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Comment in response to ETA Doc. No. 90 FR 28919 Rescission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States; Docket No. ETA-2025-0007; RIN 1205-AC25

Dear Ms. Frazier and Mr. Harrison:

Centro de los Derechos del Migrante writes to strongly oppose ETA-2025-0007, Rescission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States (hereinafter "Notice of Proposed Rulemaking" or "NPRM"). Rescinding these common-sense protections for agricultural workers would harm immigrant, migrant, and U.S.-based workers alike.

For two decades, Centro de los Derechos del Migrante (CDM) has worked alongside migrant and immigrant families and communities to ensure that borders are not a barrier to justice and migrant workers' voices, experiences, and priorities shape labor migration policies. CDM has partnered with researchers to publish groundbreaking reports on structural flaws in U.S. work visa programs that endanger the safety of working people and undercut their

wages—including *Ripe for Reform*, a groundbreaking report on structural flaws in the H-2A program that harm workers.[1] CDM has also partnered with workers, advocates, unions, and anti-trafficking organizations to defend people's rights to fair wages, safe working conditions, and good jobs. CDM co-founded and chairs Migration that Works—a coalition of labor, migration, civil rights, and anti-trafficking organizations and academics advancing an alternative labor migration model that respects the human rights of workers, families, and communities. Since 2006, CDM has convened the Comité de Defensa del Migrante (Migrant Defense Committee, or "Comité"), a group of current and former migrant workers in the H-2 and other temporary work visa programs and their family members. The Comité works to empower and organize migrant workers in the United States and in their home communities, creating a culture of informed migration and centering migrant workers' perspectives in policy conversations. Working in partnership with the Comité and other worker leaders, CDM conducts extensive outreach in H-2A workers' home communities and regions of employment each year, building relationships that guide our policy priorities. Rescinding the Final Rule promulgated in 2024, as the Department now proposes,[2] would seriously harm the migrant workers we represent and organize with.

The Department of Labor ("DOL" or "the Department") proposes to rescind various portions of the 2024 Rule, which ensured that the H-2A program did not have an adverse effect on workers in the United States by filling gaps in workplace protections for agricultural workers across the country–and thus protecting both H-2A visa workers and U.S. workers in corresponding employment.[3] The 2024 Rule protects workers against fraud during the recruitment process by enhancing disclosure requirements on foreign recruiter information. It also protects workers from retaliation when they: stand up and blow the whistle on abuse, organize, and exercise their rights in their workplaces.[4] It includes protections allowing H-2A workers to exercise greater autonomy in their homes.[5] It also makes workers' transportation

[1] Exhibit A, CDM, *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program* (2020), https://cdmigrante.org/ripe-for-reform/. CDM's other research and publications are here: https://cdmigrante.org/publications.

[2] Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States, 90 Fed. Reg. 28,919 (proposed July 2, 2025) (to be codified at 20 C.F.R. pts. 651, 653, 655, and 658 and 29 C.F.R. pt. 501).

[3] Corresponding employment is the employment of non-H–2A workers, including local U.S.-based workers, by an employer with an approved Application for Temporary Employment Certification in any work in the job order, or in any agricultural work performed by H-2A workers. 20 C.F.R. § 655.103(b) (2025). Workers in corresponding employment are entitled to at least all the rights and protections of the H-2A contract. 20 C.F.R. § 655.122(a) ("The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.") (emphasis added).

[4] 20 C.F.R. § 655.135(h), (m).

[5] 20 C.F.R. § 655.135(n).

safer,[6] their contracts more transparent,[7] and information about their employers easier to access.[8] The Department's proposal to rescind the 2024 Rule and these important protections would weaken the agency's own ability to enforce the law and make it easier for low-road employers to exploit H-2A workers, a population already at high risk of workplace abuse.[9] If H-2A employers are allowed to cheat H-2A workers out of hard earned wages, and force them to work and live in substandard conditions, then wages and working conditions will deteriorate for all agricultural workers in the United States.

H-2A workers often live and work in rural areas far from public transportation and with poor or nonexistent phone and internet service. Employers control not only H-2A workers' income, but also their transportation, housing, access to services, and continued legal status in the U.S. Even when H-2A workers can travel to service providers, they may struggle to access legal, medical, and social services due to linguistic and cultural barriers. Unscrupulous employers abuse this power imbalance with impunity.[10] The 2024 Rule implemented long-overdue provisions to enhance H-2A and corresponding workers' bargaining power in relation to their employers and provide necessary protections against retaliation. In addition, the 2024 Rule's enhanced information collection requirements better equip the Department to hold exploitative employers and recruiters accountable for violations of the H-2A program.

