good faith, relied on that third party and could not anticipate the SWA action. The time for filing a clearance order and the date of need is incredibly tight, a timing that is often established by a crop that has been planned and planted long before any application is submitted. American farmers will suffer significant financial losses caused by circumstances they have no control over, leaving them with crops in the field and no harvesters to collect those goods from the fields. Additionally, they would have increased costs associated with hiring a new third party to immediately fill the gap or redirect staff resources to undertake the task while the company is preparing for harvest (a busier time of year which often involves many longer hours per day). The Department does not provide clarity as to whether the SWA will be reviewing the filing entity, the underlying employer, or both. For instance, an agent files on behalf of Farm XY. The SWA determines a basis for discontinuation against Farm XY. Would the discontinuation apply to the agent, Farm XY, or both? In this situation, if the agent is prevented from using employment services, it would be impossible for the other farmer clients of the agent to prepare for that situation but yet would be prevented from using that agent. IFPA encourages the Department to evaluate the unintentional impacts of the expansion of the definition to include agents, attorneys, farm labor contractors, joint employers, and successors in interest to entities subject to discontinuation of services.

Basis for Discontinuation

The Department proposes to clarify the basis for discontinuation from employment services by the State Workforce Agencies (SWA) due to its perceived limited use of the existing authority. The Department notes recent training efforts have increased the use of this authority, but still believes additional clarity needs to be provided to empower SWA's to use the authority.[15] While a lack of intra-governmental education may be at fault, IFPA is aware that many SWA's have limited resources and are often short-staffed, which may also be a contributing factor to the use of this authority. Also, many SWA's work closely with their growers where clarification or questions may arise rather than simply discontinuing access to the services. Regardless, either concern does not establish a connection with the necessity of this proposal suggested by the Department to expand this authority. IFPA is concerned that the proposed expansion of those subject to this authority and proposals that limit the ability for a SWA to inquire prior to a notice discontinuation, leaving resolution only to a post-discontinuation hearing, will lead to delays in processing clearance orders for all employers, not just those subject to additional scrutiny. The DOL, SWAs, and others are already

[14] Id. At 63757

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challenged to process orders and other H2A documents in a timely manner. Adding additional review metrics will only further delay processing times without a resulting quantifiable benefit.

First, the Department proposes to modify section 658.501(a)(1) to amend change "alter" to 'correct'. We are familiar with situations where the SWA has an incorrect interpretation of the regulations or limited resources to conduct the necessary fact investigation. The Department's use of the term 'correct' presumes fact in the SWA's interpretation, which flips the burden on an employer rather than the SWA demonstrating there is an error in a job order. It impossibly leaves employers proving a negative. It is the SWA's burden to demonstrate its basis for discontinuation. However, the Department leaves the SWA as the judge, jury, and executioner under this section – without ample due process as discussed below. Second, paragraph (a)(4) proposes to require discontinuation based upon evidence of a final determination of a violation of any employment related law, including debarment from the H-2A or H-2B foreign labor certification programs. This section would require discontinuation of services upon notice to the Department or SWA of a final determination from any state, federal, or local employment related laws, including OSHA, WHD, NLRB, EEOC, state, or local departments of health and other related agencies.[16] A final determination means that there has been adjudication and resolution of the claim. Requiring discontinuation based on the same underlying claim is punitive and outside of the legal purview of the SWA in its review of the job order. Under this proposal, resolved noncompliance determinations would result in a future notice of disqualification, regardless of its relevancy to the SWA's review of the current clearance order. This provision will increase staff or attorney costs to respond to SWA notices and delays of at least 20 days while the SWA – again as judge, jury, and executioner – determines if the evidence provided is sufficient to prevent disqualification.[17]

This issue is exacerbated by the inclusion of an agent, filing on behalf of an employer, where the underlying employer has a "violation" under this section. That result of discontinuation of services would be listed on a newly created *ETA Office of Workforce Investment Discontinuation of Services* list. Essentially, that same agent or contractor files for multiple employers around the country and is now impacted by the first employer's discontinuation of services. The result would affect all the other employers and upwards of hundreds, if not thousands, of workers. Considering the vital role that attorneys and agents play in the program, especially for small employers who make up the vast majority of American farms, the impact would reach much further than simply that single clearance order.

IFPA recognizes the need to penalize employers that break laws which impact the health and safety of domestic or foreign workers; however, we encourage the Department to consider the implications of this language. The current proposal goes too far in penalizing employers acting in good faith for minor infractions. Discontinuing access to employment services should be limited to willful violations which directly affect health and safety of workers. Additionally, we propose that the Department identify a look back period where a previous final determination may impact access to employment services. Employers must have ample notice to understand whether, and how long, noncompliance adjudications or settlements from previous years would impact current clearance orders.

For these reasons, IFPA opposes the definitional expansion and the mandatory discontinuation of services as proposed.

Due Process Related to Discontinuation of Services

[16] Id at 63761
[17] Id. At 63761; Proposed §658.502(4).

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The Department proposes to eliminate the option for a pre-discontinuation hearing and instead provides a 20-day response period to a Notice of Discontinuation outside of situations where it calls for immediate discontinuation (discussed below). This proposal takes a guilty first mentality and without a pre-discontinuation hearing the proposal leaves an employer's ability to participate in the H-2A program in the hands of a single SWA official. The Department empowers SWAs to execute this authority and we anticipate employers will see an increase in notices sent without proper basis. Moreover, by expanding this authority over agents, attorneys, FLCs, and associations, a baseless discontinuation would have an impact felt by other clients of that third party who are left without any recourse. IFPA opposes the elimination of a pre-discontinuation hearing and insists that as is required by law, American farmers and affiliated parties have the same access and assurance to a neutral review of the facts in cases of alleged basis for discontinuation.

The Department proposes use of immediate discontinuation when any of the eight bases for discontinuation are met and *"in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this section would cause substantial harm to workers."*[18] (emphasis added). IFPA ardently opposes this proposal for multiple reasons. First, extremely broad discretion is given to a State Administrator to determine what qualifies as "substantial harm." Even more concerning is that an allegation does not require any verification of claim or investigation prior to the SWA immediately discontinuing services.[19] Furthermore, the alleged "substantial harm" claim need arise from no more than a single worker, paving the way for abuse by singularly disgruntled employees.[20] Allowing an immediate discontinuation of services based on a State Administrator's judgment of an unverified claim from an unqualified source deprives employers and affiliated parties adequate due process. IFPA is aware of situations where SWA officials and DOL Wage and Hour representatives have demonstrated a clear discriminatory bias against H-2A employers, agents, and labor contractors which makes such an empowerment of SWAs a critical concern.[21] The Department claims it has received "information" regarding violations of this nature over the last several years. However, neither in this rulemaking or elsewhere does the Department substantiate this claim with anything akin to evidence, qualifying factors, facts, or investigation findings, depriving industry of the ability to suggest improvements to the proposal nor does the regulated community have ample notice of what a State Administrator will consider in making this decision. As such, the Department fails to demonstrate an adequate basis for this proposal which is such a clear violation of U.S. employers' due process rights.[22] Mandatory discontinuation of services must be substantiated, must be issued following the results of an investigation, and reserved for egregious acts causing significant harm. For these reasons, IFPA ardently opposes granting a SWA official the authority to discontinue services immediately without an opportunity for impartial review, including fair presentation of evidence and opportunity for administrative appeal prior to a final decision to discontinue accessing the program. IFPA requests that the Department substantiate the rationale for this proposal with verified data and factual basis or insists the Department withdraw this suggestion and resubmit the proposal using objective data points for quantifiable improvement.

