

# 17 STATES, A GROWERS’ ASSOCIATION, AND A BERRY FARM WALK INTO A COURT: NEW AND ENDURING CHALLENGES TO H-2A REGULATIONS AND HOW TO BULLETPROOF FARMWORKER RIGHTS

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## ABSTRACT

*This Note explores a recent federal court case that stopped newly promulgated Department of Labor (DOL) rules from taking effect under the H-2A*

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*Temporary Agricultural Worker Program. The rules, issued in 2024, were meant to give farmworkers stronger protections—especially by shielding them from retaliation if they tried to organize or speak up about working conditions. 17 states, a growers’ association, and a Georgia berry farm sued to block the changes, arguing that the DOL had overstepped its authority. A judge in Georgia agreed, temporarily blocking the new protections, and highlighting a long-standing struggle between worker rights and agricultural interests.*

*To understand this dispute, this note traces the history of United States guestworker programs, from the World War II-era Bracero Program to today’s H-2A system. It explains how farmworkers—both domestic and foreign—have been left out of many basic labor laws, like those guaranteeing overtime pay, union rights, and unemployment insurance. While the DOL’s 2024 updates were meant to close some of those gaps, the court’s injunction means that only some states will apply the new rules, creating an uneven patchwork of protections across the country.*

*Not to wallow, this Note also suggests practical ways the DOL could still strengthen worker rights within the limits of current law. These include clarifying vague rules, improving education and outreach for workers, coordinating more closely with state labor agencies, and exploring a new market H-2A visas that would let workers leave unsafe jobs without losing their status. Ultimately, even small policy changes could go a long way toward protecting the people who keep America’s farms running. As this Note argues, real progress will require not only legal reform, but also a shift in how the nation values the workers who put food on our tables.*

## I. INTRODUCTION

On August 26, 2024, a judge for the United States District Court for the Southern District of Georgia, Brunswick Division issued an injunction against the implementation of a Department of Labor (DOL) amendment to the H-2A Temporary Agricultural Worker Program.<sup>1</sup> In the order granting the injunction, Judge Wood granted the requested injunctive relief because the 17 plaintiffs had met the criteria necessary for a reprieve: (1) the plaintiffs are likely to win on the merits; (2) there is a “substantial threat of irreparable injury” to plaintiffs without the injunction; (3) the proposed harm to the plaintiffs outweighs any injury to the

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1. Michael H. Neifach, *Judge Blocks New DOL H-2A Farmworker Visa Rule in 17 States*, NAT’L L. REV. (Aug. 27, 2024), <https://natlawreview.com/article/judge-blocks-new-dol-h-2a-farmworker-visa-rule-17-states> [<https://perma.cc/6QT4-CPZL>]; *Kansas v. U.S. Dep’t of Lab.*, 749 F. Supp. 3d 1363, 1369 (S.D. Ga. 2024) (order granting preliminary injunction).

defendants; and (4) there will be no disservice to the public should an injunction be granted.<sup>2</sup>

In order to understand the current lawsuit, one has to start at the beginning with the program over which the plaintiffs and defendants are fighting: the H-2A temporary agricultural worker program.

## II. WHAT ARE H-2A VISAS?

The United States' first forays into formal guestworker programs began in the domestic turmoil caused by World War II.<sup>3</sup> As American men left the home-front to fight in the Pacific and European theaters, many were left without the means to continue their work as before.<sup>4</sup> Women and children filled the roles vacated by their menfolk, but for some companies, industries, or regions, that was not enough.<sup>5</sup> American agriculture was particularly hard-hit by the rush to war, as it left many growers without laborers to till fields, plant and pick crops, run machinery, and perform basic upkeep around the farm.<sup>6</sup> Had the government not intervened, the United States might have been at a disadvantage as they attempted to feed both their domestic population as well as their troops and allies across the sea.<sup>7</sup> It was a matter of national security and much of the war effort on the home front went towards fixing the issue of farm labor.<sup>8</sup>

So began the first guestworker program in the United States. Beginning in 1942, the United States and Mexican governments created a series of agreements which led to the temporary exchange of Mexican nationals as cheap labor to fill available farm jobs in the United States.<sup>9</sup> These agreements became effectively known as the Bracero Program.<sup>10</sup> Though meant to be only a temporary measure,

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2. *Kansas v. U.S. Dep't of Lab.*, 749 F. Supp. 3d 1363, 1372 (S.D. Ga. 2024) (order granting preliminary injunction).

3. See *1942: Bracero Program* in *A Latinx Resource Guide: Civil Rights Cases and Events in the United States*, LIBR. OF CONG.: RSCH. GUIDES (Aug. 26, 2025, at 11:34 CT), <https://guides.loc.gov/latinx-civil-rights/bracero-program?os=vb...&ref=appess> [<https://perma.cc/CQV7-6YNSN>].

4. See Judy Barrett Litoff & David C. Smith, "To the Rescue of the Crops": *The Women's Land Army During World War II*, PROLOGUE MAG., NAT'L ARCHIVES, Winter 1993, at 347, <https://www.archives.gov/publications/prologue/1993/winter/landarmy.html> [<https://perma.cc/SU3C-NMSD>].

5. *Id.* at 1, 6.

6. *Id.* at 1.

7. *Id.* at 1–2.

8. *Id.* at 11.

9. *1942: Bracero Program*, *supra* note 3.

10. See *id.*

the Bracero Program would last through to 1964 due to the increasing demand for temporary workers.<sup>11</sup> Even when American GIs came home, they sought better employment, used the GI Bill to access higher education, or moved off the farm and into new suburban areas where there was more work and less labor to be done.<sup>12</sup> Compounding this work shortage, and a prevailing problem with the Bracero Program that contributed to even lower domestic participation in the agricultural labor market, was the artificial depression of wages by growers and landowners during the Bracero years.<sup>13</sup> A cyclical pattern of wage depression led to American worker flight from agricultural jobs which resulted in a need for more foreign laborers.<sup>14</sup> As more foreign laborers appeared, wages were further cut down as young Mexican men were willing to work for less, with less, and for much longer than their domestic counterparts.<sup>15</sup> This wage depression not only undercut attempts to secure employment for domestic laborers and allowed for the rampant exploitation of foreign workers, but perpetuated what was supposed to be a temporary, war-time measure.<sup>16</sup> Eventually, this abuse of the system became insupportable, and in 1964, the United States shut down the Bracero Program for good.<sup>17</sup>

The demise of the Bracero Program was not the death knell of guest work in the United States, but rather its proving ground. The H-2 Program immediately succeeded the Bracero Program.<sup>18</sup> This program, unlike the limited scope of the

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11. *Id.*

12. GI stands for “general issue” or “government issue.” *GI*, MERRIAM-WEBSTER (Aug. 27, 2025, at 11:37 CT), <https://www.merriam-webster.com/dictionary/gi> [<https://perma.cc/A98M-4YPP>]. This was, and still is, a nickname given to United States servicemembers who receive general issue gear from the government as well as being “standard issue” themselves—look no further than the children’s comic book character and toy G.I. Joe. *Servicemen’s Readjustment Act (1944)*, NAT’L ARCHIVES: MILESTONE DOCUMENTS (Sep. 17, 2025, at 11:36 CT), <https://www.archives.gov/milestone-documents/servicemens-readjustment-act> [<https://perma.cc/DRL4-NT3Z>].

13. *See 1942: Bracero Program, supra* note 3.

14. *Id.*; *see* Philip Martin, *Mexican Braceros and US Farmworkers*, WILSON CTR. (July 10, 2020), <https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers> [<https://perma.cc/AH47-LSMX>].

15. *See* Martin, *supra* note 14.

16. *Id.*

17. *Id.*

18. Sadikshya Nepal, *Primer: Evolution of the H-2A Visa Program*, BIPARTISAN POL’Y CTR. (Sep. 15, 2021), <https://bipartisanpolicy.org/explainer/primer-h2a-visa/> [<https://perma.cc/3M2W-3FX6>]; *see H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Aug. 25, 2025, at 09:39 CT), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> [<https://perma.cc/GW6R-2D3Q>].