The NPRM would also hamper the Department's ability to enforce existing, pre-2024 H-2A rules. Beyond that, various changes to the Wagner-Peyser Act's implementing regulations would also hinder the Department's ability to uniformly enforce H-2A rules across states, leading to uneven enforcement. Such changes would weaken the rule of law within the program, forcing high-road employers to compete with low-road employers that ignore the program's rules.

For these reasons, and those explained more in detail below, CDM strongly opposes the Department's proposal to rescind the 2024 Rule.

I. Disclosure of foreign recruiter information allows the Department to enforce H-2A recruitment rules effectively.

[6] 20 C.F.R. § 655.122(h)(4).
[7] 20 C.F.R. §§ 655.120(a), 655.122(l), 655.210(g), 655.211, and 653.501(c).
[8] 20 C.F.R. §§ 655.130(a), 655.137.
[9] In a survey of H-2A workers conducted in 2020, CDM found that 100% of those interviewed experienced at least one serious legal violation during their time in the U.S. "Serious legal violations included: workers paying recruitment fees; workers not receiving full travel reimbursements to or from the United States; significant wage violations; not receiving a contract or not receiving a contract in the worker's native language; sexual harassment; verbal threats based on race, gender, or national origin or related to the use of force or deportation; the seizure of identity documents; overcrowded or seriously substandard housing; and the failure to provide essential safety equipment." CDM, *supra* note 1, at 4.
[10] *Id.*

The 2024 Rule's heightened standards for information collection and disclosure for foreign recruitment at § 655.137 improve the Department's ability to enforce H-2A rules about recruitment and protect workers from fraud, fees and other related abuses. Because of gaps in enforcement of the H-2A rules—particularly regarding recruitment practices abroad—recruiters are currently unlikely to be held accountable for illegally charging prospective H-2A workers exorbitant fees. In 2018, a CDM survey found that 58% of H-2A workers reported paying recruitment fees that averaged around $590 per person.[11] Workers calling the National Human Trafficking Hotline between 2018 and 2020 reported paying fees ranging from $1,000 to $9,000.[12]

H-2A workers rarely have spare income to cover recruitment fees or other related inbound travel expenses, so many take out loans to cover these costs. Forty-seven percent of H-2A workers surveyed by CDM reported taking out a loan to cover recruitment expenses, including prohibited recruitment fees.[13] Interest rates on these loans range from moderate to exorbitant, with workers reporting paying anywhere from 5% to 79% interest rates.[14] Local banks, lenders, and recruiters themselves sometimes require H-2A workers to leave deeds to property or titles to automobiles as collateral, compounding the economic exploitation of these workers and putting them at risk of trafficking.[15]

Some recruiters also require H-2A workers, or their family members, to sign extortionate promissory notes governed by foreign law so that the recruiter can threaten enforcement in the worker's home country if the worker does not complete the contract. These promissory notes often require workers or their family members to agree to pay tens of thousands of dollars or sign over the deeds to their property as security for the H-2A worker's completion of work. Recruiters use these promissory notes to coerce H-2A workers to continue to work, even under abusive and illegal conditions, as long as the employer requires. If the H-2A worker leaves the abusive employer or is fired in retaliation for standing up for their rights, recruiters use the promissory notes to attempt to collect from the worker's family in their home country. An H-2A worker in Florida describes this coercive experience:

> In my community, there are not many recruiters, so you have to take what you get if you want to work and have opportunity. I was charged 30,000 pesos [roughly $1,700 in 2023 dollars] for the visa, payable to the recruiter. The recruiter took all this money and said

[11] Exhibit B, CDM, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change* 4 (2018), https://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.
[12] Exhibit C, Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020* 15 (2021). https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf.
[13] CDM, *supra* note 11, at 5.
[14] *Id.* at 18.
[15] *Id.* at 4.