Proposed Regulations to Parts 655

[18] Id. At 63765; Proposed §658.502(b)
[19] Id. At 63765-63766
[20] Id.
[21] *Human trafficking or a guest worker program? H-2A's systemic issues result in catastrophic violations* https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/
[22] 88 Fed. Reg. 63766

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Definitions:

Key Service Provider/Labor Organization §655.103(b)

The Department proposes to define key service provider as "any other service provider to which a worker may need access."[23] This language is arbitrarily vague. As written, any individual or group would qualify as a "key service provider." This ambiguous language is sure to lead to confusion regarding which service providers are covered under this section and which key service providers the unfair treatment section under section 655.135(h)(1)(v) would be applied. The Department must narrow this definition to establish better guidelines for qualifying key service providers.

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. The Department chooses to use a definition broader than the NLRA definition by including any organizations "in which agricultural workers participate." This unnecessarily broad definition makes it unclear what organizations the Department intends to be included and, as such, we cannot provide meaningful comment on its impact. This is particularly concerning under proposed section 655.103, where employers are required to provide employees' personal identifying information to any requesting "labor organization" and allows representatives from "labor organization" access to farm housing up to 10 hours per month. IFPA encourages the Department to make this definition specific to prevent ambiguity that causes a workers' personal information to be shared incorrectly or results in access to personal property by an improper organization.

Further, IFPA requests that prior to moving this section forward in any manner, the Department must create a directory which they annually accredit and review the credentials of all "labor organizations" wishing to participate in the aforementioned role prior to permitting these entities access to any employees or facilities. This directory must be publicly available so that program users and H2A employees can confirm a labor organization's legitimacy. Without a mechanism to qualify and monitor these groups, the Department is putting employees in a safety risk situation by allowing literally any individual or group to identify themselves as "a labor organization" and the farm and service providers must comply with their requests.

Single Employer Test §655.103(e)

The Department proposes to codify a "single employer" test that will be used to determine if nominally separate employers, filing individual job orders, should be considered as a single entity for purposes of assessing temporary or seasonal need. The Department proposes to evaluate 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. No one factor would be determinative in the analysis.

[23] Proposed §655.103(b)

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IFPA has concerns regarding the application of this definition. Agricultural businesses can involve complex business structures for a variety of reasons that are not pertinent to the H-2A program. Additionally, 96 percent of farms are family owned and operated.[24] Due to the small scale of operations, there are separate H-2A employers with familial and intertwined control. Specific to IFPA membership, the specialty crop business structure can be especially complex. For example, many farms are multi-commodity farms and therefore form various entities for risk management. There also may be situations where a fixed-site employer spins off a labor company seeing a need to provide labor services for other growers. The fixed site and labor company may be related; however, they file taxes and corresponding documents as completely separate entities. In addition, there may be distinct financial reasons for a young grower to have separate crews, including opportunities to access grants. Last, family farm ownership structure is often the result of tax and estate planning of multi-generational operations and land. As the Department aptly notes, even if considered "single entities" under the proposed rule, there are many circumstances that having multiple entities would not be problematic because each has underlying needs that meet the seasonal or temporary need requirements.[25] The complexity of farm business structures, especially in the produce sector, causes IFPA to have concern that this proposal will result in increased Notice of Deficiencies resulting in increasing costs, delays, and appeals by program users.

Additionally, IFPA seeks clarity in the regulatory text which suggests the single employer test only applies to applications filed within the same "area of intended employment." The preamble language implies that to be the case, but it would provide greater clarity to the regulated community to modify the regulatory text to clarify that this review would only be conducted on applications within the same area of intended employment. IFPA provides the following recommended language: "(e) Definition of single employer for purposes of temporary or seasonal need and contractual obligations. Separate entities ***filing for the same or similar job opportunities in the same area of intended employment*** will be deemed a single employer..." By making this modification, it will provide needed clarity to stakeholders impacted by the regulation.

Successor in Interest §655.104

The Department proposes revisions 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. IFPA recognizes the intent of this provision and the fact that debarment is an extreme penalty for the worst program violators; however, it is often the case that if debarment occurs the business ceases to exist because the H-2A labor force is vital to continue operations. The Department assumes in these revisions that the next filer is stepping in the shoes of the debarred employer with nefarious intent to conduct their business in the same condition as the previous entity. However, in most situations a neighboring farmer – completely unaffiliated or unaware of the underlying violations causing debarment – may purchase or lease the production from that debarred employer. This usually includes continuing production of existing crops on the farm and using the equipment and resources on site to complete the harvest/season. Plain reading of this section implies that that subsequent employer would be considered a successor in interest despite having no connection to the debarred employer. While it is clear the Department's intent is to prevent unscrupulous employers, agents, or FLC's from simply creating a new shell entity to avoid the penalty, IFPA wants to ensure that subsequent leasees or purchasers of farmland or production would also not be considered a

[24] https://www.nass.usda.gov/Newsroom/archive/2021/01-22-2021.php
[25] Id. At 63769

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successor in interest. As such, IFPA requests that the Department revise this proposal to prevent the aforementioned situations from occurring.

Prefiling Procedures:

AEWR Implementation Window §655.120(b):

The Department proposes to require employers to pay the updated Adverse Effect Wage Rate (AEWR) upon the date of the publication in the Federal Register eliminating the 14 days implementation window that has been in place since 2018. Recently, the Department created a complex wage structure requiring multiple wage rates be paid dependent on the worker job classification.[26] Pursuant to these new regulations the Department relies on the USDA Farm Labor Survey (FLS) and the Bureau of Labor Statistics Occupational Employment and Wage Survey (OEWS) to set wage rates based upon Standard Occupation Code. The Department publishes the required rates of pay for the following year in January and July, respectively. This new wage structure already places an administrative burden on employers to monitor federal filings multiple times a year and update payroll systems and wage rates accordingly within the 14-day implementation period. Now, the Department proposes to increase that administrative burden by requiring AEWR changes to take effect immediately and suggesting that if farmers want to have notice, they not only monitor the Department's filings, but now track the FLS and OEWS survey webpages to have notice of a program change. In establishing the 2023 Adverse Effect Wage Rate, the year-to-year average change was 7 percent with some regions seeing up to a 15 percent increase in a single year[27]. The Department encourages employers to "include into their contingency planning certain flexibility to account for any possible wage adjustments."[28] This variability in wage rates can cost a single employer thousands, if not millions, of dollars and it is impossible to "contingency" plan accurately. The single year increase in wage rates has caused IFPA members to hire fewer workers, change crops to less labor-intensive varieties, or consolidate operations – all having a negative impact on the agricultural workforce, rural economies, and the American consumer.