Bracero Program, looked worldwide for workers with no regard for their nation of origin.<sup>19</sup> Furthermore, this new program covered all agricultural and agriculture-adjacent guestworkers in the United States.<sup>20</sup> However, the Immigration Reform and Control Act of 1986 (IRCA) amended the visa categories for these workers into H-2A visas for agricultural workers and H-2B visas for non-agricultural jobs.<sup>21</sup> After the IRCA reclassified the one H-2 visa into two separate programs, the Immigration Act of 1990 also put strict limits on the number of H-2B visas that could be authorized each year.<sup>22</sup> While H-2B visas are limited to 66,000 total visas allocated per year (33,000 for the first half of the year and 33,000 for the second half of the year), there is no limit to the number of H-2A visas that can be approved.<sup>23</sup>

The H-2A program, as it currently stands, remains largely the same program that emerged from the 1986 IRCA split of the H-2 program. The program is still restricted to agricultural work, grants non-immigrant visas for temporary lawful status in the United States and allows the participation of peoples from across the world to apply for and access these visas.<sup>24</sup>

#### *A. H-2A by the Numbers*

H-2A workers are overwhelmingly men and overwhelmingly young.<sup>25</sup> According to the National Center for Farmworker Health, Inc., approximately 47%

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19. See *H-2A Temporary Agricultural Workers*, *supra* note 18.

20. Nepal, *supra* note 18.

21. Immigration Reform and Control Act of 1986 § 301(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Aug. 26, 2025, at 11:53 CT), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/A9Y4-YAUR>].

22. *Id.*; Immigration Act of 1990 § 205(a), 8 U.S.C. § 1184(g)(1)(B), (10).

23. See *H-2B Temporary Non-Agricultural Workers*, *supra* note 21 (noting that this limitation on H-2B visas creates a strong incentive for visa fraud on behalf of employers and is a major cause for concern for the DOL); *H-2B Temporary Non-Agricultural Workers*, *supra* note 21; *H-2A Temporary Agricultural Worker Program*, U.S. DEPT. OF HOMELAND SEC. (Aug. 26, 2025, at 11:55 CT), <https://www.dhs.gov/h-2a-temporary-agricultural-worker-program> [<https://perma.cc/AZG9-PEVT>]; see generally *H-1B and H-2B Visas in Crisis: Assessing the Shortage and Its Impact on Immigrant Workers*, A.B.A. (Aug. 27, 2025, at 11:31 CT), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/labor-and-employment-rights/work-visas-in-crisis/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/labor-and-employment-rights/work-visas-in-crisis/) [<https://perma.cc/3LH7-LE5L>].

24. *H-2A Temporary Agricultural Workers*, *supra* note 18.

25. See NAT'L CTR. FOR FARMWORKER HEALTH, INC., H-2A GUEST WORKER FACT SHEET 1 (2020), [https://www.ncfh.org/wpcontent/uploads/2025/04/h2a\\_fact\\_sheet\\_10.2020-1.pdf](https://www.ncfh.org/wpcontent/uploads/2025/04/h2a_fact_sheet_10.2020-1.pdf) [<https://perma.cc/269J-APY7>].

of certified H-2A workers in 2018 were between the ages of 20 and 29.<sup>26</sup> The next largest age group among H-2A workers was the 30 to 39 age range with about 30% of all certifications in the same year.<sup>27</sup> That means that almost 80% of all H-2A certified workers in 2018 were aged 20 to 39.<sup>28</sup> Compounding this is an overwhelming—bordering on exclusive—tendency to hire men.<sup>29</sup> In the same year, nearly 97% of all H-2A workers were men.<sup>30</sup> This incredible rate of young men being hired as part of the H-2A program is the result of regulations which allow American growers to be discriminatory in their hiring practices.<sup>31</sup> Unlike their American counterparts, H-2A workers are not protected by anti-discrimination legislation that bars growers from hiring only young men from specific backgrounds or nations.<sup>32</sup>

As previously stated, one of the major changes that was made moving from the Bracero Program to the current H-2A program is that the workers come from all over the world, not just from Mexico.<sup>33</sup> While an astounding 91% of H-2A visa holders still come from our neighbor to the south (a hangover from the Bracero years) other countries have also become popular recruiting grounds for H-2A workers including Canada, Jamaica, and South Africa.<sup>34</sup> Just as large concentrations of workers originate from certain countries, many H-2A workers end up concentrating in relatively few places once they get to the United States.<sup>35</sup> The USDA data show that in 2022 about half of all H-2A workers ended up working on contracts in just one of five states: Florida, California, Georgia,

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26. *Id.* at 2.

27. *Id.*

28. *Id.*

29. *See id.*

30. *Id.*

31. *See* 20 C.F.R. § 655.135(c)(3) (2025) (demonstrating that the regulations require employers to “consider,” “accept and hire all [United States] applicants who are qualified and who will be available” for the job regardless of gender, age, or other protected class. No such provision exists for foreign farmworkers, allowing them to be subject to various forms of gender, age, and nationality discrimination without penalty.).

32. *See id.* (demonstrating that the regulations require employers to “consider,” “accept and hire all [United States] applicants who are qualified and who will be available” for the job regardless of gender, age, or other protected class while no such provision exists for their foreign counterparts).

33. *H-2A Program*, GLOB. SKILLS P’SHIP, CTR. FOR GLOB. DEV. (Aug. 27, 2025, at 12:38 CT), <https://gsp.cgdev.org/legalpathway/h-2a-program> [<https://perma.cc/4RN6-Y7NQ>].

34. *Id.*

35. Marcelo Castillo & Skyler Simmitt, *Florida, California, and Georgia Accounted for One-Third of H-2A Jobs in FY 2022*, ECON. RSCH. SERV., U.S. DEP’T. OF AGRIC.: CHARTS OF NOTE (May 30, 2023), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=106604> [<https://perma.cc/NW4A-U6RX>].

Washington, and North Carolina.<sup>36</sup> Of the 370,628 H-2A visas approved in 2022, 50,973 workers were employed in the state of Florida.<sup>37</sup> In the same year, California had 43,760 H-2A workers, and Georgia hosted 34,974 workers.<sup>38</sup> Combined, Florida, California, and Georgia soaked up approximately one-third of the total H-2A visas issued for 2022.<sup>39</sup> If the next two highest H-2A states are added—Washington with 33,049, and North Carolina with 25,624—that number jumps to almost half of all H-2A visas in the United States.<sup>40</sup>

These numbers make sense given that Florida, California, Georgia, Washington, and North Carolina have agricultural industries that prefer manual labor (as opposed to mechanized labor) due to the quality and type of crop.<sup>41</sup> However, only looking at the number of visas by state can be deceptive. Though only five states claimed over half of all H-2A visas allocated in 2022, just 1% of employers who requested at least 500 workers were granted almost 40% of all H-2A workers for the year.<sup>42</sup> By contrast, just under 8% of H-2A workers went to over 68% of employers who requested one to nine total visas.<sup>43</sup> These foreign workers are not simply supplementing deficits in the agricultural labor force, they *are* the agricultural labor force.

### *B. Worker Protections—or Lack Thereof*

These hundreds of thousands of workers go almost completely unprotected by the law. Some of our largest and most fundamental worker protections legislation contain explicit carveouts for agricultural workers.<sup>44</sup> This lack of protection extends to foreign farmworkers who, like their domestic counterparts, are exempt from many vital protections guaranteed to other workers in other

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36. *Id.*; *The Expanding Role of H-2A Workers in U.S. Agriculture*, AM. IMMIGR. COUNCIL (June 11, 2024), <https://www.americanimmigrationcouncil.org/research/h-2a-workers-us-agriculture> [https://perma.cc/N9QE-QW56].

37. AM. IMMIGR. COUNCIL, *supra* note 36.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Marcelo Castillo, *H-2A Temporary Agricultural Job Certifications Continued to Soar in 2022*, ECON. RSCH. SERV., U.S. DEPT. OF AG.: AMBER WAVES (Mar. 13, 2023), <https://www.ers.usda.gov/amber-waves/2023/march/h-2a-temporary-agricultural-job-certifications-continued-to-soar-in-2022/> [https://perma.cc/ZUV7-5742].