> that if we didn't pay, he wouldn't take us to work.This is how it works, not only in our town. [At the H-2A workplace] there were people from other states who, once we were already in the United States, told me that they weren't able to get the 30,000 pesos together so they gave the recruiters deeds to their land or papers for their car.
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> When [other H-2A applicants and I] went to the recruiter's house, he held a videoconference with the employer. The employer was watching the interview and listening to what one of the recruiters asked . . . . After the employer selected us, the recruiter made us sign a promissory note for 200,000 Mexican pesos [over $11,000 in 2023], which was his to keep. And he clearly told us that he would keep it until we completed the contract and returned to Mexico; then we could go to him and ask him to destroy the note . . . . Before you go to the United States, the recruiter tells you, "Never say that I charged you," or "Don't talk about money." This is a threat.
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> But [after arriving at the H-2A workplace], I began to think that the employer did know about the money the recruiter had charged, and the promissory note he had required us to sign, because that's the only way [the employer] could have had us working in that way, without ever leaving, in the conditions that they dictated. Only with the fear of the promissory note would they be able to retain us in a business like that. Someone who had felt free to leave would have left without thinking about it. But people wouldn't leave because they were trapped. It was my first time [in H-2A employment] but other workers who had had different contracts before said it was the worst place they had ever worked. [But] we couldn't leave because the owner of the company would say, "If someone escapes from here, I will personally file a report with the consulate that you have escaped." For that reason, I had never wanted to go anywhere– that and the promissory note.[16]

Human traffickers use these tactics–high recruitment fees and holding deeds as collateral–as tools to put or keep H-2A workers in debt in order to extract their labor and exert control over them.[17] Between 2018 and 2020, 2,841 H-2A workers who called the National Human Trafficking Hotline were identified as victims of human trafficking.[18] Human trafficking is a grave violation of U.S. law, but without adequate enforcement, recruiters, low-road employers, and traffickers can continue to traffic workers without consequence. Forcing H-2A workers to work under these coercive circumstances, often for little pay and in dangerous conditions, erodes wages and working conditions for all workers. Enhanced measures relating to the collection of information about recruiters would help the Department to identify traffickers and their co-conspirators abroad, and thereby enforce U.S. anti-trafficking laws.

[16] CDM interview with anonymous former H-2A worker #4, October 24, 2023.
[17] Polaris, *supra* note 12, at 16.
[18] *Id.* at 10.

CDM has also documented instances of rampant gender and age discrimination during recruitment, with upwards of 86% of women stating they were not hired or offered less favorable pay or less desirable jobs than men.[19] Unscrupulous recruiters and employers are emboldened to discriminate to hire workers with their preferred demographics because they know that enforcement by the Department is highly unlikely. CDM has documented instances of blatantly discriminatory recruitment, for example, advertisements for jobs that are only available to men between certain ages.[20]

Enhanced information collection requirements relating to recruiters help also combat fraud in recruitment. Scam artists, pretending to be recruiters, advertise false job postings in order to collect purported recruitment fees from prospective H-2A workers. In 2018, 1 in 10 survey respondents reported paying for a job opportunity that did not exist.[21] By collecting information on real recruiters abroad, the Department could distinguish them from false recruiters engaged in fraud. Even legitimate recruiters commit fraud when they misrepresent a part of the job offer, such as promising better wages or less work than the actual contract states. Collecting information on these recruiters would assist the Department in holding them accountable for fraud and illegal rent-seeking when they charge H-2A workers prohibited fees.

Workers would benefit from information on legitimate recruiters that the Department would collect under the 2024 Rule. Currently, prospective H-2A workers and their advocates have no access to verifiable information that would allow them to determine whether a given recruiter is a legitimate agent of the employer they purport to represent. There is also no reliable, government-provided platform for workers to be able to independently verify job offers and recruiter information in their own language. Recruiters and con artists get away with fraud due to the lack of availability of up-to-date recruiter information in existing platforms, such as SeasonalJobs.dol.gov by the Department. As a former Florida H-2A worker described to CDM:

> What workers seek is trust, or the possibility of trust, in the person who offers them work . . . There should be a process by which a worker can have confidence [in an H-2A job opportunity]. For me, that would mean that the worker can verify the type of work, the salary, the housing, and everything that comes with that job. So that we aren't made to feel inferior, because we need to be able to travel to work with confidence. That's why we go—to work hard, to contribute, and to be able to go home. Not to be mistreated or cheated out of our money.[22]

Preserving the Department's ability under § 655.137 of the 2024 Rule to collect information on recruiters will allow the Department to hold unscrupulous recruiters accountable

[19] CDM, *supra* note 1, at 5.
[20] Exhibit D, Recruitment advertisement.
[21] CDM, *supra* note 11, at 20.
[22] CDM interviews with anonymous worker former H-2A worker #1, October 31, 2023 and November 9, 2023.

and allow for the Department to take enforcement action in an area that is currently underenforced. Without this provision, it will be nearly impossible for workers and the Department to hold low-road employers and recruiters responsible for charging illegal recruitment fees or engaging in other illegal recruitment activities.

This information collection requirement minimally increases the burden on employers that benefit from the H-2A program and is critical in enforcing and maintaining the rule of law. The Department has been collecting similar information related to recruiters in the H-2B program since 2015 without incident.