The 14-day window is appropriate to remove administrative burden on employers of monitoring of non-program sources to update payroll systems so that they are effective the day of publication. If the Department's main concern is ensuring workers are paid the AEWR in effect for those days, IFPA can support requiring the employee be back paid for the increase to the date of publication in the Federal Register notice, while still giving an employer the flexibility to see the Federal Register notice and update systems accordingly. Using a backpay formula would achieve the same goal with the risks identified above.

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

[26] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 Fed. Reg. 12760 (February 28, 2023).

[27] USDA Farm Labor Survey https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/pv63h9083/gq67m157z/fmla1122.pdf (November 2022)

[28] 88 Fed. Reg. 63774

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The Department proposes to add to the list of required wage rates "any other wage rate the employer intends to pay" and if there are different units of pay, the employer must list the highest applicable rate for each unit of pay in its job order and must advertise all of these wage rates in its recruitment.[29]

IFPA opposes this proposal and the requirement to list each rate of pay on the job order along with the highest hourly rate. In the specialty crop industry, growers can pay workers using a piece rate that varies based upon commodity, variety, crop quality, weather, and those piece rates may be by bin, bucket, box, or bushel. The complexity of all the various rates that could be paid throughout the season will be impossible to anticipate at the time of the job order. This is due to yields. At the beginning and ends of the season, yields are lower, and a piece rate is not used. Further, during certain seasons the weather impacts harvest – often in the middle of the harvest – and those conditions can drive pay formulas up or down depending on the impact and resulting market conditions. These are all factors that are unknown at the time of hiring. This requirement not only adds considerable time to the application process, but it also increases the risk of technical errors on the job order, increases the opportunity for NODs, and essentially puts program applicants in a situation to "guess" about market and harvest conditions nearly 2 months before the crop has even reached maturity. This provision is impractical and without merit.

The Department also proposes to require the highest applicable wage rate to be paid during the pay period. Specifically, the Department proposes to remove the current regulatory language requiring an employer to supplement workers' pay where a worker is paid by the piece and does not earn the required hourly wage rate for each hour worked. The current regulation does not require an employer to supplement workers' pay when a worker who is paid by the hour does not earn enough to meet the applicable prevailing piece rate.[30] The Department proposes that an employer must evaluate the highest applicable rate of pay for every pay period – essentially requiring review of hour-by-hour productivity regardless of pay structure. In practice, employers pay piece rate as an incentive to increase workers' earning potential. However, there are instances when an employer wants the workers to move more slowly and therefore, switches the pay to hourly. For example, if there is a particularly high value crop growers would encourage more methodical harvest to ensure the integrity of the crop be sufficient enough to capture the full value at market. Alternatively, it may have rained, or the temperature is too hot and the workers moving too quickly causes a safety concern. Under this proposal, regardless of safety precautions, a worker will always be incentivized to move faster than conditions warrant. When workers are paid hourly, the productivity is not measured. The Department incorrectly assumes that growers have "processes in place to accurately record information needed for compliance with the proposed changes."[31] Currently, the majority of agricultural payroll systems do not quantify an individual worker's productivity when being paid hourly. Therefore, there is data to determine what that individual worker's productivity was for that hourly time and frankly is not a measure needed. Thus, no plans are in the works to capture this data. If finalized, the fresh produce industry would have to update their entire approach to payment systems, which would include software purchases, training costs for employers and workers to learn the new systems, and likely additional staff to monitor production and data entry. Alternatively, farmers would be required to hire additional staff to monitor and capture workers' productivity during that time frame. All costs the Department fails to account for in its analysis.

Below is an example of the difficulty this proposal will have in practice: On a rainy day, employees start the day working hourly to ensure appropriate safety measures are taken. The employee turns on their time system to track

[29] Id. at 63744; proposed §655.120
[30] Is. at 63744
[31] Id. At 63775

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those hours worked at an hourly rate of pay. After 3 hours, the workers transition to a piece rate after conditions are safer. The worker switches to piece rate of pay and enters each bin picked into the system. Over the course of the next 3 hours the worker picks one bin. Therefore, under current payroll software, an additional employee would be required to monitor and track the partial bins the worker picked under hourly pay. IFPA estimates that for a workforce of 100 workers, they would likely need to dedicate up to 10 staff to track and monitor productivity during that time. This example could be repeated daily throughout the entire pay period, requiring significant overhead and risk of unintentional errors.

This example raises a lot of apprehension about the Department's proposal. Certainly, IFPA members have concerns about the additional software costs and staff burdens in attempting to calculate the appropriate rate of pay, each hour, for each variety, for each pay period. However, this also places workers at risk. Piece rates are a critical tool that allow workers to earn more and rewards them for their efforts. As a result of this increased earning potential, workers are incentivized to work quickly and efficiently benefiting both parties. However, using piece rates in slippery conditions would increase risk of injury for workers. Under the Department's proposal, despite an employer's effort to keep workers safe, a worker would always be incentivized to work more quickly to earn more income. IFPA believes this proposal, if finalized, has the opportunity to decrease worker safety. Moreover, because of the added job order complexity and implementation burden, farmers may simply turn to hourly rates, which would lower workers' earning potential and decrease the farms' output.

For the above reasons, IFPA opposes the proposal to add to the list of required wage rates "any other wage rate the employer intends to pay." IFPA also opposes the proposed requirement that an employer must list the highest applicable rate for each unit of pay in its job order and advertisement of all wage rates for recruitment.

Contents of Job Offers §655.122.

Employer Provided Transportation §655.122(h)(4)

IFPA and the fresh produce industry takes worker safety very seriously, including ensuring workers have access to seatbelts in employer provided transportation. The Department proposes to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation for vehicles regulated by DOT's National Highway Traffic Safety Administration (NHTSA).

