

# United States Senate

November 14, 2023

The Honorable Julie Su  
Acting Secretary of Labor  
U.S. Department of Labor S-2521  
200 Constitution Avenue NW  
Washington, D.C. 20210

Dear Acting Secretary Su:

I write in strong opposition to the Department of Labor's (DOL) proposed rulemaking: "Improving Protections for Workers in Temporary Agricultural Employment in the United States."<sup>1</sup> The Biden administration's efforts dictate unreasonable regulations to employers who utilize temporary and seasonal non-immigrant workers to perform agricultural labor in the United States. This will significantly harm farmers' and producers' ability to use the H-2A program. I request that DOL immediately withdraw the proposed rule and commit to working with appropriate stakeholders when developing future changes to the H-2A program.

The H-2A program already involves an onerous amount of bureaucracy, burdening both employers and employees. According to the United States Department of Agriculture (USDA), the H-2A program application process is expected to take approximately 75 days before approval of workers or employers.<sup>2</sup> This DOL proposal will result in additional and unnecessary barriers to the application and reporting process, which will further delay visa processing. Despite complaints regarding the proposed rulemaking from farmers and stakeholders participating in the H-2A program, employers who utilize it generally agree that without additional labor from guestworkers, American producers could not efficiently plant or harvest crops. Our nation's agriculture industry is dependent on foreign workers when domestic workers are unavailable to fill open positions in the farming industry.

Considering our nation's food supply chain is reliant on foreign labor, the Administration should thoroughly evaluate and consider producers' experiences and concerns with the H-2A program before implementing new rulemakings that would upend the program. Unfortunately, DOL ignored the November 1, 2023, letter in which I, along with several of my Senate colleagues, requested an extension of the sixty-day comment period so that our constituents would have ample opportunity to provide feedback.<sup>3</sup>

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<sup>1</sup> 88 FR 63750.

<sup>2</sup> U.S. Department of Agriculture (2023). H-2A visa program. <https://www.farmers.gov/working-with-us/h2a-visa-program>.

<sup>3</sup> Senate letter to Department of Labor (November 1, 2023). <https://www.hydesmith.senate.gov/sites/default/files/2023-11/110123%20Improving%20Protections%20for%20Workers%20Comment%20Extension%20Request.pdf>

DOL's proposed rule, which was published in the Federal Register on September 15, 2023, aims to strengthen protections for seasonal and temporary farmworkers, but will ultimately result in putting America's farmers out of business. Through this overreach of the executive branch, the Biden administration is exhibiting tremendous government overreach by prioritizing foreign agricultural guestworkers over American farmers' ability to run their own farm or business, make payroll, and maintain their livelihoods. The proposed rule would effectively unionize the H-2A program by broadening the rights of temporary workers to freely organize, allowing workers to make improbable demands without fear of retaliation, and providing labor organizations with open invitations to guestworker housing and meetings between guestworkers and employers. In addition to extending invitations to labor organizations, workers would now be able to invite and accept guests to stay in their employer-provided housing, opening employers to significant liability concerns.

While the proposed rulemaking would enhance benefits for guestworkers, farmers would be unduly burdened by the new regulatory regime with which they must comply. Under the proposed regulations, employers must provide a current list of workers to union organizations, certify and explain why they will or will not "bargain in good faith" over labor proposals, and effectively communicate any delayed start or end dates and overtime pay.<sup>4</sup> Additionally, the proposed rule outlines how an employer may only terminate workers "for cause" and that all progressive disciplinary actions must be thoroughly documented before firing; otherwise, employers who fire a foreign guestworker must pay the three-fourths guarantee and the worker's trip back to their home nation. Alabama is a proud right-to-work state and forcing union practices onto privately held agricultural businesses for the benefit of foreign workers is unacceptable. This proposed rulemaking would appease union activists by inhibiting employers' abilities to effectively manage their own workforce.

