The Future of H-2A
Tom Bortnyk, Vice President and General Counsel
Presented by Kerry Scott, Program Manager

Proposed “Reform” Efforts

- **July 26, 2019**: DOL published its 489-page Notice of Proposed Rulemaking (NPRM) to “modernize” and “improve” the H-2A program.
  - Public comment period ended September 24, 2019
  - 83,413 comments submitted; DOL indicated that less than 900 of them were considered “original” and “substantive”
  - Assuming no legislative action, will likely publish final rule sometime in 2020 (or early 2021)

- **December 11, 2019**: The House passed H.R. 5038, the Farm Workforce Modernization Act (FWMA).
  - Passed 260-165, with 34 Republicans voting in favor
  - Must now pass Senate and be signed by President Trump to become law

Current H-2A Regs v. NPRM v. FWMA

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<th>Issue</th>
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<tr>
<td>Eligibility</td>
<td>Ag employers with temporary or seasonal labor need</td>
<td>No change</td>
<td>No change</td>
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<td>Application Process</td>
<td>File with SWA up to 75 days before date of need (no later than 60 days). File with DOL upon SWA approval or no later than 45 days before date of need. File via petition with CIS upon DOL certification. (NOTE: Currently in practice with new FLAG system).</td>
<td>No change</td>
<td>No change</td>
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<td>Start Dates</td>
<td>One start date per application; staggered start dates require multiple labor market tests</td>
<td>Permits staggered start dates in first 120 days if employer provides notice to DOL, recruitment extends through last staggered start date</td>
<td>Permits staggered start dates in first 120 days if employer provides notice to DOL; all staggered start dates must have the same end date; RLs not eligible unless they are joint employers or obtain “premium surety bond”</td>
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<td>Hours Guarantee</td>
<td>Must offer three-fourths of the work hours specified in the H-2A contract</td>
<td>No change</td>
<td>No change</td>
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<td>Corresponding Employment</td>
<td>Workers are “corresponding” if they perform any duty listed in the job order, or any job duty performed by H-2A workers</td>
<td>No change</td>
<td>Changes term to “similarly employed”; workers are similarly employed if they are in the same occupational classification as the H-2A worker</td>
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<td>Housing</td>
<td>Must provide housing at no cost to non-local workers, inspected annually by the SWA</td>
<td>Same as current regs, except that year-round employers must provide family housing; federal grants for farmworker housing</td>
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<td>Transportation</td>
<td>Must pay/reimburse inbound travel (transportation, subsistence, lodging) from worker’s home to consulate, and from consulate to place of employment.</td>
<td>Same as current regs, except employer not responsible for worker’s travel to consulate.</td>
<td>Same as current regs, except employer not responsible for worker’s travel to consulate if worker lives within 50 miles of consulate</td>
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**Wages**<br>At WVR by region; must pay highest of<br>state/municipal or<br>state/federal minimum effective<br>upon publication (even near contract)**<br>Same as current regs, except AWVR<br>is state, reapparated by job<br>classification; for duties that<br>fall into multiple categories, must pay<br>highest applicable wage; no<br>disadvantages adjustment; if AWVR<br>declines**<br>Same as current regs, except AWVR<br>is state, reapparated by job<br>classification; for duties that<br>fall into multiple categories, must pay<br>highest applicable wage; no<br>disadvantages adjustment; if AWVR<br>declines**<br>Recruiters prohibited from seeking<br>receiving fees from workers.**<br>Recruiters prohibited from seeking<br>receiving fees from workers.**<br>Recruiters prohibited from seeking<br>receiving fees from workers.**
**Recruitment**<br>VSA’s posts job order; DOL, posts job<br>order at seasonaljobs.dol.gov; must offer<br>re-employment to former workers; must<br>recruit U.S. applicants through<br>the 2A process in the contract**<br>Same as current regs, except must<br>recruit U.S. applicants through<br>posts job order; DOL posts job<br>order at seasonaljobs.dol.gov; must offer<br>re-employment to former workers; must<br>recruit U.S. applicants through<br>the 2A process in the contract**<br>Same as current regs, except must<br>recruit U.S. applicants through<br>posts job order; DOL posts job<br>order at seasonaljobs.dol.gov; must offer<br>re-employment to former workers; must<br>recruit U.S. applicants through<br>the 2A process in the contract**
**Former U.S. Employees**<br>Required to offer re-employment to<br>any U.S. worker formerly employed<br>at the place of employment within<br>the last year, except those<br>terminated for cause or who<br>abandoned employment.**<br>Required to offer re-employment to<br>any U.S. worker formerly employed<br>at the place of employment within<br>the last year, except those<br>terminated for cause or who<br>abandoned employment.**<br>Required to offer re-employment to<br>any U.S. worker formerly employed<br>at the place of employment within<br>the last year, except those<br>terminated for cause or who<br>abandoned employment.**
**Current undocumented workers**<br>are not eligible to receive<br>re-employment; employers are<br>required to offer re-employment to<br>any U.S. worker formerly employed<br>at the place of employment within<br>the last year, except those<br>terminated for cause or who<br>abandoned employment.**
**Employers must create plans and<br>provide training on heat illness<br>to be available to workers, and<br>emergency response**<br>Employers must create plans and<br>provide training on heat illness<br>to be available to workers, and<br>emergency response**<br>Employers must create plans and<br>provide training on heat illness<br>to be available to workers, and<br>emergency response**
**At risk employment**<br>Does not apply.**<br>Does not apply.**<br>Does not apply.**
**E-verify**<br>Applicants to be verified in Year 4 after bill<br>signed into law**<br>Applicants to be verified in Year 4 after bill<br>signed into law**<br>Applicants to be verified in Year 4 after bill<br>signed into law**
**Legislation**<br>Current undocumented workers<br>legislated as “Certified Agricultural<br>Workers” (CAWs) if they worked 180<br>days in agriculture in the 2 preceding<br>years; CAWs considered “U.S.<br>workers” for purposes of H-2A<br>recruitment, eligible to apply for<br>Green Cards as early as Year 4**

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**Migrant and Seasonal Agricultural Workers Protection Act (MSPA)**<br>Has 24 workers excluded from MSPA<br>Transportation safety requirements<br>to H-2A employers.**<br>Applies MSPA to H-2A employers;<br>provides express private right of<br>action for employees to sue H-2A<br>employers; third-party groups (legal<br>services) can file complaints against<br>H-2A employers with DOL; new<br>authority for DOL to sue employers**
**Foreign Recruitment**<br>Recruiters prohibited from seeking or<br>recruiting fees from workers.**<br>No change**<br>Creates FLSA-like registration/licensing<br>for foreign recruiters; requires<br>employers to post bond based on #<br>of workers; recruiters must file<br>annual report to DOL, private right of<br>action to sue employers for<br>recruiting violations**
**Appeals**<br>De novo hearing or expedited<br>administrative review of deficiencies<br>and denials.**<br>Eliminates appeal process for<br>deficiencies; AMD eliminates de novo<br>hearings for denials**
**Visa Term**<br>Length of certified period of<br>employment = 30 days to find<br>subsequent employment**<br>Length of certified period of<br>employment = 30 days to find<br>subsequent employment**

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<td>Online Application</td>
<td>SRA and DOL processes centralized through the Foreign Labor Application Gateway (FLAG) system; no online process for DHS visa petitions.</td>
<td>Centralizes application process through FLAG.</td>
<td>Requires DOL/DHS/USDA/State Dept. to create single online portal for entire process. (NOTE: Already in practice; DOL didn’t want to finalize rule!)</td>
</tr>
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**Questions? Please ask.**

Or follow up with us directly:

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