43. *Id.*

44. National Labor Relations Act, 29 U.S.C. § 152(3); Fair Labor Standards Act, 29 U.S.C. § 213(a)(6); Wilbur J. Cohen & Robert J. Myers, *Social Security Act Amendments of 1950: A Summary and Legislative History*, SOC. SEC. BULL., Oct. 1950, at 3.

fields.<sup>45</sup> Farmworkers, foreign and domestic, are not subject to protections granted to unionization efforts under the National Labor Relations Act (NLRA).<sup>46</sup> In fact, it is not simply silence on the part of the NLRA that keeps farmworkers from accessing its protections but a deliberate carveout for farmworkers that bars their inclusion.<sup>47</sup> The suit on which this paper turns makes use of this exception.<sup>48</sup>

The same can largely be said for the Fair Labor Standards Act (FLSA) and the Social Security Act (SSA). The FLSA was enacted to provide workers with more power in the workplace, such as setting a standard work week to 40 hours and requiring enhanced pay for any hours worked over that time (overtime).<sup>49</sup> This landmark legislation also explicitly excluded farmworkers from its protections.<sup>50</sup> To this day, farmworkers are not federally entitled to a standardized work week nor are they privileged to receive overtime pay.<sup>51</sup> The SSA, on the other hand, was meant to insulate those who could not work from hardship after they left the job market.<sup>52</sup> Congress wrote into the SSA the United States' first social safety net with unemployment insurance, an old-age monetary benefit, and the opportunity to collect a government stipend in the event of disability that rendered one unable to work.<sup>53</sup> Of course, like all the other protections afforded American workers, the SSA flatly excluded farmworkers and other agricultural labor from these important and extensive benefits.<sup>54</sup> This exclusion though, at least for domestic farm workers, did not remain for long.<sup>55</sup> In 1950, the SSA's provisions of old-age pensions and

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45. National Labor Relations Act, 29 U.S.C. § 152(3); Fair Labor Standards Act, 29 U.S.C. § 213(a)(6); Cohen & Myers, *supra* note 44, at 3.

46. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151–169.

47. *Id.* § 152(3).

48. Complaint at 20–27, *Kansas v. U.S. Dep't of Lab.*, No. 2:24-cv-76-LGW-BWC (S.D. Ga. June 10, 2024).

49. *See generally* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

50. *Id.* § 13, 52 Stat. at 1067.

51. 29 U.S.C. § 213(a)(6), (b)(12). Though some states have mandated overtime pay for farmworkers, there remains no requirement nationally to do so. *Overtime for Agricultural Workers*, NAT'L AGRIC. L. CTR. (Aug. 28, 2025, at 12:31 CT), <https://nationalaglawcenter.org/state-compilations/agpay/overtime/> [<https://perma.cc/68MR-4YDD>].

52. *See generally* Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301–1305).

53. *See generally id.*

54. *Id.* § 210, 49 Stat. at 625 (federal old-age benefits old-age reserve account), § 811, 49 Stat. at 639 (taxes with respect to employment), § 907, 49 Stat. at 643 (tax on employers of 8 or more).

55. *Old-Age, Survivors, and Disability Insurance: Development of Agricultural Coverage*, SOC. SEC. BULL., June 1958, at 3, 5.

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disability benefits were extended to American farmworkers—though the same could not be said of unemployment insurance.<sup>56</sup>

It was these lapses in protection that have prompted many regulatory agencies to try to make up for and patch the cracks left by these exceptions. In particular, the DOL has turned its attention on the working conditions and myriad related issues with H-2A visa holders.<sup>57</sup> Continuing problems with enforcement—coupled with an administration seemingly focused on increasing the welfare of workers—created the perfect environment for the DOL to change how it found and dealt with violations of H-2A regulation.<sup>58</sup> This led to a set of groundbreaking amendments to the existing H-2A regulations, which went into effect on June 28, 2024, that would accomplish the DOL's goals and make it both easier and more efficient for H-2A farmworkers to hold their own against their employers.<sup>59</sup>

### III. CURRENT LITIGATION

Late in 2023, in accordance with the Administrative Procedure Act (APA), the DOL promulgated a number of amendments to the H-2A regulations to the various states, agencies, and departments that would be affected by the changes in the Federal Register in compliance with informal rulemaking procedures.<sup>60</sup> The amendments ranged from changes to working definitions contained within the regulations, the inclusion of workable guidelines for what constitutes a “for cause”

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56. *Id.*; Cohen & Myers, *supra* note 44, at 3.

57. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order at 1, *Kansas v. U.S. Dep't of Lab.*, No. 2:24-cv-00076-LGW-BWC (S.D. Ga. July 8, 2024); *see generally* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, and 29 C.F.R. pt. 501).

58. *Biden's Labor Department Withdraws Trump Administration's Final Rule on H-2A Guest Worker Program*, FARMWORKER JUST. (Aug. 27, 2025, at 11:46 CT), <https://www.farmworkerjustice.org/news-article/bidens-labor-department-withdraws-trump-administrations-final-rule-on-h-2a-guest-worker-program/> [<https://perma.cc/E7SR-WBVE>]; Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 1; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33900.

59. Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33898.

60. *See generally A Guide to the Rulemaking Process*, OFF. OF THE FED. REG. (Sep. 17, 2025, at 11:36 CT), <https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf> [<https://perma.cc/3F8K-3PGH>]; Administrative Procedure Act, 5 U.S.C. § 553; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33898.

termination, and, at issue here, a provision that would limit retaliation against H-2A workers who attempt to organize or collectively bargain with their employer.<sup>61</sup>

In their promulgation of these regulatory changes, the DOL espoused that their primary concerns, and the driving forces behind the rule changes, were the health and safety of the H-2A workers and enabling the DOL to better enforce the provisions contained within the regulations.<sup>62</sup> Among their more specific concerns is the inability of farmworkers to advocate for themselves in the absence of DOL agents.<sup>63</sup> Most farmworkers are necessarily isolated by virtue of: (1) the language barriers that often exist between the wider community and the workers; (2) the high probability that they are among strangers; (3) being in a foreign country with foreign laws and legal practices; and (4) being entirely dependent on their employer for—among other things—their food, shelter, income, continued employment, and legal status in the United States.<sup>64</sup> This isolation, the DOL stated, is their major concern surrounding the enforcement of the rules and regulations encompassing the H-2A program.<sup>65</sup>

To fix this issue of isolation, and an apparent inability to put more boots on the ground, the DOL decided to promulgate a new provision that would add a previously absent layer of protection for collective activities taken by H-2A farmworkers to better their circumstances.<sup>66</sup> Their logic is simple: in the absence of a DOL agent, no one will advocate for H-2A farmworkers quite like H-2A farmworkers.<sup>67</sup> This collective action would allow for farmworkers to get help from people who know their struggles in a more accessible way, thus aiding in the

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61. See generally Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33898.

62. See *id.* at 33898, 33998.

63. See *id.* at 33900–01.

64. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 7; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33987, 33989–90.

65. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 7; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33987.

66. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 9–10; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33900–01.

67. Defendants' Opposition to Plaintiff's Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 9; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33900–01.

enforcement of the all too frequently broken or evaded H-2A regulations.<sup>68</sup> These fixes were supposed to improve the safety and health of H-2A farmworkers.<sup>69</sup> Instead, they were enjoined in 17 states that are currently in front of a judge in the federal court in the Southern District of Georgia.<sup>70</sup>

#### *A. The Litigants*

The complaint was first brought by a coalition of 17 states led by Kansas, Miles Berry Farm, and the Georgia Fruit and Vegetable Growers Association in the Brunswick Division of the Southern District of Georgia.<sup>71</sup> The original complaint alleges two main issues with the new H-2A rules promulgated by the DOL: (1) the DOL did not have the statutory authority to grant rights to H-2A workers that had been explicitly denied them by acts of Congress; and (2) that the rules were arbitrary and capricious.<sup>72</sup> The suit was quickly joined by sixteen other states: Arkansas, Florida, Georgia, Idaho, Iowa, Indiana, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, South Carolina, and Virginia.<sup>73</sup>

The interest of these states is easy to discern: more H-2A protections mean higher costs to their citizens.<sup>74</sup> It might also mean an increase in the need for state-level DOL personnel to investigate the anticipated rise in violation reporting as a result of the collective efforts of H-2A communities across their states.<sup>75</sup> Something of note is that every state that joined the lawsuit has, or had at the time, a Republican governor.<sup>76</sup> Three of the biggest H-2A recipient states, California, Washington, and North Carolina, are not party to the suit.<sup>77</sup> Their common characteristic is that all three have, or had at the time, governors elected on a

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68. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 6–10; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33900.

69. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 2; Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. at 33898.

70. *Kansas v. U.S. Dep't of Lab.*, 749 F. Supp. 3d 1363, 1369 (S.D. Ga. 2024) (order granting preliminary injunction).

71. Complaint, *supra* note 48, at 1.

72. *Id.* at 20–27.

73. *Id.* at 1.

74. *See id.* at 19–20.

75. *Id.* at 17.

76. *Fast Facts About America's Governors*, CTR. ON THE AM. GOVERNOR, EAGLETON INST. OF POL. AT RUTGERS UNIV. (Aug. 25, 2025, at 9:38 CT), <https://governors.rutgers.edu/fast-facts-about-americas-governors/> [<https://perma.cc/5DV4-QRRV>].

77. *See* Complaint, *supra* note 48, at 1.

Democratic ticket.<sup>78</sup> Though this issue does not necessarily mean that there is a political dividing line, it is indicative of the parties' attitudes toward labor and the worker's place in the process. It also serves as a fairly accurate predictor of which states might oppose future attempts to make H-2A protections more robust, regardless of what happens with the current lawsuit. As it stands, these states accounted for approximately 28% of all H-2A workers admitted to the United States for the 2022 growing season.<sup>79</sup>

The second named plaintiff, Miles Berry Farm, is a 540 acre produce farm in Baxley, Georgia.<sup>80</sup> Among its products are 400 acres of blueberries, 20 acres of strawberries, and 120 acres of an assortment of fruits and vegetables.<sup>81</sup> They also pack and ship straight from their farm, ensuring that their products are fresh wherever they end up.<sup>82</sup> Of course, the over 500 acres of fruits and vegetables must be picked and packed by someone. Over the course of the 2023 growing season, Miles Berry Farm requested 152 total H-2A workers in five different work orders that spanned the growing season from January into September.<sup>83</sup> The work orders are standard: they set out expected hours (48 per week), the minimum pay (\$13.67 per hour) and the actual pay rate (\$0.50 per pound of berries picked), where the workers will live (one dwelling for 152 people), and how the workers can expect to get their food (kitchen facilities will be provided).<sup>84</sup> They also list the expected duties as:

Harvest blueberries (hand and machine), harvest strawberries, zucchini, persimmons, grapes, misc. squash. Perform simple ag equipment maintenance such as sharpening blades, cleaning, lubricating Rake and bale pine straw. Operate tractors and implements, mowers, forklifts and other simple farm

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78. *Fast Facts About America's Governors*, *supra* note 76.

79. See AM. IMMIGR. COUNCIL, *supra* note 36 (indicating that of the 370,628 total H-2A visa approvals nationwide, a combined 102,433 H-2A visa were approved in California, Washington, and North Carolina, comprising 27.64% of the total approvals for the year 2022).

80. *Welcome to Miles Berry Farm*, MILES BERRY FARM (Aug. 27, 2025, at 11:40 CT), <https://www.milesberryfarm.com/about> [<https://perma.cc/S8YR-YX4Q>].

81. *Id.*; see *Products*, MILES BERRY FARM (Aug. 27, 2025, at 11:44 CT), <https://www.milesberryfarm.com/products> [<https://perma.cc/5GMY-S8NR>].

82. See *Welcome to Miles Berry Farm*, *supra* note 80.

83. See Miles Berry Farm, H-2A Case Number H-300-22326-600560 (Dep't of Lab. Jan. 4, 2023); Miles Berry Farm, H-2A Case Number H-300-22352-647889 (Dep't of Lab. Jan. 31, 2023); Miles Berry Farm, H-2A Case Number H-300-23040-760897 (Dep't of Lab. Apr. 17, 2023); Miles Berry Farm, H-2A Case Number H-300-23084-878088 (Dep't of Lab. Apr. 19, 2023); Miles Berry Farm, H-2A Case Number H-300-23084-878093 (Dep't of Lab. Apr. 27, 2023).

84. See, e.g., Miles Berry Farm, H-2A Case Number H-300-23335-535596 (Dep't of Lab. Dec. 28, 2023).

equipment. Maintain growing fields: irrigation systems, weeding, summer pruning, and general cleanup.<sup>85</sup>

The compensation for forgoing services is not cheap for growers of this size. Though the listed wage is a minimum of \$13.67, the offered piece rate is \$0.50 per pound of berries, and many workers will exceed the minimum hourly wage if their employer offers a piece rate.<sup>86</sup> Though this is dependent on the worker and their own efforts to pick more and faster.

These costs increase further when the H-2A worker count increases. As with much of what Miles Berry Farm grows, blueberries are a hand-harvest preferred crop.<sup>87</sup> This means that blueberries can and often are harvested by machine, but the product is usually better conditioned and better suited to hand-harvesting.<sup>88</sup> Of course, hand-harvesting requires much more labor, many more working hours, and therefore much more money to finance the endeavor.<sup>89</sup> Should these 152 workers, working in the sun and heat with potentially lethal implements decide to push for more safety measures, enhanced or more frequently placed water stations, or better pay will impact the bottom line of Miles Berry Farm.<sup>90</sup> This seems to be the prevailing fear amongst like-minded growers—that new protections will mean new expenses.<sup>91</sup>

The last of the plaintiff types is a growers' association from Georgia. The Georgia Fruit and Vegetable Growers Association (GFVGA) offers a collection of growers from across the state a “voice [in] the industry,” various educational resources, and other member services.<sup>92</sup> This organization filed as part of the larger

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85. *Id.*

86. The minimum wage per hour is set by the state and can be seen on the form submitted to the DOL. Many workers will offer a piece rate alongside this hourly wage as an incentive for their workers to pick faster and more efficiently as workers can often exceed the minimum hourly wage through the piece rate. Though workers are guaranteed a minimum wage of \$13.67 per hour of work regardless of how they pick. *See, e.g.*, Miles Berry Farm, H-2A Case Number H-300-23335-535596 (Dep't of Lab. Dec. 28, 2023).

87. LISA W. DEVETTER ET AL., WASH. STATE UNIV. EXTENSION, HARVESTING BLUEBERRIES: A GUIDE TO MACHINE PICK BLUEBERRIES FOR FRESH MARKET 1, 7 (2022), <https://s3.wp.wsu.edu/uploads/sites/2181/2022/02/FS368E.pdf> [<https://perma.cc/UJG4-GN74>].

88. *Id.*

89. *Id.* at 1.

90. Complaint, *supra* note 48, at 18–20.

91. *Id.*

92. *Membership*, GA. FRUIT & VEGETABLE GROWERS ASS'N (Aug. 27, 2025, at 11:35 CT), <https://www.gfvga.org/page/Membership> [<https://perma.cc/K6K8-SRAG>].

suit on behalf of at least one of their approximately 600 members.<sup>93</sup> For their part, the GFVGA claims in the complaint that:

A key part of the services GFVGA provides to its members centers on the H-2A program, including gathering information regarding changes to the program; assessing how the changes will impact members; and putting members in contact with congressional staff, agency personnel, and farm labor contractors to resolve operational challenges in the administration of the H-2A program.<sup>94</sup>

They are a Georgia state growers' lobby and one of the connections many growers make when it comes to navigating the complicated world of H-2A.<sup>95</sup> Their principle complaint on behalf of their members is the same as everyone else—they worry that these regulations will cost them more in the long-run.<sup>96</sup> Miles Berry Farm is not a member for the GFVGA, but at least four other farms in Georgia are members of the GFVGA and currently use H-2A labor, allowing the GFVGA have standing in the suit.<sup>97</sup> This combination only serves to further reinforce that economics and cost-saving measures are truly at the heart of this lawsuit and that a definitively pro-employer, anti-labor stance is being taken by the plaintiffs.

The defendants, for their part, are: the DOL (who promulgated the rules); José Javier Rodríguez, in his official capacity as the Assistant Secretary of Employment and Training from the DOL; and Jessica Looman, in her official capacity as the Administrator, Wage and Hour Division from the DOL.<sup>98</sup> In addition to the three main defendants there are three interveners: (1) the Centro de los Derechos del Migrante; (2) Candelario Rodriguez Serrano; and (3) Jorge Sánchez Reyes.<sup>99</sup>

### *B. The Legal Issues*

The crux of the complaint revolves around major worker protections. The first and most crucial act, in regard to the collective bargaining powers of workers, is the NLRA.<sup>100</sup> This Act, a product of the New Deal innovations of Franklin

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93. Complaint, *supra* note 48, at 8–10.

94. *Id.* at 9.

95. See *Membership*, *supra* note 92.

96. Complaint, *supra* note 48, at 19–20.

97. *Id.*

98. *Id.* at 1, 10.

99. Motion to Intervene at 1, *Kansas v. U.S. Dep't of Lab.*, No. 2:23-cv-76-LGW-BWC (S.D. Ga. July 5, 2024).

100. National Labor Relations Act, 29 U.S.C. §§ 151–169.

Roosevelt and subsequent amendments, guarantees workers the ability to collectively bargain with their employers without fear of retaliation for doing so.<sup>101</sup> Despite the extensive agricultural sweep of most New Deal programs, the NLRA explicitly wrote agricultural workers out of its protections.<sup>102</sup> This Act:

[S]hall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act.<sup>103</sup>

The chief challenge then is that the DOL usurped federal authority to expand rights to H-2A visa holders that are outside their statutory authority.<sup>104</sup> They claim that Congress' deliberate denial of collective bargaining rights for agricultural workers precludes the DOL granting them in their own legislation as Congress has made it clear that such farmworkers should not be entitled to that protection.<sup>105</sup> They also argue that the extension of collective bargaining rights by the DOL is "arbitrary and capricious" or without a rational basis for believing the regulation would reasonably address a government interest.<sup>106</sup> The plaintiffs, for their part, in their complaint state that they see no reasonable connection between the measures the DOL sought to implement and a legitimate government purpose.<sup>107</sup> Instead, they focus on the wholesale federal neglect of farmworkers—foreign and domestic—to justify that the newest amendments to the H-2A regulations are without authority and contrary to the stated policies of the United States government.<sup>108</sup>

The brief for the plaintiffs, though, misses out on a crucial note: namely that some states have extended the right of collective bargaining themselves.<sup>109</sup> 14 states currently guarantee the right to collective action, including: Arizona, California, Colorado, Hawaii, Kansas, Kentucky, Louisiana, Massachusetts,

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101. *See generally id.*

102. *Id.* at § 152(3).

103. *Id.*

104. Complaint, *supra* note 48, at 20–23.

105. *Id.*

106. *Id.* at 25–27.

107. *Id.* at 25–27; *see* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 29–30 (2020) (illustrating the arbitrary and capricious standard).

108. Complaint, *supra* note 48, at 20.

109. *Collective Bargaining Rights for Farmworkers*, NAT'L AGRIC. L. CTR. (July 14, 2022), <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/> [<https://perma.cc/H6QM-XALX>].

Nebraska, New Jersey, New York, Oregon, Washington, and Wisconsin.<sup>110</sup> Of the states on the forgoing list, three are party to the lawsuit to prevent the DOL from granting collective bargaining power to foreign farmworkers—Kansas, Louisiana, and Nebraska—and another two are in the top five states that request the highest number of H-2A visas who did not join the suit—California and Washington.<sup>111</sup> These protections, of course, only extend as far as the states allow. For example, the regulations that allow for collective bargaining in Kansas prohibit lockouts, pickets, and strikes during certain times.<sup>112</sup> In contrast, Louisiana’s law concerning collective bargaining makes no mention of prohibitions or curtailments, stating merely that “[n]othing in this Part shall be construed to deny or abridge the right of agricultural laborers by and through a labor organization or labor union to bargain collectively with their employer.”<sup>113</sup> These ordinances, as with so much else, also only apply to domestic farmworkers.

On August 26, 2024, Judge Wood granted an injunction for the plaintiffs to stop the implementation of the collective efforts amendments in the plaintiff states pending the outcome of the lawsuit.<sup>114</sup> Of the 50 states and myriad peoples covered by DOL regulations, 17 states are now exempt for currently enacted protections for H-2A farmworkers.<sup>115</sup>

### C. What This Means for Workers

Now comes the obvious question on the other side of this lawsuit—what does this mean for the workers? For some it means that the ability to collectively bargain does not change from what it previously was.<sup>116</sup> They can still be fired for unionization efforts as, without the newest amendment to the H-2A regulations, there are no protections.<sup>117</sup> This means that any enforcement help the DOL was hoping to get from workers themselves cannot be counted on, at least not where collective efforts are concerned.<sup>118</sup> For those in states like Minnesota, North

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110. *Id.*

111. *See* Complaint, *supra* note 48, at 1; Castillo & Simnitt, *supra* note 35.

112. KAN. STAT. ANN. § 44-828 (West 2025).

113. LA. REV. STAT. § 23:888 (West 2025).

114. *Kansas v. U.S. Dep’t of Lab.*, 749 F. Supp. 3d 1363, 1383 (S.D. Ga. 2024) (order granting preliminary injunction).

115. *Id.* at 37.

116. *See id.*

117. *Id.*; *see* 20 C.F.R. § 655.135(h)(2) (2025) (providing the protections which will not be in force in the plaintiff states).

118. Defendants’ Opposition to Plaintiffs’ Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 1; *see* Improving Protections for Workers in

Carolina, and Washington not enjoined from enforcement, farmworkers can begin efforts to create guestworker unions or collectively bargain with their employers right now.<sup>119</sup>

While not ideal, there might be a silver lining to the partial rollout. With fewer states to focus on, the DOL can focus their attention on states where collective action is unchallenged. This enhanced focus might yield insight into improving the H-2A program and lead to further changes to the regulations down the line. They might also glean a sense of how to implement this and similar policies in unfavorable environments from their experience in states not opposing implementing collective bargaining efforts (assuming the DOL receives a favorable judgement in the current suit).

Those working in a non-party state remain at a disadvantage with regard to their health and safety and their dependence on their employer.<sup>120</sup> H-2A employees are uniquely dependent on the good will and humanity of their employers.<sup>121</sup> Those employees are far from home in a foreign land, possibly unable to adequately communicate outside their immediate group, and without a means to access adequate housing, food, and legal status within the country without their employer's help or guidance.<sup>122</sup> Without the change made to the regulations by the most recent spate of amendments, workers are still without the means to effectively deal with non-compliant bosses.<sup>123</sup> The DOL determined that this situation has not lead to compliance in the past barring a groundswell of spontaneous worker action on a purely individual basis hitting every single H-2A employer in the United States at one time, workers remain in the exact same position as before.

There is also the very real possibility of work order confusion going forward. The Foreign Labor Application Gateway (FLAG) system now has a split in the

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Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33901 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658, and 29 C.F.R. pt. 501).

119. See *Kansas v. U.S. Dep't of Lab.*, 749 F. Supp. 3d 1363, 1383 (S.D. Ga. 2024) (order granting preliminary injunction).

120. See 29 C.F.R. §§ 1910.142(b)(9) (2025) (housing regulations); 20 C.F.R. §§ 655.210(e)(1)–(2) (meal regulations), 655.135(i)(2) (illustrating that H-2A workers have no status outside their employment).

121. Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/ Temporary Restraining Order, *supra* note 57, at 1, 7.

122. See 29 C.F.R. § 1910.142(b)(9) (housing regulations); 20 C.F.R. §§ 655.210(e)(1)–(2) (meal regulations), 655.135(i)(2) (illustrating that H-2A workers have no status outside their employment) (citation modified).

123. See *Kansas v. U.S. Dep't of Lab.*, 749 F. Supp. 3d 1363, 1383 (S.D. Ga. 2024) (order granting preliminary injunction).

regulations it processes H-2A applications under.<sup>124</sup> For those states and growers not affected by the injunction, the newest set of regulations is applied.<sup>125</sup> As for growers in one of the 17 plaintiff states, they are subject to a mix of the older regulations and some of the newer amendments not enjoined by the court.<sup>126</sup> To combat this confusion, the DOL has asked growers to disclose whether their applications are in enjoined areas and requires separate applications for work performed in affected and unaffected zones.<sup>127</sup> With a system that is often difficult to navigate at the best of times, only time will tell if these disclosures lessen the confusion imposed by this lawsuit.

#### IV. GOING FORWARD

Regardless of how this case turns out, there are many ways that the DOL could enhance the use and enforcement of the regulations without requiring workers to do the yeoman's work. The DOL can: (1) assess and refine definitions; (2) strengthen efforts at education; (3) create better cooperation channels between the DOL and State Workforce Authorities; and (4) lobby for a change to the NLRA that would eliminate the bar against farmworker inclusion in collective bargaining protections.

##### *A. More Robust Definitions*

###### *1. "Meal"*

First, and most importantly, the DOL could—and should—update the definitions contained within the H-2A regulations. This would serve a few purposes, including: (1) clarifying what kind of protections and the scope of the protections that workers are entitled to; (2) enabling better adherence to those protections by eliminating confusion; and (3) allowing for easier prosecution of those who continue to defy the regulations.

As an example:

(e) *Meals*. The employer must specify in the job offer and provide to the worker, without charge or deposit charge: (1) Either three sufficient meals a

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124. Michael H. Neifach, *How to Navigate FLAG System Updated for New H-2A Farmworker Visa Rule and Court Order*, NAT'L L. REV., (Sept. 12, 2024), <https://natlawreview.com/article/how-navigate-flag-system-updated-new-h-2a-farmworker-visa-rule-and-court-order> [<https://perma.cc/6C8W-L85C>].

125. *Id.*

126. *See id.*

127. *Id.*

day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare their own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and (2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).<sup>128</sup>

This regulation appears adequate—at least until one considers that there is no definition or standard for what a “meal” is under the regulations.<sup>129</sup> Instead, the very definition of a meal is left to the employers.<sup>130</sup>

Additionally, the DOL has not helped itself in the past. In what can only be described as a half-hearted attempt to solve the meal issue, the DOL promulgated an opinion about public accommodations and the adequacy of either meals or kitchen facilities.<sup>131</sup> They discuss that “rental or public accommodations” such as hotel or motels may not have adequate facilities for meal preparation, and so may not meet the employer’s obligation to their workers.<sup>132</sup> When that occurs, the DOL states employers would be responsible for providing three meals per day to their workers.<sup>133</sup> But once again this opinion fails to define with any particularity what a meal actually is.<sup>134</sup> What the DOL does say is that some meals—though they did not specify which—provided by these “rental or public accommodations” may not be sufficient to meet the employer’s burden.<sup>135</sup> They state that, “simply providing a muffin or cold cereal for breakfast would not be sufficient” for the purposes of the regulations.<sup>136</sup> The food, in this case, a breakfast provided by the hotel or motel, must be “readily accessible to the workers and [be] nutritionally adequate.”<sup>137</sup> This vague instruction to allow workers to actually access food then further raises the question of nutritional adequacy. This too is something the DOL has failed to adequately qualify in its regulations, answers, or administrative opinions. But

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128. 20 C.F.R. § 655.210(e)(1)–(2) (2025).

129. *Id.* § 655.103 (demonstrating there is no definition for the term *meal* in the regulations).

130. *Id.* § 655.210(e)(1)–(2).

131. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61715 (Oct. 12, 2022) (to be codified at 20 C.F.R. pts. 653, 655, and 29 C.F.R. pt. 501).

132. *Id.*

133. *Id.*

134. *See generally id.*

135. *Id.*

136. *Id.*

137. *Id.*

meals, access, and nutrition are not the only problematic non-definitions in desperate need of clarification contained within the H-2A regulations.

## 2. Departures from the United States

The regulations stipulate that, workers are required to “leave the United States at the end of the period certified by the Department or separation from the employer, whichever is earlier,” and that it is the duty of the employer to provide them notice of their duty to do so.<sup>138</sup> But once again, the regulations are entirely silent on how many days workers have to comply and when the employer should make such known to them.<sup>139</sup> Is this communication to be in writing a number of weeks before a planned exit or as soon as possible upon termination? Or is a simple, “okay, now leave,” enough notice? Do they have to leave immediately, or must they simply leave before the 180th day to avoid an immigration bar?<sup>140</sup> This seemingly trivial cut-off is made even more important when one considers when the employer’s responsibility to their worker ends. Section 655.122(h)(2) states:

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the United States from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.<sup>141</sup>

This lack of clarity can have incredible consequences for the worker in question if the United States finds they have overstayed their visa. A visa overstay of over 180 days can result in a three-year bar from entering the United States.<sup>142</sup> This would effectively eliminate an H-2A worker’s livelihood for three seasons, causing substantial harm to workers and their families. It might also result in desperate workers entering the United States without a visa, increasing the potential for even worse working conditions, dangerous and unmonitored work, and further harms should they be caught by Immigration and Customs Enforcement (ICE), or the Border Patrol.

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138. 20 C.F.R. § 655.135(i)(1) (2025).

139. *See generally id.*

140. 8 U.S.C. § 1182 (a)(9)(B)(i).

141. 20 C.F.R. § 655.122(h)(5).

142. 8 U.S.C. § 1182(a)(9)(B).

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The lack of definitions affords ambiguity and wiggle room that workers cannot understand, and employers can exploit. These holes in the regulations also prove frustrating for attorneys seeking to bring lawsuits against growers, as they are forced to spend much of their time interpreting the language of the regulation and defending their position on that interpretation, rather than focusing on the material facts that lead to the suit in the first place.

### 3. “Employer”

Fortunately, the DOL has demonstrated in this last round of regulatory changes that they are ready and willing to enhance their definitions for clarity.<sup>143</sup> By way of an example, the latest rule changes included an updated working definition and framework for “termination for cause” that was completely absent before.<sup>144</sup> This new addition defines what a “for cause” termination is and what steps must be taken for a for cause termination to be considered legitimate under the new regulations.<sup>145</sup> They include informing the employee in a language they understand, making sure their compliance with the policy was within their control, and allowing for the worker to correct the error prior to termination of their employment if applicable.<sup>146</sup> This kind of detail in the regulations not only enables workers to better exercise their rights when they are violated (due to being clearly and concisely defined), but also allows growers to know what their obligations are to their workers, ensures their faithful compliance, and helps avoid lawsuits.

This change may also be seen in the DOL’s updated definition of “employer.”<sup>147</sup> Previously, an H-2A employer was:

Employer means a person, firm, corporation or other association or organization that:

1. Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
2. Has an employer relationship with respect to H-2A employees or related U.S. workers under this subpart; and

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143. See generally *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61662–63, (Oct. 12, 2022) (to be codified at 20 C.F.R. pts. 653, 655 and 29 C.F.R. pt. 501).

144. 20 C.F.R. § 655.122(n).

145. *Id.* § 655.122(n)(2)(i)(A–E).

146. *Id.*

147. *Id.* § 655.103(b).

3. Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).<sup>148</sup>

This definition raises all manner of questions. What is an employer relationship? How do Farm Labor Contractors (FLCs) fit into the scheme of an employer? An FLC is a person or, more likely, a business entity that files H-2A visa applications on behalf of a grower.<sup>149</sup> They are very helpful due to their more specific expertise in understanding the requirements for applying for H-2A workers, as well as freeing up time so the grower can focus on other parts of their operation.<sup>150</sup> It is also very common for FLCs to be the ones who actually recruit the foreign workers and arrange their passage to their worksite.<sup>151</sup> But it is important to note, FLCs are *not* the employer. Or are they? The DOL largely fixed these ambiguities in the latest round of amendments.<sup>152</sup> The newest definition of employer is much clearer:

*Employer.* A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

- (i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; or
- (ii) Files an *Application for Temporary Employment Certification* other than as an agent; or
- (iii) Is a person on whose behalf an *Application for Temporary Employment Certification* is filed.<sup>153</sup>

This new definition eliminates the question of who is the true employer, and carves out space for FLCs to operate without interfering with or worrying about the actions of the grower once their end of the business is concluded.<sup>154</sup> These reductions or wholesale eliminations of as much ambiguity as possible is a crucial

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148. 29 C.F.R. § 502.10(a) (suspended 2009).

149. See *Farm Labor Contractors*, GAP CONNECTIONS (Aug. 26, 2025, at 11:48 CT), <https://www.gapconnections.com/resources/farm-labor-contractor-flch-2alc> [<https://perma.cc/FPB4-WMP2>].

150. See generally *id.*

151. See *id.*

152. See 20 C.F.R. § 655.103(b).

153. *Id.*

154. See generally *id.*

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step in bulletproofing regulations against misuse, misinterpretation, and the DOL's current trend of correcting these errors is a great way to protect farmworkers in a hard-to-challenge manner.

### *B. Education*

Another method the DOL might employ when it comes to ensuring the rights and safety of H-2A farmworkers is the simple act of education. Iowa Legal Aid hosts a Farmworker Rights Project in two of their offices.<sup>155</sup> This project is dedicated to specifically educating H-2A farmworkers about their rights.<sup>156</sup> The approach is simple and much like that of the DOL: farmworkers cannot defend against or report violations that they do not know are violations.<sup>157</sup> This education would not have to include an entire project be dedicated to the task. Legal clinics, pamphlets distributed to migrants upon entry to the United States, and large-scale trainings held at the beginning of the season could do wonders for educating farmworkers on their employers' most basic responsibilities.

### *C. Boots on the Ground and Increased Cooperation*

Of course, more frequent and thorough home and workplace visits and inspections by DOL or State Workforce Agency (SWA) staff would be one of the best and most effective forms of policing these regulations.<sup>158</sup> This would require the federal government, state, and local governments to allocate more money to these agencies as a lack of a budget for staff is a key limiting factor in carrying these out.<sup>159</sup> It would also require federal and state political will to undertake such a project. The Trump administration's anti-immigrant and anti-worker stance makes the federal portion of this scheme a non-starter.<sup>160</sup> Individual states are faring no better than the federal government when it comes to friendliness toward immigration. State governments in Iowa, South Dakota, and Nebraska have expressed hostility toward immigrants within the state without reference to legal

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155. See *Farmworker's Rights*, IOWA LEGAL AID (Aug. 26, 2025), <https://iowalegalaid.org/resource/farmworkers-rights/> [https://perma.cc/RXL6-K9SV]; *Current Projects*, IOWA LEGAL AID (Sep. 11, 2025, at 15:15 CT), <https://iowalegalaid.org/who-we-are/projects/> [https://perma.cc/HK6V-YHAT].

156. See *Farmworker's Rights*, *supra* note 155.

157. See *id.*

158. See Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 7–10.

159. See generally *id.* at 7.

160. See Joel Rose, *Trump Supporters Welcome the First Steps in His Immigration Crackdown*, NPR (Feb. 8, 2025, at 5:00 ET), <https://www.npr.org/2025/02/08/nx-s1-5279370/trump-supporters-welcome-immigration-crackdown> [https://perma.cc/27GL-QG9Z].

status.<sup>161</sup> However, this rejection of immigration is not the default state of affairs in the Midwest. States like Minnesota, Wisconsin, and Illinois have affirmed their support of immigrants, extolled the manifold virtues of immigration, and demonstrated their intent to protect the immigrants within their borders.<sup>162</sup>

Without wildly inflating the budget, there could be a much more cooperative partnership between state and national efforts to police H-2A visa filers. There is currently very little to no cooperation between the DOL and SWAs when it comes to policing, monitoring, or reporting violations of H-2A visa requests.<sup>163</sup> H-2A growers who violate the regulations are subject to penalties, including but not limited to, a full bar from future applications for H-2A workers.<sup>164</sup> This disbarment is meant to apply to the growers themselves; though, it can also apply to successors in interest and those who apply on behalf of the debarred employer.<sup>165</sup> But since

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161. See Robin Opsahl, *Gov. Reynolds Directs Iowa Law Enforcement to Cooperate with Trump Deportations*, IOWA CAP. DISPATCH (Jan. 17, 2025, at 17:46 CT), <https://iowacapitaldispatch.com/briefs/gov-reynolds-directs-iowa-law-enforcement-to-cooperate-with-trump-deportations/> [<https://perma.cc/GZ2U-SPYV>]; see Joshua Goodman & Jim Mustian, *Kristi Noem's Immigration Rhetoric Overlooks Stark Economic Realities in her Own State*, ASSOCIATED PRESS (Jan. 23, 2025, at 12:47 CT), <https://apnews.com/article/kristi-noem-dhs-immigration-crackdown-trump-south-dakota-52bf133437d20f4dd6f5284bb751e264> [<https://perma.cc/N6ZC-HT6K>]; see *Gov Pillen's Anti-Immigrant Executive Order to State Agencies and Law Enforcement, Explained*, ACLU OF NEB. (Jan. 24, 2025), <https://www.aclunebraska.org/en/gov-pillens-anti-immigrant-executive-order-state-agencies-and-law-enforcement-explained-aclu> [<https://perma.cc/8DK3-5D6L>].

162. *What is Tim Walz's Record on Immigration?*, AM. IMMIGR. COUNCIL (Oct. 2, 2024), <https://immigrationimpact.com/2024/10/02/tim-walz-immigration-record/> [<https://perma.cc/M4WJ-ZL7X>]; Tom Tiffany, *Unchecked Illegal Immigration Strains Wisconsin. Evers Shouldn't Obstruct Law.*, MILWAUKEE J. SENTINEL (Dec. 12, 2024, at 5:06 CT), <https://www.jsonline.com/story/opinion/2024/12/12/wisconsin-illegal-immigration-safety-mass-deportation-law-evers/76923361007/>; Press Release, J.B. Pritzker, Governor of Illinois, Gov. Pritzker Signs Two New Laws Protecting Immigrant Youth (July 23, 2019), <https://www.illinois.gov/news/press-release.20334.html> [<https://perma.cc/QWG8-U4QJ>]; Amanda Vinicky, *Pritzker Vows to Protect Illinois Residents Despite Threat of Prosecution for Defying Trump on Immigration*, WTTW (Jan. 23, 2025, at 17:14 CT), <https://news.wttw.com/2025/01/23/pritzker-vows-protect-illinois-residents-despite-threat-prosecution-defying-trump> [<https://perma.cc/F2VW-DAD8>].

163. See DEP'T OF LAB., INSTRUCTIONS FOR F2024 GRANT PLAN (2025), <https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEGL/2021/TEGL%2012-21%20Change%20Attachment%20III%20%28Accessible%20PDF%29.pdf> [<https://perma.cc/ZE7S-49VU>] (illustrating that there is little automatic data communication between SWA and DOL, requiring work and labor hours to adequately achieve the goals of the two agencies).

164. See generally 20 C.F.R. § 655.182 (2025).

165. See *id.* §§ 655.104(c), 655.182(b)(1).

the disbarment is a federal penalty and the individuals most likely to catch the violation are in the states, many employers slip through the cracks.<sup>166</sup>

The ultimate option for the protection of H-2A workers would be to lobby for the NLRA to extend to farmworkers (and ideally all labor, regardless of previous exception from protection). To say that this would be a long shot is understating the case. The farm lobby is a massive operation that spent over \$180 million in 2024 to encourage pro-agriculture initiatives in Congress.<sup>167</sup> More than the seemingly insurmountable hurdle that is the farm lobby is the mere fact of American misunderstanding of H-2A visa holders, the popularity of unions in general, and the fact that Congress has had decades to make a farmworker addition to the NLRA but has yet failed to do so.<sup>168</sup> It would seem a solution to the woes of H-2A farmworkers, and the DOL's attempts to protect them, lie instead in a freer market for labor.