The most burdensome mandate in the DOL proposal would require employers to immediately incorporate a new Average Effect Wage Rate (AEWR) when finalized. This removes the critical 14-day delay between the AEWR rate posting and the implementation period, which allows farmers time to plan their payroll and budget. If employers mistakenly do not pay the updated AEWR, they must pay the heightened rate in backpay and are subject to penalties. The cost of labor is one of the top costs for our producers and employers require at least two weeks to calculate their financials to make the numbers work for increased payroll. Applying immediate adjustments to payroll strips employers' ability to plan, take out loans, or maintain their available labor pool.

DOL's proposal follows its recent March 30, 2023 change to the AEWR methodology,<sup>5</sup> which also occurred without stakeholder input.<sup>6</sup> Altering the methodology forces employers to face two AEWR changes each year, one each from the Farm Labor Survey and the Occupational Employment and Wage Statistics Survey. Employers must now immediately deal with any AEWR calculation adjustments. The March changes increased the AEWR significantly across the

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<sup>4</sup> Michigan Farm News (2023). Sweeping new H-2A rules proposed by Department of Labor. <https://www.michiganfarmnews.com/sweeping-new-h-2a-rules-proposed-by-department-of-labor>

<sup>5</sup> 88 FR 12760.

<sup>6</sup> American Farm Bureau Federation (2023). New H-2A wage rule set to crush family farms. <https://www.fb.org/the-zipline/new-h-2a-wage-rule-set-to-crush-family-farms>.

country, with Alabama experiencing a 14% rate increase to \$13.67 per hour,<sup>7</sup> which is substantially more than the federal minimum wage of \$7.25 per hour.<sup>8</sup> On top of record-high inflation, skyrocketing input costs, and the financial burden from the AEW method change, the cost of acquiring, housing, and paying workers has soared. In Alabama, receiving H-2A workers costs approximately \$1,000 in fees each, not including the wage rate and housing expenses incurred after arrival.<sup>9</sup> While DOL claims this rule will improve wage predictability for employees, immediate compliance will ignite financial instability in farming operations and further threaten any potential profitability.

The H-2A program has experienced exponential growth in participation over the last several years, with 371,000 H-2A positions certified in 2022.<sup>10</sup> According to the U.S. Citizenship and Immigration Services H-2A Employer Datahub, Alabama had 87 approved employers and 2,178 approved beneficiaries participate in the H-2A program in 2022, compared to 8 approved employers and 184 approved beneficiaries in 2015.<sup>11</sup> The agricultural industry in not only Alabama, but across the entire country, has grown to rely on the H-2A program for labor, highlighting the need for sound, fact-based improvements to the program to provide both farmers and workers a level playing field.

The proposed rulemaking will not promote “self-advocacy” among temporary workers or provide vital protections regarding their well-being. Instead, this rule will disrupt an already damaged system and further inhibit farmers and producers from their task at hand – feeding, clothing, and fueling our great nation. The proposals undermine the management and privacy of operations while granting the federal government and labor organizations unjust access to control and report on farmers. Any changes to the H-2A program should be subject to thorough and insightful action by Congress, not forced on producers by an executive branch agency. Producers in Alabama and across the nation depend on the H-2A program for a reliable workforce. We must prioritize our farmers’ needs through a flexible approach to the agricultural guestworker program, not a one-size-fits-all union wish list from the Administration.

To reiterate, I request immediate withdrawal of the proposed rulemaking and a commitment from the DOL to incorporate the appropriate and skilled stakeholders in future rulemaking processes regarding the H-2A program. I appreciate your consideration of this request.

Sincerely,



Tommy Tuberville  
United States Senator

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<sup>7</sup> American Farm Bureau Federation (2022). Examining the 2023 AEW. <https://www.fb.org/market-intel/examining-the-2023-aewr>.

<sup>8</sup> Department of Labor (2023). State minimum wage laws. <https://www.dol.gov/agencies/whd/minimum-wage/state>

<sup>9</sup> Alabama Daily News (2023). In labor shortage, more Alabama farms turn to guest worker visas. <https://aldailynews.com/in-labor-shortage-more-alabama-farms-turn-to-guest-worker-visas/>

<sup>10</sup> U.S. Department of Agriculture Economic Research Service (2023). <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>

<sup>11</sup> U.S. Citizenship and Immigration Services H-2A Employer Datahub (2023). <https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub>