Overview

• 2019 in Review -- H.R. 5038, Farm Workforce Modernization Act

• The year ahead – Legislative, Administrative

• 2020 Election Outlook and Implications
What I’m NOT Planning to Cover…

• Impeachment

• Iran

• Iraq

What’s in a Number? (33)

• 33 is a number with special significance. In the field of Numerology, thirty-three symbolizes a Master Teacher.

• Religion: in English version of Book of Genesis, God is mentioned 33 times. Jesus was believed to be 33 when he died

• In nature, the animal kingdom is divided into 33 phyla. The human spine has 33 vertebrae. The sun rises at the exact same spot on the horizon once every 33 years

• It’s been 33 years since the House of Representatives passed a bill that seeks to address Agriculture’s unique labor challenges

H.R.5038 - Political Context

• House must move first. Democrats control House

• House leadership would not advance a bill unless (1) bipartisan, (2) supported by farm worker advocates

• Much common ground on “current workforce” solutions

• More controversy on “guest workers” and their treatment

• Flash points: caps, wages, enforcement rights

• Take-home messages:
  • Any compromise is, well, a compromise
  • Perfect is enemy of good
  • No UFW “bottom line” in House
  • Unlike past agreements, we are not fully bound to “the deal”
  • Key areas for improvement as process advances

H.R.5038, Farm Workforce Modernization Act
H.R.5038, Farm Worker Modernization Act

- Three-pronged approach
  - Current workforce stabilization, incentives
  - H-2A changes (mostly improvements)
  - E-Verify, phased in for Agriculture specifically
- Passed House December 11, 260 – 165
  - 34 R's joined all but 4 D's
  - The view from the “peanut” Gallery
- Anatomy of a Victory: champions, old fashioned grassroots, grasstops

Title I – Three Options for Legal Status

- Option: Transition to H-2A
- Option: Become Certified Agricultural Worker (CAW), and renew that status
- Option: Certified Agricultural Worker (CAW), and earn/pursue eventual right to apply for legal permanent residency (green card)

Certified Agricultural Worker (CAW)

- Past Ag work, good behavior to qualify
- CAW status provides:
  - Agricultural work authorization for 5 ½ years
  - Protection of immediate family
  - Right to work, travel
  - “U.S. domestic worker” labor protections
- Renewable in 120 day period at end of 5 years
  - Must have worked 100+ days in Ag each year as CAW
  - Not otherwise ineligible
- NOTE: current H-2A employers shielded from displacement of experienced H-2A's by CAW worker referrals

Optional Adjustment of Status for Experienced Ag Workers

- Future work requirement
  - 4 years, for workers who demonstrated 10+ years prior work in Ag
  - 8 years, for workers who met minimum threshold to qualify but worked <10 years prior to enactment
- Background check
- Penalty - $1000
Title II – Modernizing H-2A

• Temporary/Seasonal H-2A remains uncapped
• Streamlined electronic platform
• Retains/codifies many elements of current program
• Several cost, flexibility improvements
  • Underlying 3 year visa – saves 2 years of visa petition costs
  • Job registry posting only. No advertising
  • Active recruitment ends when workers depart for job
  • “Staggered entry” up to 120 days under single filing

Required Wage

• Employers must offer higher of four wages
• One-year AEWR freeze
• 2021-2029, AEWRs may not increase more than 3.25% (potentially 4.25% in high minimum wage states) or fall more than -1.5%.
• Once job posted, “promised wage” is exactly that; does not need to be increased if AEWR goes up
• Disaggregation by occupational classification; worker must be paid highest applicable (borrowed from Trump admin regulatory proposal…point of concern for many of us)
• Post-2029, AEWR replaced by new wage rate based on joint USDA/DOL study and rulemaking

Housing

• Maintains requirement for employer to provide housing
• Authorizes funding/incentives for employer-provided housing and to encourage construction/rehabilitation of farm worker housing

Non-Seasonal/Temp. Needs ("Year-round Jobs")

• Expands H-2A to year-round positions/3 year admission
• 20,000 visa cap/year for first 3 years (60,000 total)
  • Half are restricted to dairy industry
• For next 7 years, USDA and DOL jointly determine. Increase cannot exceed 12.5% over prior year, nor fall below 20,000
• After year 10, USDA and DOL (with DHS) jointly determine if a cap needed, and if so, methodology
• Emergency provisions
Portable Agricultural Visa Pilot Program

- 6-year pilot program authorizes portable H-2A visas for up to 10,000 workers
- Period of admission up to 3 years; 60 day grace period between jobs to secure new employment
- Employers must register with DHS, may employ these workers “at will”

Enforcement

- Strengthens oversight and enforcement of abuses in foreign labor recruitment undertaken by entities outside the United States

Primary Concerns with H-2A Provisions

- Disaggregation (too many classifications?! Highest applicable wage…)
- Lack of clarity regarding primary vs. limited or ancillary tasks
- Application of Migrant & Seasonal Ag Worker Protection Act
  - Concern is expansion of “private right of action”
  - Mediation prior to right of action
  - Mixed views based on degree of exposure
- Other…e.g., “corresponding employment”

Permanent Residency / Employer Sponsorship

- This is “legal immigration” option, distinct from the earned legalization and H-2A reforms
- Adds 40,000 new visas to employment-based category for “unskilled” labor. Agriculture has first preference
- Employer sponsorship; H-2A visa holders eligible to self-petition after working 10 years/100 days per year
Title III – Electronic Verification

- Makes various E-Verify improvements to address concerns, limitations such as fraud vulnerability
- Phases in E-Verify for agricultural employers, large to smaller, beginning 6 months after closing of CAW application period
- New hires only; no reverification requirement for current workforce

The Road Ahead

Senate Process

- “Own bill” or House bill?
- Bipartisan working group
  - Tillis (R-NC) & Feinstein (D-CA), and…?
- Timelines and considerations
  - Impeachment / Senate trial
  - Primaries
  - Supreme Court
  - Election
- Past as prologue?
2020 Election - Senate
- 22 Republicans
- Most Vulnerable:

2020 Election - Senate
- 12 Democrats
- Most Vulnerable:

U.S. House of Representatives
- Political groups: Majority (232), Democratic (232), Minority (198), Republican (198), Other (1), Independent (1), Vacant (4)
House and 2020 Election

- House Retirements as of now:
  - Republicans – 26
  - Democrats – 9

- House “Consensus” Forecast:

![Image Credit: 270towin.com](Image Credit: 270towin.com)

The Race for Congress (Generic Ballot)
Credit: FiveThirtyEight.com

How (Un)Popular is Donald Trump?
Credit: FiveThirtyEight.com
**New H-2A Regulations?**

- Changes could come out by Spring
- Will they get it right?

**H-2A AEWRs**

- 2020 average increase 5.6%
- Setting aside the freeze, most states saw increases greater than the H.R.5038 caps
- IL/IN/OH took biggest hit, 9.5%
- New York: $14.29, 7.8% increase

**Enforcement**

- SSA No-Match
- I-9 Audits, Raids
What It Will Take