#### *D. Workplace-Transferable Visas*

Currently, H-2A visas are tied to specific job orders.<sup>169</sup> That means, if an H-2A worker is experiencing hardship or is unsafe at their current employment, they would need to end their current contract, return to their country of origin (most likely using their own money), and only then could they apply for and be eligible to receive a new H-2A visa.<sup>170</sup> Of course, at that point much of the season might be over and many jobs will have closed or begun work with those workers they were able to get. Most workers, at that point in the season, are out of luck and out of work until the next season.

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166. Ryan Murphy, *Employers Banned from Hiring H-2A Workers Can 'Reinvent' Themselves to Hire Again*, INVESTIGATE MIDWEST (Sep. 14, 2023), <https://investigatamidwest.org/2023/09/14/employers-banned-from-hiring-h-2a-workers-can-reinvent-themselves-to-hire-again/> [https://perma.cc/224Y-P4JK].

167. *Agribusiness Lobbying*, OPEN SECRETS (Aug. 28, 2025, at 12:34 CT), <https://www.opensecrets.org/industries/lobbying?ind=A> [https://perma.cc/DW8E-BL5Q].

168. See generally Samantha Ayoub, *Debunking H-2A Myths*, AM. FARM BUREAU FED'N (Nov. 15, 2024), <https://www.fb.org/market-intel/debunking-h-2a-myths> [https://perma.cc/QD92-CB7Y]; *Labor Unions*, PEW RSCH. CTR. (Feb. 1, 2024), <https://www.pewresearch.org/politics/2024/02/01/labor-unions/> [https://perma.cc/L2DX-9D8U]; Dustin J. Coffman, *The Excluded Workers: The NLRA, Farm Laborers, and a Lineage of Exploitation*, 27 DRAKE J. AGRIC. L. 85, 85–87 (2022).

169. See 20 C.F.R. § 655.121.

170. See *Are You Thinking About Leaving Your Job Before Your Contract Ends?*, FARMWORKER UNIT, LEGAL AID OF N.C. (Aug. 26, 2025, at 11:57 CT), <https://www.farmworkerlanc.org/know-your-rights/h2a-contracts/thinking-about-leaving-contract/> [https://perma.cc/PXT4-D98D].

One means of remedying this issue and bolstering the rights of immigrant agricultural workers without explicitly doing so would be to make H-2A visas transferable from grower to grower. In essence, sever the grower's application from the worker's application and make the system much more akin to a traditional job market. By granting conditional H-2A visas to workers (pending acceptance of a work contract) the DOL could still adequately vet and track the workers who come into the United States on non-immigrant visas while allowing for the flexibility to leave abusive or hostile working environments. At that point, workers might reenter the marketplace for H-2A specific work and be reassigned to a work order where they would report within a certain time. Of course, growers might incur expenses to bring workers over who then do not stay. But that possibility already exists in the system and should not present a major roadblock to the implementation of this special job market.

#### V. CONCLUSION

Of course, at the top of everyone's mind is what impact the current administration will have, not only regarding attempts to protect H-2A workers, but on the legal status of H-2A visas as a whole.<sup>171</sup> While it appears that the Trump administration's focus is currently on those workers who enter the United States without documentation, the administration's clear anti-immigrant policies leave many unsure about the future of legal guestworker programs.<sup>172</sup> In the final days of his first presidency, Donald Trump sought to roll back several important features of the H-2A visa program: (1) reduced opportunities for domestic farm laborers; (2) diminished ability to receive travel reimbursements for foreign workers; (3) weakening of wage protections; and (4) less oversight into the safety of worker housing.<sup>173</sup> As the Trump administration continues to ramp up to more radical policies and promulgate more legislation and executive orders to achieve their ends, it is clear that the current system for H-2A workers—lacking as it already

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171. See Sarah Thamer, *Despite Trump Immigration Policy Changes, Experts Say the H-2A Program is on Solid Footing*, MPRNEWS (Jan. 30, 2025, at 4:00 CT), <https://www.mprnews.org/story/2025/01/30/despite-trump-immigration-policy-experts-say-the-h2a-program-is-on-solid-footing-for-now> [https://perma.cc/34ZY-5B6T].

172. See generally Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025); Debu Gandhi, Ben Greenho & Nick Wilson, *Trump's Rash Immigration Actions Place Cruelty and Spectacle Above Security*, CTR. FOR AM. PROGRESS (Feb. 27, 2025), <https://www.americanprogress.org/article/trumps-rash-immigration-actions-place-cruelty-and-spectacle-above-security/> [https://perma.cc/79H6-9VJ4].

173. *Biden's Labor Department Withdraws Trump Administration's Final Rule on H-2A Guest Worker Program*, FARMWORKER JUST. (Sep. 13, 2025, at 13:32 CT), <https://stage.farmworkerjustice.org/news-article/bidens-labor-department-withdraws-trump-administrations-final-rule-on-h-2a-guest-worker-program/> [https://perma.cc/8H4V-A8DJ].

may be—is under further threat. Only time will tell by what means and to what extent the current administration will disrupt this vital source of labor for the American agricultural market.

Though the future of the H-2A visa program is unclear, the means to secure the current supply of foreign agricultural labor is well within the grasp of the DOL even with an injunction against their newest regulations.<sup>174</sup> Though the suit and the ensuing injunction in question has temporarily denied 17 states' H-2A worker populations access to collective bargaining rights (among other things), there are steps that the DOL can and should take to better secure the rights and dignities of H-2A workers.<sup>175</sup> Among these are changes to the permit system which would allow workers to apply for a blanket visa instead of one tied to a specific job, the increased use of precise definitions, and increased cooperation and communication between the DOL and SWA offices in the states.<sup>176</sup>

Of course, the judiciary might find in the end that the DOL was well within their statutory authority to extend to H-2A workers the ability to unionize.<sup>177</sup> This would firmly set the regulations promulgated by the DOL and cement a legal basis for future action allowing for farmworker advocacy. Congress might also move to establish the right to collective bargaining for all workers within the United States, though the political and social will to do so is severely lacking.<sup>178</sup> In the coming years, Americans will better understand the keystone position occupied by guestworkers in the agricultural sphere as the prospect of employment under an H-2A visa becomes less and less appealing to foreign workers. Unfortunately, any attempts to update the system at that point may be too late, as the system, under its current conditions, has done precious little to protect its workers from abuse and neglect. Only changes now can safeguard the security, dignity, and health of these workers and ensure the continued dominance of American agriculture.

Across the Midwest, one can find signs to the effect of, “If you ate today, thank a farmer.”<sup>179</sup> This author would like to amend this sign, just slightly, in the

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174. See generally *Kansas v. U.S. Dep't of Lab.*, 749 F. Supp. 3d 1363, 1369 (S.D. Ga. 2024) (order granting preliminary injunction).

175. *Id.*

176. See discussion *supra* Sections III.B–D.

177. See generally Defendants' Opposition to Plaintiffs' Motion for Stay/Preliminary Injunction/Temporary Restraining Order, *supra* note 57, at 1–2.

178. See discussion *supra* Sections III.C–D.

179. Chris Neal (photograph), in Zane Irwin, *Trump's Promised Tariffs Sow Uncertainty for Kansas Farmers*, KCUR (Dec. 2, 2024, at 04:00 CT), <https://www.kcur.org/politics-elections-and-government/2024-12-02/trumps-promised-tariffs-sow-uncertainty-for-kansas-farmers> [<https://perma.cc/6D3F-KWCB>].

spirit of giving credit where credit is due. Using a similar turn of phrase that is inclusive of both those who own *and* work their land and those who provide the labor in agricultural spaces not within their ownership, the sign should read: “If you ate today, thank a farmworker.”