The Department should also keep the related assurance and applicable document requirements at § 655.135(p) and § 655.167(c)(8) to enforce the collection of such data and thereby make possible the enforcement described above.

II. The 2024 Rule's worker voice and empowerment provisions help to prevent workplace violations that erode wages and working conditions for all workers.

The 2024 Rule prohibits employers from retaliating against H-2A and U.S.-based workers in corresponding employment for exercising their rights. The worker voice and empowerment provisions made explicit existing protections such as the right to consult with key service providers, file complaints, and cooperate with a government agency's investigation.[23] The NPRM proposes to eliminate these crucial clarifications. The NPRM also proposes to eliminate prohibitions on employer retaliation against workers who participate in government investigations or take concerted action to self-organize and enforce their rights (§ 655.135(h)). This will contribute to a chilling of workers' willingness to speak up about workplace violations and a deterioration of wages and workplace conditions for all farmworkers in the U.S.

a. Workers and employers benefit from clarity about the right to consult with key service providers.

The 2024 Rule clarifies workers' rights to consult with key service providers. Key service providers include "[a] health-care provider; a community health worker; an education provider; a translator or interpreter; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; an emergency services provider; a law enforcement officer; and any other provider of similar services."[24] This is a crucial clarification because H-2A employers often restrict workers from inviting guests, such as service providers, to visit worker housing.

[23] 20 C.F.R. § 655.135(h), (m), (n).
[24] 20 C.F.R. § 655.135(h)(1)(v), 655.103(b).

The NPRM proposes to eliminate this provision, which would limit H-2A and corresponding workers' access to information that would otherwise prevent violations of workers' rights. As discussed above, most H-2A workers work and live in extreme isolation[25] in employer-controlled housing, with little access to outside resources. Workers who wish to seek information about a workplace concern or healthcare need to know that they can invite providers to their housing without employer retaliation. For example, some workers have chronic or long-term health conditions, such as pregnancy, requiring regular healthcare. Other trusted service providers deliver critical information about workers' rights under the H-2A rules, and other services. The 2024 Rule ensures that key service providers can access workers' housing without encountering low-road employers' restrictions. Without an explicit provision protecting workers' rights to consult with key service providers, many H-2A workers will lose access to vital services to learn about their rights and obtain healthcare. Isolated from service providers—and, in some cases, restricted from inviting service providers to consult with them in their housing—many H-2A workers will be forced to consult complex legal rules and navigate the U.S. legal system alone. And many will not be able to protect their rights–rights that are necessary to avoid a depressive effect on the wages and conditions of corresponding workers.

The Department also proposes to rescind the very definitions of "key service provider" and "labor organization" in § 655.103(b). But these definitions are vital to ensuring that H-2A workers have access to key service providers and can engage with labor organizations without fear of retaliation. The 2024 H-2A rule's definitions explicitly allows H-2A workers to invite into their homes, without fear of retaliation, service providers and organizations that assist workers in protecting and defending their rights. These definitions also provide clarity to employers attempting to comply with the H-2A rules and assist the Department in enforcing and ensuring compliance. Rescinding these definitions would prevent H-2A and corresponding workers from accessing key service providers, critical information, and healthcare.

b. Workers need to be able to complain about rights violations to government agencies and participate in government investigations without fear of retaliation.

Section 655.135(h)(1) of the 2024 Rule protects workers' right to complain to a government agency or participate in a government investigation without fear of retaliation. This right was already guaranteed under two sections of the existing H-2A rules, §§ 655.135(e), (h)(1) and (5), which require H-2A employers to comply with federal, state, and local laws that prohibit retaliation against H-2A workers who exercise their H-2A rights. However, many workers do not know all the federal, state, and local laws and regulations that protect them. The 2024 Rule's clarification of this right helps to ensure that the right exists in practice, without misinterpretation or confusion for workers or employers in its enforcement.

[25] *See, e.g.,* CDM, *supra* note 1, at 27; Exhibit E, Sara A. Quandt et al., *Farmworker Housing in the United States and Its Impact on Health*, 25 New Solut.: J. Envtl. & Occup. Health Pol'y 263, 269 (2015).

By prohibiting H-2A employers from intimidating or retaliating against workers for enforcing their rights or self-organizing, these provisions of the 2024 Rule rightly penalize abusive employers and empower workers to refuse illegal and substandard working conditions. These protections are crucial because H-2A employers exercise near-total control over their employees' lives. Workers who fear retaliation are less likely to report and challenge violations of their rights, and low-road employers will continue to offer substandard working conditions, depressing overall work standards across the industry.