IFPA does not have opposition to providing and maintaining seatbelts in vehicles governed by the NHTSA. The Department sought comment on whether employers ever retrofit their vehicles and if they would need to do so to comply with this proposal. IFPA members note that they have needed to retrofit vehicles in the past and would need to make further additions to existing equipment as a result of this proposal. Our members note that there would absolutely be significant costs associated with resources to first identify what farm vehicles are regulated by the NHTSA, then to purchase materials, and time spent installing and changing out seatbelts and similar equipment for this new compliance.

Recognizing there will be a need to retrofit vehicles and employer time and cost associated with that effort, IFPA asks that the Department provide an enforcement grace period of 6 months to 1 year for employers to comply with this provision.

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Additionally, the Department sought comment as to whether to require employers to enforce the wearing of seatbelts. IFPA does not believe it is a practical regulatory obligation to have the employer policing employees using seatbelts in this manner. It would be unrealistic and an undue burden to have the driver of a vehicle double check each workers' seatbelt use before, during, and after each trip or risk a regulatory noncompliance resulting from a worker unbuckling their seatbelt after a seatbelt check was completed. Therefore, IFPA opposes the suggestion that employers bear the responsibility to monitor the use at all times of offered seatbelts in farm equipment.

Last, the Department sought comment on whether this proposal should apply to vehicles primarily operated on private farm roads when the total distance traveled does not exceed ten miles, so long as the trip begins and ends on a farm owned or operated by the same employer. IFPA does not support the extension of the seatbelt requirements to vehicles primarily operated under the exemption in 29 CFR 500.104. The stated rationale for the seatbelt proposal is the "dangers inherent in rural transportation."[32] IFPA disputes that there are increased dangers to rural transportation; however, even if true, extending this proposal to private farm vehicles would not have the same risk. Therefore, IFPA opposes the regulation of farm vehicles on the farm.

Productivity Standards as a Condition of Job Retention §655.122(l)(3)

The Department proposes to require disclosure of minimum productivity standards that are a condition of job retention in the job offer, regardless of whether the employer pays on a piece rate or hourly basis.[33] Additionally, the Department proposes that the productivity standard may only be invoked by an employer "when workers were informed, or reasonably should have known the productivity standards; the productivity standard is listed in the job offer; and the productivity standard is reasonable and applied consistently."[34]

The ability to set and utilize productivity standards as a job performance measure and condition of job retention is a valuable tool for employers to ensure that workers are fulfilling their job obligations. As discussed previously, determining a productivity standard months before the crop is ready for harvest is impossible, and often the productivity standard changes many times throughout the season due to the aforementioned situations.

IFPA supports the inclusion of the disclosure of these standards if they are a condition of employment. However, it is imperative that employers have the flexibility to modify these rates and productivity standards as the season continues. For example, once a crop matures the productivity standards may change related to the crop's conditions. Additionally, the Department does not adequately provide methods it will use to evaluate whether a productivity standard is reasonable and applied consistently. It is unclear if "applied consistently" means within the same employer's workforce or throughout the area of intended employment. The Department should provide additional clarity to ensure employers are aware of the standards they are required to meet (e.g., surveys, historical data, etc.). Moreover, since 2010, the Department has placed a restriction on the level that a productivity standard can be set. These standards have not changed in line with advancements in the agricultural sector. For instance, in the specialty crop industry there have been significant improvements in trellis systems that allow for more effective pruning and harvesting, thus increasing worker efficiency levels. IFPA recognizes that employers that place productivity standards at unattainable levels should be subject to increased verification; however, a one size fits all approach does not work for the 600+ fresh produce commodities grown and harvested in a variety of mediums and production

[32] Id at 63776
[33] §655.122(l)(3); Id. at 63778
[34] Id. At 63779.

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systems. A tomato is not harvested the same way as a watermelon, just as an apple is not harvested the same way as an onion. This rule as proposed makes the assumption all fresh produce is harvested the same, at all times of the year, from all parts of the country, from all production mediums (i.e., open field vs. greenhouses vs. elevated trellis beds, etc.).

Disclosure of Overtime Pay §655.122(l)(4); §655.210(g)(3)

IFPA does not oppose the proposed requirement to require disclosure of any applicable overtime wage rates.

Termination for Cause or Abandonment of Employment §655.122(n)

The Department proposes to define "termination for cause" through six criteria that all must be satisfied prior to an employer taking disciplinary action and/or termination.[35] The only exception is for "rare circumstances" where disciplinary consequence for a first-time offense is justified due to "egregious misconduct."[36] The Department states that having a clear definition of termination for cause would provide "structure and clarity to both workers and employers, but also make it easier for the Department to identify pretextual terminations."[37]

IFPA does not support the proposed definition of "for cause." Specifically, IFPA has serious concerns regarding the proposed paragraph (n)(2)(i)(F) requiring "the employer engages in progressive discipline to correct the worker's performance or behavior." IFPA opposes the required use of progressive discipline as proposed. The Department defines 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."[38] IFPA believes this standard will be very challenging to meet within an agricultural context. The proposed definition severely limits the ability of the employer to appropriately act when an employee is not complying with the terms and conditions of employment.

In order to deploy a progressive discipline policy, growers will have to hire an employment attorney to develop the policy, increase training of staff, or hire human resources staff as most farms do not have dedicated human resources staff. This will be especially burdensome on small farms. The Department suggests these regulatory changes are necessary as a result of its enforcement experience.[39] In the same breath, the Department cites less than a handful of investigations where workers have been wrongfully terminated.[40] The Department does not provide a factual basis to suggest that unlawful discharge is prevalent throughout the H-2A program and fails to provide an adequate justification that this program adjustment would result in preventing an adverse effect of US workers. IFPA encourages the Department to focus enforcement efforts on addressing those rare instances of unlawful discharge, rather than placing an unnecessary program addition for the entirety of H2A users in America.

Moreover, the Department proposes to require that the employer bear the burden of demonstrating that any termination for cause meets this standard.[41] The Department justifies this proposal as "reasonable" because the entities are seeking an exemption from various terms and conditions of the program (e.g., outbound transportation,

[35] Proposed §655.110(n); 88 Fed. Reg. 63782.
[36] Id. At 63783
[37] Id. At 63781.
[38] Proposed §655.122(n)(f)
[39] Id. At 63781
[40] Id. At 63783
[41] Proposed §655.122(n)(2)(iv)

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three-fourths guarantee). This is a false and biased characterization of the reasons an employer would terminate an employee for cause. As noted above, the Department fails to provide a factual basis to suggest that improper discharge is prevalent throughout the program. The Department starts from an idea that all American farmers using H-2A are attempting to cheat the system. Frankly, this type of bias can only produce an arbitrary and capricious regulation. IFPA represents growers from all over the country and terminations for cause alone are extremely rare and are certainly not done to avoid compliance with program requirements. The Department here again assumes guilt over assuming employers act in good faith.

