



# DOL Finalizes Farmworker Protection Rule: 8 Key Takeaways for H-2A Agricultural Employers

Insights

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The U.S. Department of Labor just released a final rule that will expand employment protections for farmworkers in the H-2A visa program and enhance the agency’s capabilities to monitor and enforce program compliance. The DOL says that “Farmworker Protection Rule” – which was published in the Federal Register on April 29 – targets abusive working conditions experienced by H-2A temporary agricultural workers. The rule will take effect on June 28 and apply to H-2A applications filed on or after August 29. We’ll give you eight key employer takeaways and some practical steps you can take to prepare for this new rule.

## 8 Key Takeaways from the Farmworker Protection Rule

The Farmworker Protection Rule gives new protections to farmworkers in the H-2A program – a federal visa program that allows U.S. employers to bring foreign nationals to the country to fill temporary agricultural jobs – and increases employer accountability. Here are eight key takeaways:

### 1. *New Protections for Worker Self-Advocacy*

Workers who are engaged in “agriculture” under the Fair Labor Standards Act and not protected by National Labor Relations Act (NLRA) will have new protections related to collective action and concerted activity, including the right to choose to engage in self-organization. Employers will be prohibited from retaliating or discriminating against a worker for refusing to:

- attend a “captive audience meeting” if the primary purpose of the meeting is to discourage workers from joining unions or engaging in other protected activities; or
- listen to employer-sponsored speech or view employer-sponsored communications with that same primary purpose, even if the speech or communication occurs during their regularly scheduled working hours.

In addition, workers residing in employer-furnished housing will have broader rights to engage in activities at their living quarters or nearby premises, including consulting with “key service providers” such as lawyers and welcoming guests such as labor organizations. Employers must also allow workers to designate a representative for meetings that could lead to discipline.

H-2A employers will not be required to recognize labor organizations or to engage in any collective bargaining activities, activities, absent state authority to do so. For example, preexisting law in California permits agricultural employees to organize under the Agricultural Labor Relations Act.

## **2. “For Cause” Termination Clarified**

Employers will need to limit terminations of H-2A workers “for cause” to situations involving workers who failed to comply with employer policies or rules or “to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer.”

Even when that is the case, an employer may terminate the worker for cause only if a host of additional conditions are satisfied, including following progressive discipline procedures. This is significant because H-2A workers who are terminated for cause lose essential rights under the H-2A program, including the three-fourths guarantee, housing and meals until the worker leaves, outbound transportation, and, for U.S. workers, the right to be contacted for re-hire in the following season.

## **3. Immediate Effective Date for Updated AEW and Compensation During Minor Delays**

The Adverse Effect Wage Rate – which is typically published in mid-December – currently takes effect following a two-week delay. Going forward, newly issued AEW rates will take effect immediately upon publication in the Federal Register.

In addition, employers who fail to provide adequate notice to the State Workforce Agency and workers of a delay in their start date will be required to pay workers the applicable rate for each day that work is delayed for up to 14 days and provide additional pay, housing and benefits to certain workers placed on clearance orders via the Agricultural Recruitment System. This is an expansion of the existing requirements applicable only to minor delays.

## **4. New Disclosure Requirements for Foreign Labor Recruitment**

Employers will be required – similar to the disclosure rules for foreign worker recruitment in the H-2B program – to provide copies of all agreements with any agent or recruiter (regardless of whether they are located in the United States or abroad) that the employer engages or plans to engage in the recruitment of H-2A workers. Employers must provide additional disclosures such as the contact information of any person or entity working for the recruiter who will solicit prospective H-2A workers and the workplace’s owners, operators, and managers.

## **5. New Disclosure Requirements for Minimum Productivity Standards**

Employers will be required to disclose to workers before they accept the job any minimum productivity standards that are a condition of job retention. This rule applies regardless of whether the employer pays on a piece rate or hourly basis. Employers will be prohibited from raising

productivity standards mid-contract with the goal of terminating workers who fail to meet the standards.

## **6. Expanded Transportation Safety Requirements**

Employers will be prohibited from operating any employer-provided transportation (such as vans or buses used to transport H-2A workers) unless all passengers and the driver are wearing seat belts meeting federal safety standards.

## **7. Increased Employer Accountability**

New procedures will apply for discontinuing employment services for employers who have failed to meet the DOL's requirements. For example, the new procedures:

- require states to discontinue services to debarred employers;
- streamlined the process for debarment of successors who carry forward a debarred company; and
- lay out how the DOL will determine whether separate entities are acting as one employer – known as the “single employer test” – for purposes of enforcement and assessing seasonal or temporary need.

## **8. New Rule Applies to H-2A Applications Filed On or After August 29**

While the new rule generally takes effect on June 28, H-2A applications filed before August 29 will be processed under the applicable existing rules. Applications filed on or after that date will be processed in accordance with the Farmworker Protection Rule.

## **What's Next?**

Although recent legal challenges to H-2A regulatory changes have had mixed results, challenges to certain aspects of this law are likely, especially given some of the inherent conflicts with the exemption of farmworkers from the NLRA and U.S. Supreme Court precedent regarding union access to farm property. Employers in agriculture should nonetheless begin preparing now by creating and implementing policies and procedures to comply with the new rules. Additionally, H-2A applications will need to be updated to make sure they meet these new requirements.

## **Conclusion**

We will continue to monitor these developments and provide the most up-to-date information directly to your inbox, so make sure you are subscribed to Fisher Phillips' Insight System. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Agriculture Team.

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