H-2A worker participation in government investigations, including making complaints, is crucial to the maintenance of labor standards for all agricultural workers in the U.S. When H-2A workers help government agencies enforce laws regarding the minimum wage, safety and health, and discrimination, it reduces the ability of unscrupulous employers to erode pay and working conditions across the industry with impunity.

This right is particularly important to combat human trafficking, an abuse to which H-2A workers are particularly susceptible. In November 2021, the U.S. Attorney's Office for the Southern District of Georgia secured an indictment against several labor traffickers—recruiters and employers who recruited and charged H-2A workers from Mexico and Central America illegal fees, confiscated their passports, forced them to live in housing in inhumane conditions, withheld wages, and threatened them with violence and deportation. Two of the defendants tried to intimidate a witness testifying to a federal grand jury, pressing them to "deny any knowledge of the illegal activities."[26] As in this case, H-2A workers are often key witnesses in government investigations of labor abuses by their employers, including crimes like human trafficking. Workers' ability to cooperate with government investigations without fear of retaliation is crucial to ensure the government can prosecute human traffickers and protect workers, and prevent the deterioration of working conditions for agricultural workers across the U.S.

c. The 2024 Rule helps workers to organize against workplace violations and maintain lawful wages and working standards without fear of retaliation.

The 2024 Rule allows H-2A and corresponding workers in agriculture, as defined by the Fair Labor Standards Act,[27] the right to organize without fear of retaliation.[28] The rescission of this provision will contribute to the exploitation of workers by unscrupulous employers and adversely affect H-2A and U.S.-based workers alike. As mentioned above, H-2A and workers in

[26] Exhibit F, Press Release, U.S. Att'y Off. for the S.D. Ga., Human smuggling, forced labor among allegations in south Georgia federal indictment (Nov. 22, 2021), https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment (discussing *United States of America v. Patricio et. al.*, No. CR - 521-0009 (S.D. Ga. 2021)).
[27] 29 U.S.C. § 203(f).
[28] 20 C.F.R. § 655.135(h)(2)(i).

corresponding employment are at particularly high risk of labor exploitation due to the isolated nature of their housing and work, as well as their relative lack of bargaining power.[29] Their isolation means that outside organizations have little chance to see or report violations of the H-2A rules or U.S. labor law. In many cases, it is up to the workers themselves to report violations, and they have to overcome numerous obstacles, including potential retaliation, to do so.

CDM regularly hears about incidents of retaliation by H-2A employers against workers who take concerted action to speak out about violations. For example, one H-2A worker recently reported to CDM that he and his colleagues met to discuss concerns about being forced to pay expensive illegal fees partway through the season. The workers decided that one of them would share their concerns with the supervisor. But their supervisor ignored them. The workers eventually asked a U.S.-based employee to raise their concerns with the supervisor. The supervisor retaliated against the H-2A workers for reporting their concerns, threatening to deport or physically harm them. Stories like these illustrate the importance of retaliation protections for H-2A workers and workers in corresponding employment.

Organizing empowers workers to exercise their rights and enforce the protections afforded to them under U.S. labor laws and H-2A regulations, and to ensure that all H-2A employers comply with the H-2A rules.

d. Agricultural workers should not be forced to attend coercive employer-sponsored meetings designed to discourage workers from enforcing their rights.

Section 655.135(h)(2)(ii) allows H-2A workers the right to refuse to attend coercive employer-sponsored meetings. Low-road employers use coercive speech in captive audience meetings to discourage worker participation in concerted activity or other labor organizing. Because workers in the H-2A program depend wholly on the employer for income, housing, resources, and continued legal status, they feel compelled to join these captive audience meetings for fear of retaliation. A codified right to refuse such meetings empowers H-2A workers to avoid this type of coercion.

The chilling nature of captive audience meetings would have a detrimental impact on H-2A and corresponding workers' working conditions. If employers are allowed more opportunities to intimidate workers, then workers will be less inclined to come forward and

[29] Fifty-eight percent of H-2A workers surveyed were threatened with immigration consequences such as deportation, and 32 percent were threatened with being blacklisted from working in the U.S. again. Additionally, 58 percent reported having to work excessive hours, 41 percent reported that they had their wages withheld or taken, and a confirmed 2,841 H-2A workers became victims of human trafficking between 2018 and 2020. Polaris, *supra* note 12, at 5 and 10.

exercise their rights to report violations, including employer intimidation and retaliation, to the pertinent authorities. This will result in worse pay and working conditions for all workers.

