



H-2A Reform

Pitfalls and Possibilities

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The Basics

- The H-2A program allows agricultural employers to hire temporary foreign guestworkers. It involves a multi-stage government approval process.
- The program is complicated and involves everyone's least favorite activity – *dealing with the government*.
- And, there are numerous employer obligations. Non-compliance with those obligations can be costly.

For all of these reasons, many growers are reluctant to use the H-2A program. And, many existing users are crying out for help – from their elected representatives, trade associations, etc. – to “fix” the program and make it easier to use.



State of the Program

- The H-2A program works. Period. While it's not perfect, the reality is that thousands of growers utilize the program successfully. There will be dysfunction with *any* government program – how you respond to the challenges is the biggest determinant of success.
- Some industry groups have called for a comprehensive overhaul or even abolition/replacement of the program (see, e.g., the ill-fated H-2C program). We would urge caution – the devil is *a/ways* in the details.
- Unfortunately, thoughtful, incremental reform is not the way our government typically conducts its business.



Proposed “Reform” Efforts

- In the last days of the Trump Administration, DOL published its 500-plus-page **Final Rule** to “modernize” and “improve” the H-2A program.
 - Rule was a mixed-bag for growers. While there were some positives, the rule was silent on key employer pain points in the current rules.
 - Other than a few bright spots, the improvements can mostly be described as window dressing
 - Upon taking office, the Biden Administration promptly mothballed the effort.
- In late 2019, the U.S. House passed H.R. 5038, the **Farm Workforce Modernization Act (FWMA)**.
 - Bill stalled in the Senate, and has not been able to gain any kind of momentum.



Rep. Zoe Lofgren (D-CA), sponsor of the FWMA

Key Highlights -- Current H-2A Regs v. Trump Rule v. FWMA

Issue	Current H-2A Regs	Trump Rule	FWMA
Eligibility	Ag employers with temporary or seasonal labor need	No change	Ag employers with temporary or seasonal labor need (uncapped); year-round ag employers (capped at 20,000 visas annually for first 3 years).
Start Dates	One start date per application; staggered start dates require multiple labor market tests	Permits staggered start dates in first 120 days if employer provides notice to DOL; recruitment extends through last staggered start date	Permits staggered start dates in first 120 days if employer provides notice to DHS; all staggered start dates must have the same end date; FLCs not eligible unless they are joint employers or obtain “premium surety bond”
Hours Guarantee	Must offer three-fourths of the work hours specified in the H-2A contract	No change	No change
Corresponding Employment	Workers are “corresponding” if they perform any duty listed in the job order, or any job duty performed by H-2A workers	No change	Changes term to “similarly employed”; i.e., are workers in the same occupational classification as the H-2A worker

Issue	Current H-2A Regs	Trump Rule	FWMA
Recruitment	SWA posts job order; DOL posts job on seasonaljobs.dol.gov ; must offer re-employment to former workers; must recruit U.S. applicants through the <u>50% point</u> in the contract	Same as current regs, except must recruits U.S. applicants through <u>first 30 days</u> of the contract (or through latest staggered start date)	Same, except must recruit U.S. applicants through the <u>later of 30 days or the 33% point</u> in the contract; employer bears burden of proof to show applicant rejected for lawful, job-related reason
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	H-2A workers excluded from MSPA	Explicitly applies MSPA transportation safety requirements to H-2A employers (NOTE: DOL currently enforces this, even though existing regs are ambiguous)	Applies MSPA to H-2A workers; provides express private right of action for employees to sue H-2A employers; third-party groups (legal services) can file complaints against H-2A employers with DOL; new authority for DOL to sue employers
Foreign Recruitment	Recruiters prohibited from seeking or receiving fees from workers	No change	Creates FLC-like registration/licensing for foreign recruiters; requires bonding based on # of workers; recruiters must file annual report to DOL; private right of action to sue employers for recruiting violations

Issue	Current H-2A Regs	Trump Rule	FWMA
Heat-Illness Plans/Training	N/A	N/A	Employers must create plans and provide training on heat illness, access to water, shade, breaks, and emergency response
At-Will Employment	N/A	N/A	Creates 5-year pilot program for portable H-2A visas, capped at 10,000 workers
E-Verify	N/A	N/A	Mandatory for agriculture, phased on by size of farm (all farms required to use E-Verify in Year 4 after bill signed into law)
Legalization	N/A	N/A	Current undocumented workers legalized as “Certified Agricultural Workers” (CAWs) if they worked 180 days in agriculture in the 2 preceding years; CAWs considered “U.S. workers” for purposes of H-2A recruitment; eligible to apply for Green Cards as early as Year 4

Proposed Wage Reform

- The Trump Administration also proposed reforming the methodology for the **Adverse Effect Wage Rate (AEWR)**. The rule combined the existing AEWR structure with an Occupational Employment Statistics (OES) survey system for occupations not included on the USDA Farm Labor Survey (FLS).
 - DOL was sued by worker advocate groups, and the rule was enjoined by a federal court.
- In 2021, the Biden Administration revived the Trump Rule – albeit with some key changes as a workaround to the lawsuit. The rule is currently in the 60-day “notice and comment” period.