If this proposal is adopted, farmers' record keeping burden will dramatically increase throughout the contract period. Coupled with provisions under §655.135(m)(2), employers will have an extensive burden to maintain records for any and all training, mentoring, or correcting, that the appropriate designee attended, and the progressive disciplinary plan was followed to merely demonstrate during an audit that processes were followed, even if there was no actual termination for cause. This is an extensive part of the total burden placed on employers necessary to comply with this proposal, which the Department fails to account for in the cost analysis.

The Department provides an exception to termination "for cause" as defined in section 655.122(n) for the "rare circumstances" where disciplinary consequence for a first-time offense is justified due to "egregious misconduct."[42] By already determining that egregious misconduct occurs in "rare circumstances," the Department is signaling they would not fairly apply a reasonable person test where an employer would terminate based upon that exception. Also, to the point above, the recordkeeping to defend that employer's decision would be extensive and costly since defense would likely require legal services support.

IFPA supports flexibility for employers to terminate "for cause" as is appropriate for their workplaces and the Department should move forward with proposals crafted from an unbiased, justified, and well-reasoned position.

Application for Temporary Employment Certification Filing Procedures

Enhanced Disclosure of Information about Employers; Owners, Operators, Managers, and Supervisors

§655.130

The Department proposes to require disclosure of additional identifying information about employers, owners, operators, managers, and supervisors of H-2A and corresponding workers in the H-2A application.[43] The proposal includes the disclosure of identity, location, and contact information and requires the employer to update this information through the work contract period.

IFPA has various concerns about this proposal. First of all, agricultural businesses often involve complex ownership structures. Due to the high capital cost associated with production agriculture, many farms have investors or even investment funds that have an ownership interest in the business. Additionally, leaseholds are used throughout agriculture with varying lease arrangements (cash lease, crop share, etc.). The majority of these owners do not have a controlling interest or are involved in any way with business decisions, including workforce decisions. The Department does not have adequate information to determine the impact of such a proposal and the proposal is too vague to even allow for meaningful comments for improvement. For example, even a simple ownership structure

[42] Id. At 63783
[43] Proposed §655.130(a)(2); §655.130(a)(3)

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where the owner may not be involved in workforce matters and be irrelevant to any analysis under the Department's authority – like landowners where farmers lease land – would be subject to this rule. Let alone more complex ownership structure that may involve public companies, equity funds, or multiple owners of a farm; would each shareholder need to be disclosed? We do not know. However, this open-ended proposal that would require an employer to list personal identifying information of owners would undoubtedly be infringing on owners' privacy rights, potential disclosure of confidential business information, and would pose an extensive administrative burden on employers, without any documented regulatory value or authority. Second, requiring the disclosure of operators, managers, and supervisors' personal information is a violation of our employees' privacy and creates a potential safety risk, especially in cases of retaliatory targeting. Further, it places employers at a risk of employment-based litigation for their personal information disclosure. The Department does not appear to demonstrate an understanding regarding the extent of the impact of this proposal. Employers would be required to release contact information of potentially hundreds of staff depending on the size of the operation. The Department also fails to provide an adequate definition of what operator, manager, and supervisor would include to allow for meaningful comment. Also, with the turnover rate within agriculture, it would be burdensome on the employer to continually update the Department.

The Department does not have untethered authority under the statute that would grant access to this information. The statute requires the Secretary of Labor determine (A) 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 (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[44] There is a dual purpose of this program and the Department must weigh **both** employer and worker interests in the regulatory action. Additionally, the Privacy Act of 1974 requires that federal agencies maintain in their records only information about an individual "relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). Once again, the Department does not provide a rational basis that information about uninvolved owners and supervisors is necessary to accomplish its purpose. The Department states that this collection of information would "allow the Department to gain a more accurate and structure of the employers agricultural operation in the administration and enforcement of the H-2A program." [45] While the Department may want that information to help carry out its enforcement duties, the government's desire for that ease does not outweigh the burden upon employers and infringing on privacy of agricultural owners and employees. The Department has not shown what authority it relies upon to request information of manager or supervisor who is not subject to the H-2A regulation. Those employees have not chosen to participate in the H-2A program and should not be required to have their information disclosed to the government. The Department's own data shows that nearly half of the agricultural workforce does not have valid work authorization. As a result, an employee may have clear interest in not having their information disclosed which could result in immigration enforcement.[46] The Department's meager attempt to provide an explanation is based on "some H-2A employers" and "in the experience of the Department, some employers" have sought to avoid penalties or temporary or seasonality requirements.[47] Again, the Department fails to provide factual basis, to cite actual violations or investigations, and lacks a data driven

[44] 8 USC 1188(a)(1)

[45] 88 Fed Reg. 63786

[46] DOL National Agricultural Worker Survey https://www.dol.gov/sites/dolgov/files/ETA/publications/ETAOP2022-16_NAWS_Research_Report_16_508c.pdf

[47] 88 Fed Reg. 63786

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argument to support the need to increase the filing burden on employers or to infringe upon an employee's privacy. There are other ways for the Department to learn about business structures, such as conducting visits or conveying stakeholder workgroups to better understand the industry. IFPA would encourage the Department to consider these alternatives in place of regulatory changes that undermine American and foreign workers' rights to have their private information protected.

For these reasons, IFPA does not support this proposal as it will place additional administrative burden, increase litigation risk on employers, and would clearly violate an employee's right to privacy in violation of the Privacy Act of 1974.

Assurances and Obligations of H-2A Employers §655.135

Protections for Workers Who Advocate for Better Working Conditions §655.135(h), (m), and (n)

The Department proposes to broaden certain obligations and assurances of an H-2A employer to include a number of protected activities to safeguard collective action.[48] In its justification of this proposal, the Department notes that it understands the INA's adverse effect requirement "[…]as establishing a baseline 'acceptable' standard for working conditions below which workers in the United States would be adversely affected."[49] However, this type of interpretation of adverse effect has been put into question by courts in the past. The 5th circuit stating, "In our view these arguments are based on a misunderstanding of the nature of the regulatory scheme authorized under the Immigration and Nationality Act, 8 U.S.C.A. § 1101 et seq.[…]the Secretary's […] authority is limited to making an economic determination of what rate must be paid all workers to neutralize any "adverse effect" resultant from the influx of temporary foreign workers."[50] Additionally, the court noted that setting standards high enough to attract domestic workers, in that case a high enough wage rate, "jumps well beyond the discretionary authority of the Secretary."[51] The same rationale applies here. The Department is intending to set standards they have no authority to establish as the courts have already ruled the statute authorizes the Secretary merely to "neutralize any adverse effect." Based on that ruling from the courts, this proposal must be withdrawn as it is outside of the legal and statutory bounds of the Department's authority.