The 2024 Rule's protections against retaliation for worker organizing and refusing to attend employer-sponsored meetings are not preempted by the National Labor Relations Act (NLRA). The NLRA is silent on agricultural workers' organizing rights, so it does not preclude farmworkers being subject to another labor statute or regulation.[30] Fourteen states, including California, New York, and Washington, recognize farmworkers' collective bargaining rights.[31] Courts have repeatedly held that the NLRA does not preempt those state regimes.[32]

III. Expanded guest access to worker housing prevents abuse and supports H-2A and corresponding workers' First Amendment rights to association and to receive information at their homes.

Eliminating § 655.135(n), which provides a right to expanded guest access to worker housing, puts H-2A and corresponding workers at greater risk of abuse, including violations of their First Amendment rights. The 2024 Rule requires employers to allow workers residing in employer-furnished housing to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of the workers' workday, subject only to certain limited restrictions. The 2024 Rule also clarifies that employers may not prevent service providers from contacting workers and seeking an invitation. CDM staff recalled a recent experience that highlights the importance of workers being able to receive guests at their housing:

> While conducting outreach to H-2A workers for a recent legal clinic that had been advertised on social media, staff from CDM found that no workers were present when they went to visit worker housing outside of typical work hours. H-2A workers later told CDM that their employer had required them to report to their worksite at the time of the visit, even though there was no work to be done. These workers missed an opportunity to obtain information from the clinic CDM hosted.[33]

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[30] The "NLRA's protections extend only to workers who qualify as 'employee[s]' under [29 U.S.C. § 152(3)]." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996). That section, which defines "employee" for NLRA purposes, does "not include any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). Congress's exclusion of any given worker from the scope of the NLRA's protections does not prohibit protections from being extended via other statutory regimes. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007).

[31] Samantha Mikolajczyk, *Collective Bargaining Rights for Farmworkers*, National Agricultural Law Center, https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/.

[32] *See, e.g.*, *United Farm Workers of Am., AFL-CIO v. Ariz. Agr. Emp't Rels. Bd.*, 669 F. 2d 1249, 1257 (9th Cir. 1982).

[33] Farmworker Justice, Comment on Proposed Rule, "Improving Protections for Workers in Temporary Agricultural Employment in the United States (Aug. 15, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0296.

Restricting guest access to worker housing would prevent H-2A and corresponding workers in employer-furnished housing from accessing essential, potentially life-saving services. H-2A worker housing is often in rural areas, and many workers do not have transportation for personal matters or essential services. Employers usually provide transportation only for travel to and from the worksite.[34] These barriers prevent some workers from accessing healthcare. The 2024 Rule helps ensure that healthcare providers can provide timely care for ill and injured workers. Workers face a cascade of harms when their employers refuse to transport them to a clinic or healthcare facility. For example, in 2025, CDM interviewed an H-2A worker in Florida whose employer did not immediately take him to receive urgent medical care when he was injured on the job. The worker had no transportation to seek medical care on his own, so he was forced to wait for the employer to receive treatment. When he returned to work, his employer refused to transport him to follow-up medical appointments, so the worker could not continue his treatment. He left employment before the H-2A contract ended because he could no longer withstand the pain caused by the injury. Had this H-2A worker been allowed to invite healthcare providers to his home, he could have received a full course of treatment, recovered from his work-related injury, and returned to work.

In addition, employers often monitor workers' guests, further intimidating and isolating workers.[35] Every person should be able to freely invite anyone they want to their home—not only to access services, but also to create social ties and build community. Workers in employer-provided housing often face isolation, intimidation, and other barriers that prevent them from being able to build community and learn about local resources to protect themselves and preserve their wellbeing. Crucially, expanding guest access to worker housing allows H-2A workers an opportunity to learn about and enforce their rights under the program. An H-2A worker underscored the need for guest access to identify and report labor abuses:

> I think there should be a law that lets human rights and other organizations enter the [H-2A] ranches to see workers and speak with them, find out how they are being treated, [and make sure] that they are not experiencing labor abuses more than anything else…because we'd say that [H-2A employers] abuse workers because they know that on those ranches, human rights and other organizations are never going to come in and see the workers. They think no one can report them, and workers are also scared to report their employers because they don't know where to go or have a number… since [workers] also don't know how the laws here work and [have] fear of not knowing where to go or who to turn to for help in this country. [36]

Furthermore, eliminating expanded guest access could lead to violations of H-2A and corresponding workers' First Amendment rights to associate and receive information in their