Proposed Wage Reform (Cont'd)

The Trump Rule

The Good - Froze the 2020 AEWR until 2023, after which the AEWR would experience annual increases based on the Employment Cost Index (ECI), allowing for more modest annual increases than the current system.

The Bad – Non-FLS occupations (e.g., supervisors, truck drivers) would be subject to OES-based wages, which could increase wage rates to \$20-30.

The Ugly – Rule adopted the “one duty” framework, wherein a single duty from a non-FLS occupation thrusts the job into the OES wage.



Proposed Wage Reform (Cont'd)

The Biden Rule

The Good – The proposal has not been finalized.

The Bad – It takes the worst elements of the Trump Rule and leaves them in place, without the “good” parts.

The Ugly – Still unworkable for many growers, and will lead to a Balkanization of H-2A contracts into discrete occupational categories, thereby significantly driving up the administrative cost of the program and limiting employer flexibility to move workers between tasks.



Proposed Wage Reform (Cont'd)

The FWMA

The Good – 4.5% cap on annual AEWR increases for occupations included within the FLS.

The Bad – Adopts the Trump/Biden OES framework for non-FLS occupations.

The Ugly – AEWR cap does not apply to prevailing wages established by state surveys. And, the bill loosens the standards for states to conduct such surveys. The likely result is a “backdoor” wage increase that’s worse than the current system, especially for growers with piece rates.



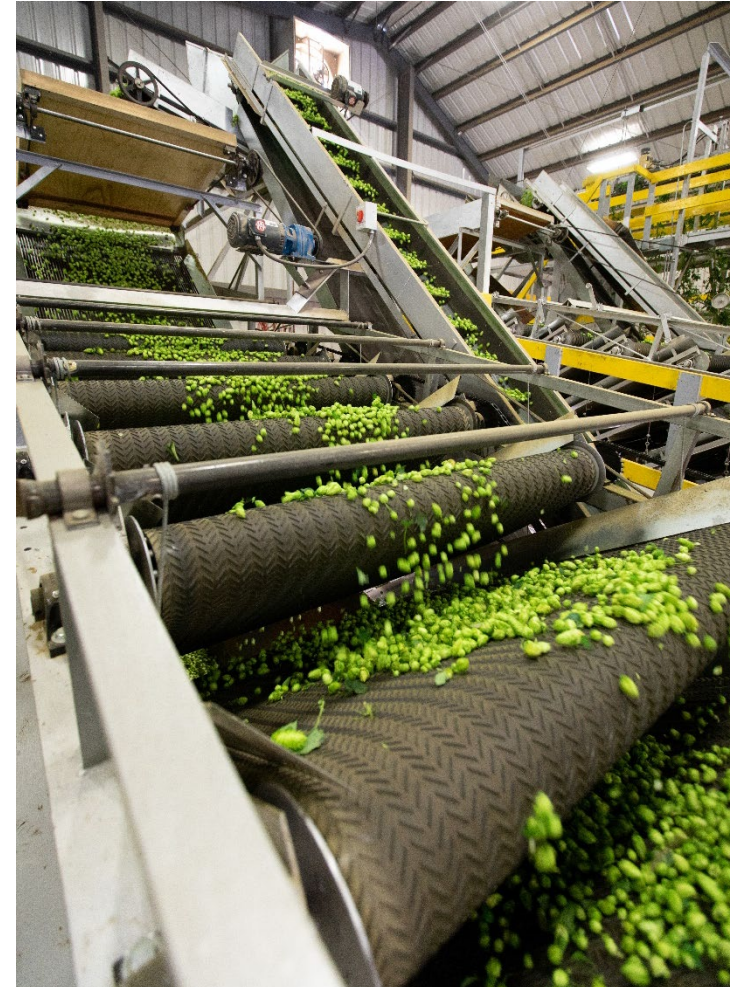
Our Takeaways

- As written, proposed H-2A reform efforts are flawed – that includes the Trump Rules (program reform AND wage rule), the Biden wage rule, and the FWMA.
- Fundamental issue is that all of these reform efforts codify the “bad” parts of the H-2A program and adopt superficial fixes for common pain points (e.g., wages).
- Worse, the proposals all attempt to distract growers with “shiny objects” from the growers’ wish lists (AEWR cap, staggered worker arrivals, etc.). But the Devil is in the details, and growers may find themselves regretting asking for change.



Making H-2A Work For You

- Industry groups are largely in favor of program reform; that's a good thing. But the industry should be careful what it wishes for, and needs to pay attention to the details.
- Don't let the DC-insiders give away the farm. Their goal is "getting to yes." Be skeptical, hold them accountable, and insist on a better deal. Your business depends on it.
- Rather than calling for radical reform (and risking the possibility of ending up with a *worse* program), you should look to ways to make the existing H-2A program work for your business.



Making H-2A Work For You (Cont'd)

It starts with education. It is impossible to be successful in a program that you don't understand.

- The program is complicated, but learnable, especially with help from experts.
- Educating your staff – crew leaders, HR team, payroll department, etc. – can help you adapt to the program's requirements and thrive!

We deal with hundreds of growers, in all industries and geographies imaginable. We hear their success stories every day. It takes some effort to get there, but H-2A can work for your business, too.



Questions? Please ask.

Or follow up with me directly:

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