As noted above, IFPA disagrees with the Department's assumption that H-2A workers are "vulnerable" and does not believe the Department has the legal authority to make the proposals included in this section. The preamble of this proposal indicates the continuing clear bias against agricultural employers and the H-2A program, failing to balance the need for agricultural labor by American farmers while protecting against adverse effect of US workers, as required under the statute. The Department states that the "temporary nature of the work; frequent geographic isolation of the workers; dependency on a single employer for work, housing, transportation, and necessities, including access to food and water; language barriers; possible lack of knowledge about their legal rights" as considerations it believes make the H-2A workforce "more vulnerable to labor exploitation."[52] If this is true, the Department itself has created the system that creates worker vulnerability. If the Department is concerned with the impact its regulation has on the workforce, IFPA encourages revisions to the existing regulations to provide more

[48] 88 Fed. Reg. 63787
[49] Id.
[50] *Williams v. Usery,* 531 F.2d 305 (5th Cir.1976)
[51] Id. At 307.
[52] 88 Fed. Reg. 63789

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flexibilities for the workers which in turn lowers costs on employers and, in the Department's logic, makes the workers less vulnerable. This would provide a better balance of interests as required under the law rather than increasing the regulatory burden on top of existing regulatory requirements.

Moreover, the Department fails to provide a reasonable justification for how these proposals would prevent an adverse effect on US workers. As noted in the preamble, domestic farmworkers are exempt from the proposed protected activities under the National Labor Relations Act (NLRA) and less than 1 percent of the domestic agricultural workforce is unionized.[53] The Department claims that its authority to prevent against an adverse effect allows these policy changes; however, considering the low union membership of domestic farmworkers the Department fails to demonstrate how an analogous low union membership of H-2A workers would cause an adverse effect. The Department "believes" that greater access for labor organizations for the H-2A workers will improve working conditions; however, provides no rational basis for justification for this belief.[54] Again, the department has not shown that it has the legal authority under the INA for these proposals or a legal or economic rationale for regulatory proposals themselves. As such, IFPA opposes these proposals in their entirety.

Preemption by the NLRA

IFPA opposes the Department's proposal to create a new category of protected activity via regulation. Throughout this rulemaking, the Department simply picks and chooses which legal authorities meet the policy goal of union expansion and disregards the provisions of those laws that do not fit its political goal. The Department repeatedly pulls provisions from the NLRA for individual policy changes yet states that the exemption language does not apply.[55] Congress has explicitly exempted farmworkers from the NLRA, and this proposal is a gross overreach of the Department's regulatory authority granted under the Immigration and Nationality Act (INA).

A review of the legislative history demonstrates that Congress acted intentionally when it exempted agricultural workers from the NLRA. The exemption language was inserted into the bill by the Senate Committee on Education and Labor, as reported by the committee in May 1934 and it appeared in all subsequent versions of the bill, including the final version, S. 1958, which was passed by both houses. Congress had opportunities within the debate to remove the exemption from the legislation; however, ultimately voted to exempt these workers. In debate, the Senate Committee state that "For administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work."[56] Congress was deliberate in its crafting of the NLRA and its delineation of what constituted a covered employee under the Act. In the 90 years following passage of the NLRA, Congress has not seen it necessary to amend the exemption despite having multiple chances to do so. Since 1973, at least ten bills have been introduced attempting to include agricultural laborers under the NLRA. The Department is ignoring direct Congressional intent through these regulatory proposals, and it is up to Congress to include the workforce under the NLRA as it deems appropriate.

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[53] https://migration.ucdavis.edu/rmn/blog/post/?id=2836#:~:text=The%20share%20of%20US%20workers,members%20fell%20by%2020%20percent.
[54] Id. At 63754
[55] Id at 63793-
[56] S. Rep. No. 74-573, at 7 (1935)

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Additionally, the Department fails to acknowledge employer rights and obligations under the NLRA. Under the NLRA, an employer has the ability to act against a union for unfair practices. However, by picking and choosing which provisions of the NLRA should apply and which should not under the H-2A program the Department has left an employer completely without recourse. Throughout this section, an employer has no ability to challenge or dispute labor organization access to their property, an allegation that an employer did not bargain in good faith, or a claim of worker harassment by a labor organizer.

As a result, IFPA opposes each of the following sections as they are in violation of the Congressional authorized exemption from each of these activities for this workforce and fail to provide an employer due process. The comments below provide further concern or comment about each section, while maintaining the position that this action is preempted by the NLRA.

No Unfair Treatment §655.135(h)(1)

The Department proposes to expand the existing prohibition of unfair treatment as defined in this section. Citing the Department's own regulatory obligations upon employers, it indicates that this section is necessary to make H-2A workers more likely to raise or report H-2A violations. Specifically, the Department proposes to explicitly protect the ability for workers to consult with key service providers under subsection (h)(1)(v). As noted above, IFPA believes the Department does not provide a clear definition of who is considered a key service provider so that we can provide specific comment about how this may impact our members and to which providers this section applies.

Prohibitions on Seeking to Alter or Waiver the Terms and Conditions of Employment §655.135(h)

The Department provides clarifying language in the preamble regarding the ability of employers to enter into individual agreements with their employees outside of the H-2A program. It is a basic regulatory principle that employers cannot contract away their regulatory obligations and as such, IFPA does not see this section as necessary or that it is an issue that needs to be addressed as such an activity already would be a regulatory violation.

Activities Related to Self-Organization and Concerted Activity §655.135(h)(2)

The Department proposes "a new protected activity" for those agricultural workers exempt under the NLRA. These activities include protection from an employer 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. As discussed above, IFPA does not believe the Department's authority under the INA allows this regulatory action, nor does the Department provide a rational basis for how inclusion of these policies would result in greater access to the U.S. workforce for agricultural jobs. Additionally, to the extent that the INA does grant the authority to prevent against an adverse effect, the Department has failed to provide an APA reasoned decision for these regulatory proposals. As a result, IFPA opposes the proposed §655.135(h)(2).

Worker Voice and Empowerment §655.135(m)

Employee Contact Information §655.135(m)(1)

The Department proposes to require employers provide worker contact information to any requesting labor organization. The proposal would require an employer to provide any requesting labor organization a complete list of H-2A workers' personal identifying information, including full names, date of hire, job title, work location, personal

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email, cellular phone number, and profile name for a messaging application, home country address, and telephone number. The proposal would require an employer to update the list once per certification period, if requested.