[34] CDM, *supra* note 1, at 12.
[35] *Id.* at 27.
[36] CDM interview with anonymous former H-2A worker #4, October 24, 2023

homes. The U.S. Supreme Court has long protected the right to engage in "door-to-door canvassing and pamphleteering"[37] and "to impart information and opinion to citizens at their homes."[38] The Court has also protected the corresponding right of people to receive information from visitors to their homes.[39] This right protects migrant workers.[40]

Owners' rights to exclude people from their property do not trump tenants' fundamental rights to receive information from visitors.[41] H-2A workers have a fundamental First Amendment right to receive guests in their housing. Federal courts and state appellate courts across the country have long recognized that "the ownership of a labor camp does not entail the right to cut off the fundamental rights of those who live in the camp."[42] As the New Jersey Supreme Court observed,

> [W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice,

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[37] *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 160 (2002).
[38] *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).
[39] *See, e.g., Martin v. City of Struthers, Ohio*, 319 U.S. 141, 149 (1943) (requiring "due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home").
[40] *See, e.g., People v. Rewald*, 318 N.Y.S.2d 40, 45 (Co. Ct. 1971) (noting the First Amendment rights "come into play where, as here, the migrant camp residents spend much time within the camp area. They have under our Constitution a right to free access to information and, most certainly, visitors, such as news reporters, may not be denied without good cause shown the right of reasonable visition [sic] for purposes of gathering and disseminating news. Thus, camp residents and public alike may be fully informed, may openly communicate their ideas, may intelligently exercise their franchise to vote and, when and if necessary, petition their government for redress of grievances.").
[41] *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) does not disrupt this principle. In that case, the Supreme Court decided that a California law allowing labor union organizers access to workers at an employer's property constituted a Fifth Amendment taking of that property without compensation. Within the framework of *Cedar Point*, expanding access for guests to the homes of agricultural workers does not constitute a Fifth Amendment taking; instead this access is "consistent with longstanding background restrictions on property rights" and therefore, is a "government-authorized physical invasion[] that does "not amount to [a] taking[]." *Cedar Point*, 594 U.S. at 160. Furthermore, the government may require property owners to cede a right to access as a condition of receiving certain benefits. *Id.* at 161. Here, the benefit to H-2A employers is the ability to participate in the H-2A program itself. Finally, the 2024 Rule allows narrower access than that contemplated in *Cedar Point*. The 2024 rule only allows guest access to employer-provided worker housing, while the California rule struck down by *Cedar Point* allowed union organizers to access *all* of an employer's private property, without specification or qualification. *Id.* at 144.
[42] *Folgueras v. Hassle*, 331 F. Supp. 615, 623 (W.D. Mich. 1971); *see also Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co.*, 518 F.2d 130 (3d Cir. 1975); *Velez v. Amenta*, 370 F. Supp. 1250 (D. Conn. 1974); *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972); *State v. DeCoster*, 653 A.2d 891 (Me. 1995).

> so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.[43]

The court also observed that "[p]roperty rights serve human values. They are recognized to that end, and are limited by it."[44] Following this understanding of property rights, the right of exclusion does not and cannot limit the fundamental First Amendment rights of workers to associate and receive information. Workers do not relinquish their rights to association or access of information simply by virtue of residing in employer-furnished housing.

The requirement that H-2A labor contractors (H-2ALCs) provide proof that housing providers will comply with this provision expanding guest access to housing[45] is intrinsic to the rule's enforcement. Without a requirement of such proof, there is no way for the Department to keep track of who is following this rule and who is not, making robust enforcement of the rule impossible, and its goals unreachable.

IV. The presence of a designated representative at investigatory interviews can prevent unjust firings of, and retaliation against, H-2A and corresponding workers.

The proposed elimination of § 655.135(m), which gives H-2A and corresponding workers in agriculture the right to designate a representative during investigatory interviews, would put workers at greater risk of H-2A rule violations, including violations that erode pay and working conditions for workers in corresponding employment. The 2024 Rule allows workers to designate a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action. Under this rule, the employer must permit the worker to receive advice and assistance from the designated representative during any such interview. The presence of a designated representative helps workers to document and challenge retaliatory and discriminatory discipline, to enforce the terms and conditions required by the H-2A contract, and to act in concert with their colleagues to advocate for improved working conditions without fear.