In addition, this proposal would require an employer to respond to any request by a labor organization. While the Department only allows this request to be updated a single time through the season, the Department fails to limit the number of requesting labor organizations asking a single employer. IFPA members anticipate costs associated with the maintenance of this information and staff resources to respond to these requests. Moreover, while labor organization is defined in the proposed regulation, the Department provides no clarity as to how an employer is to ascertain whether the requesting party is in fact an eligible labor organization. IFPA has concerns that this provision will be abused. For example, it is possible that an anti-immigrant group could leverage this proposal and place workers at risk. Alternatively, this information could be improperly secured and then sold to nefarious groups for use in identify theft scams. Either scenario places the farmer or employer at legal liability, and not the labor organization. The Department provides no verification mechanism for these groups, exposing both employers and employees. Last, IFPA believes this is in violation of an employee's privacy. In making this proposal, the Department disregards a workers' right to privacy and places a burden upon employers without providing a reasonable basis that this action will protect against an adverse effect of U.S. workers. Moreover, the Department pulls these requirements from the NLRA without acknowledging that Congress explicitly exempted FLSA agricultural workers from these requirements.

If this proposal remains in the final rule, the Department must establish assurances that an employer will not be held liable or face penalty if the private information gets into the hands of a non-covered entity. Moreover, the Department should restrict requesting labor organization to those registered and vetted by the Department and limit the number of labor organizations that request this information from a single employer. Last, the Department should grant workers the ability to voluntarily "opt-out" of disclosure without the employer facing a presumption that they coerced the worker to do so. The Department should develop a proposal for stakeholder consideration on an adequate opt-out process to ensure there is no coercion (or perceived coercion) of the worker.

Right to Designate a Representative §655.135(m)(2)

The Department proposes 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.[57] IFPA opposes this proposal as it is overly broad, and we cannot adequately assess the impact this proposal would have on member operations. Further, that suggestion (that another employee be present) would not be acceptable in the case of domestic (non-corresponding) workers and therefore establishes a precedent that only foreign workers can "bring a friend" to a disciplinary meeting.

First, the proposed language to include "where the worker reasonably believes that the meeting may lead to discipline" is too broad to provide adequate notice to employers. To begin, disciplinary action or lead to discipline is not defined. The scope of situations where this could apply ranges from in-field correction of work techniques or training to suspension or termination. We cannot provide meaningful feedback on the impact of this proposal because IFPA cannot identify where this proposal would apply in work settings. Additionally, as proposed, any time a worker claims to believe discipline may be involved, the employer would be prevented from continuing the action until a representative is present. There would be no immediate way for an employer to dispute that belief as

[57] 88 Fed. Reg. 63796

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unreasonable. As drafted, this proposal leaves much open for interpretation likely to cause workplace disruptions and further grievances as a result of different understandings or expectations and risk of employer noncompliance caused by ambiguity in the regulations.

Second, the proposal allows the worker to designate any third party for the purposes of this section. The preamble specifically allows a coworker or any other individual to attend[58]. The Department is unaware of the impacts that this may have on a farm. Employment matters are typically confidential in nature, and opening those conversations to coworkers, friends, or family violates proprietary or confidential information protections from being shared. Further, it may even create situations where employees perceive unequitable treatment between situations/discipline. This could cause workplace disruptions, fights, or disagreements.

Third, the Department fails to provide a reasonable basis as to how this requirement will protect against an adverse effect of US workers and, once again, picks and chooses when the NLRA applies to fit its policy agenda. For example, the Department notes that the NLRB has held that section 7 does not apply to nonunion workplaces yet proposes this section would apply to H-2A workers given their "vulnerabilities." As discussed above, IFPA disputes that these workers are vulnerable and that the Department's assertion fails to be substantiated by facts.

Prohibition on Coercive Speech §655.135(m)(3)

The Department proposes to prohibit employers from engaging in coercive speech that would prevent workers from advocating for better working conditions, including "captive audience meetings" or "cornering" 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 to that nonattendance or nonparticipation will not result in reprisals, and d) assures employees that attendance or participation will not result in rewards or benefits.[59]

The Department seeks comments about ways to avoid infringing on the employer's free speech rights while protecting workers' rights to engage in protected activity. Based on this proposal, it is not clear how or when an employer would need to provide these disclosures to employees. Additionally, the Department does not provide an employer guidance about the scope of recordkeeping needed to verify such notice was given to workers. The Department develops this proposal relying extensively on the NLRA and NLRB decisions, despite ignoring that Congress exempted the regulated workforce from the same act.

Commitment to Bargain in Good Faith Over Proposed Labor Neutrality Agreement §655.135(m)(4)

The Department proposes 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 if not, provide an explanation for why they have declined.

The Department seeks comment as to whether the proposed requirement will "advance the goal of ensuring 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."[60] However, the INA does not grant the authority to advance labor

[58] 88 Fed. Reg. 63797
[59] 88 Fed. Reg. 63798; Proposed §655.135(m)(3)
[60] Id.

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organization, rather the authority is intended to protect the adverse effect of US workers. The Department has not included a rational basis for how this provision meets that objective. If an employer attests that they will bargain in good faith, because this workforce is exempt from the NLRA an employer cannot challenge an assertion that they did not bargain in good faith to the NLRB. If this provision is finalized, IFPA requests assurances that those who deny attesting that they will negotiate labor neutrality agreements will not be subject to increased enforcement than those employers who elect to negotiate neutrality agreements. Additionally, IFPA members have critical concern that by exercising their legal right to refuse to negotiate a neutrality agreement will increase enforcement, advocacy group presence on farms, and frivolous litigation.

For these reasons and the failure of the Department to provide an adequate justification as to how this will protect against adverse effect, IFPA opposes this proposal.

Access to Worker Housing §655.135(n)

The Department proposes to require access for guests to employer-furnished housing subject to only reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas. Additionally, if the housing is located on a property or a facility not readily accessible to the public, a labor organization must not be denied access to the common areas or outdoor spaces for up to 10 hours per month.[61]

There is nothing under current regulation that prevents guests on or in employer provided housing and the Department does not provide more than anecdotal evidence that this is an issue for workers. However, by explicitly requiring guests on employer property, the Department is increasing the risk of having disruptions at the workers' homes and it will heighten risk for an employer, including increase in injury risk, nuisance complaints, and insurance costs. Currently, IFPA members have restrictions on behavior in housing for a variety of reasons, including worker health and safety. IFPA believes it is imperative to give employers discretion on what restrictions can be in place and does not support explicit regulatory restrictions on what can and cannot be allowed. For instance, many IFPA members provide access to a specific place for guests to meet. That may be a common area or parking lot but restrict access to housing as a courtesy to others living in the same units. As a result, IFPA does not support blanket access for guests on employer provided housing.

IFPA opposes granting access to employer owned business property to labor organizations without explicit invitation. IFPA believes this proposal would be considered a physical taking under the 5th and 14th Amendments and, in practice, will be overly disruptive to farm operations. The Supreme Court held that a California regulation that granted unions the right to "take access" to employer's property for up to four 30-day periods in one year by traversing property at will for three hours a day, 120 days a year violated was a per se physical taking. The court stating that "Whenever a regulation results in a physical appropriation of property, a per se taking has occurred."[62] Also stating that "Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation."[63]

[61] Proposed §655.135(n)
[62] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021); see also See Tahoe-Sierra, 535 U. S., at 321-323, 122 S. Ct. 1465, 152 L. Ed. 2d 517.
[63] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021).

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Outside of the legality of this proposal, IFPA also has concerns about the workplace disruptions that will occur. The proposal limits the time of a single labor organization to 10 hours per month; however, the regulation does not limit the number of labor organizations that can be on the farm for 10 hours a month. There may very well be months where multiple labor organizations are on a property each for 10 hours a month. This presence will coincide with the farms busiest seasons making it a challenge for farm operators to farm and manage access for labor organizations. This will require employer and staff resources to track and monitor who has access to the farm and how many hours they have totaled within a given month. Employers should not be required to police this activity. Additionally, because the workforce is exempted from the NLRA, employers have no grievance ability when a labor organization violates the 10-hour allowance. Furthermore, considering the broad definition of labor organization employers will have a challenging time identifying what organizations are authorized to be there. The proposal places no restriction or requirement on a labor organization to provide an employer written notice or even demonstrate that the labor organization qualifies under the proposed regulation. Last, the majority of IFPA members are regulated by the FDA under the Food Safety Modernization Act. There are extensive food safety controls that must be followed, including registration of guests on farm. This proposal must take into consideration the impact that allowing guests on employer property could have to other regulatory requirements that farmers must comply with every day to produce a safe food supply.

For these reasons, IFPA opposes this proposal.

Passport Withholding §655.35(o)

The Department proposes to clarify that an employer may not hold or confiscate a worker's passport except where the worker states in writing that it has been voluntarily requested by the employee as proscribed in the regulator proposal. IFPA supports this proposal.

Foreign Worker Recruitment §655.137

The Department proposes to increase disclosure obligations of an employer who hires an agent or foreign labor recruiter in international recruitment.[64] While IFPA acknowledges the intent of the proposal and strongly opposes any exploitation of workers by foreign recruiters, IFPA does not support requiring the employer to police every individual role of the various program contributors. An employer does not have the resources or practical ability to identify and maintain the information required under this section. Oftentimes, employers, especially small employers, rely on their agent's network to recruit and may not have access to the foreign recruiter's name and geographic location. Those recruiters could hire various people throughout the recruiting period to assist in recruitment events.

Yet failure to accurately disclose this information would trigger penalties under part 658 or even debarment resulting in farms to go out of business. This is an unjust result for an act of third parties completely outside of the employer's control.

The Department provides no guidance on how an employer should come to identify the foreign recruiter information and provides no definition of what level of due diligence is required of the employer. IFPA is not opposed to sharing

[64] Proposed §655.137

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contractual agreements to the Department, so long as all confidential business information is redacted; however, beyond that it will be burdensome for an employer to verify and maintain accurate foreign recruitment data.

The Department specifically requests whether foreign recruiter information should be shared to foreign governments. IFPA opposes the sharing of this information to foreign governments because sharing this information would most certainly impact American farmers and farm business far beyond the purpose of this rulemaking. This could include food safety, trade impacts, and foreign enforcement at business operations within the foreign country.

Document Retention Requirements §655.167

IFPA has no comment in relation to this proposal.

Post-Certification Changes to Applications for Temporary Employment Certification §655.175

The Department proposes to define a post-certification minor delay as 14 days and in the event of a minor delay, require an employer provide notice to the SWA and contact all referred employees at least 10 days before the original date of need.[65]

IFPA supports the clear delineation of what constitutes a minor delay. IFPA believes that proposal strikes a balance of the reality of agricultural production which inherently is hard to predict, subject to weather patterns, and crop growth. Post-certification delays are inevitable with those factors and this provision ensures that the workforce has adequate notice that there is a delay.

Integrity Measures

Debarment §655.182

The Department proposes to shorten the time for parties to submit rebuttal evidence to OFLC and to appeal notices of Debarment to the OALJ and ARB.

IFPA opposes this proposal. Debarment is and should be the most extreme penalty. Due to the severity of this penalty, it is not appropriate to shorten the amount of time an employer has to submit rebuttal evidence and appeal a notice of debarment. Moreover, an extension would only be where there is "good and substantial cause necessitating additional time."[66] The Department justifies this proposal by stating that it would "more quickly remove violating parties;" however, the Department fails to recognize with this statement that these are merely alleged violations, and an employer must have the opportunity for due process to defend themselves.

Considering the impact of a debarment decision is severe. In most instances, it is the difference of keeping a farm business alive or ending generations of the farm business. Fourteen calendar days is an insufficient amount of time for an employer to receive, review, hire an attorney, and gather rebuttal evidence to dispute the notice. Depending on the time of year, farm employers may not be available to receive the notice in a timely fashion, which would limit their ability to gather relevant data during a busy season.

[65] Proposed §655.175; 88 Fed. Reg. 63805-63806
[66] 88 Fed. Reg. 63807

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For these reasons, IFPA opposes the proposal.

Economic Underpinnings of the Proposed Regulation

Regulations must do more good than harm. Their benefits must outweigh their costs. When promulgating regulations, the Department must demonstrate "reasoned decision-making." *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). Regulations must not be arbitrary or capricious or abuse the Department's discretion. *See, e.g.,* 5 U.S.C. § 706(2)(A). This regulatory proposal, including the reasoning demonstrated in its assessment of regulatory impacts, fails these axiomatic principles.

The regulatory proposal fails utterly to consider the harmful effects of most features of the proposed regulation. The rule fails to cost out, weigh, or analyze its many parts. The proposal shockingly estimates the total annual, economy-wide costs of the new requirement at roughly $2 million dollars per year. The economy-wide transfer effects are estimated to be a mere $12 million per year. What are the economic benefits of the proposed regulation? According to the proposal, there are *no* quantifiable benefits of this regulation. None. *Id*. at 63809 – 63816. That is appalling. By the Department's own admission, the quantified benefits of this rule do *not* outweigh its quantified costs, anemic as they are.

Conclusion

Coupled with the existing program hurdles, the proposal of these regulations again highlights the need for Congress to pass legislative reforms to bring program certainty for users. Congress's failure to act, is the reason we seek recourse in this NPRM for proposals that will have far reaching consequences on the entirety of the fresh produce supply chain. IFPA appreciates the opportunity to comment on the proposed rule entitled "Improving Protections for Workers in Temporary Agricultural Employment in the United States" (RIN 1205-AC12, ETA-2023-0003) that was published in the Federal Register by the U.S. Department of Labor (Department) on September 15, 2023.

Sincerely,

John Hollay

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