During investigatory interviews, workers face a heightened risk of retaliation, intimidation, and harassment by their employers. In some cases, H-2A employers have abused their power by requiring workers to engage in sex acts in exchange for fair treatment at work, and retaliated against workers who refuse or oppose their harassment. An H-2A worker who filed a petition challenging sexual harassment in the workplace under the United States—Mexico—Canada Agreement (USMCA) describes such a situation:

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[43] *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).
[44] *Id.* at 372.
[45] 20 C.F.R. § 655.132(e)

> I was constantly fearful while I worked for my Employer, because I knew that if I wanted fair treatment at work, I was expected to have sex with my Employer and Supervisor to receive better treatment.
>
> I felt pressured by them to accept their sexual advances because I knew that I would be punished with low pay and especially difficult work assignments if I did not.
>
> . . . . The women that my Employer and Supervisor had sex with received preferential treatment by being assigned easier jobs. For example, I used to work in the kitchen preparing food for the workers, which was easier than field work, but after I told my Supervisor that I did not want to have sex with him, I was replaced by a female worker with whom my Supervisor was having sex. . . . After this point, all of the bosses were harsher on me.
>
> Another example of unequal treatment and retaliation occurred when one of my coworkers told me that my Supervisor said that if she had sex with him, he would make sure she could continue working in the packing shed putting boxes together. ….When my coworker rejected my Supervisor, he moved her to picking in the fields as punishment.[46]

Workers are particularly at risk of this type of *quid pro quo* sexual harassment during investigatory interviews that have the potential to lead to discipline, since unscrupulous supervisors and employers sometimes require employees to engage in sex acts in order to avoid punishment. Without the right to designate a representative, H-2A and corresponding workers face significant barriers to standing up for their rights in these interviews,[47] including potential harassment and intimidation, physical and cultural isolation,[48] and a lack of knowledge about U.S. workplace rights. The ability to designate a representative in investigatory interviews helps to close this knowledge gap, and allows workers to ensure a witness is present for potentially adversarial interactions with their employers. This protection will deter unscrupulous employers from firing workers in retaliation, abusing the power imbalance to engage in *quid pro quo* harassment, or falsely claiming that a worker quit or was terminated for cause in order to avoid paying the three-fourths guarantee.[49]

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[46] Exhibit G, *See* Amended Petition on Labor Law Matters Arising in the United States Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 of the United States—Mexico—Canada Agreement, (March 23, 2021), available at https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf.

[47] Exhibit H, Sarah Helene Duggin, *The Ongoing Battle over* Weingarten *Rights for Non-Union Employees in Investigative Interviews: What Do Terrorism, Corporate Fraud, and Workplace Violence Have to Do with It*, 20 Notre Dame J. L. Ethics & Pub. Pol'y655, 667 (2006).

[48] CDM, *supra* note 1, at 27; Exhibit E, Quandt et al., *supra* note 24, at 269.

[49] H-2A employers are required to offer a total number of work hours equal to at least three-fourths of those stated in the job order. If during the total work contract period the employer fails to offer sufficient hours to satisfy the

V. Enhanced information collection requirements advance the Department's enforcement of the H-2A regulations and allow H-2A and U.S.-based workers to hold unscrupulous employers accountable.

Rescinding the enhanced information collection requirements at § 655.130(a)(1)–(4) of the 2024 Rule would hamper the enforcement activities of the Department, resulting in harm to both H-2A and U.S.-based workers. The 2024 Rule requires employers to provide information on owners, operators, and supervisors, including identity information, location, contact information, prior trades, and other names the person or corporation could be doing business as. Such information is integral to the enforcement of H-2A program rules. For example, many times, low-road employers do business as two companies, hiring H-2A workers for different periods of time to cover annual work. This is explicitly prohibited by the program, since H-2A workers can only be hired to do seasonal, not year-round, work.[50] The enhanced information collection requirements of the 2024 Rule would help the Department detect such practices by providing the Department with prior trades and other names under which the company has done business.

VI. Transparency in piece rate advertising and on payment obligations helps all workers understand the wage they are entitled to receive and identify wage theft.

Rescinding the 2024 Rule's changes to §§ 655.120(a), 655.122(l), 655.210(g), 655.211, and 653.501(c) regarding piece-rate advertising and payment obligations will largely nullify the regulatory provision for determining prevailing wages and adversely affect U.S.-based workers. The 2024 Rule expressly requires that, where there is an applicable prevailing piece rate or where an employer intends to pay a piece rate or other nonhourly wage rate, the employer must

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three-fourths guarantee, then the employer is required to pay the worker the amount they would have earned for working the guaranteed number of hours. 20 C.F.R. § 655.122(i); *see also* WHD, *Fact Sheet #26E: Job Hours and the Three-Fourths Guarantee under the H-2A Program* (Nov. 2022), https://www.dol.gov/agencies/whd/fact-sheets/26e-job-hours-three-fourths-guarantee-H-2A. However, if a worker quits voluntarily or is fired for cause, and the employer provides adequate notice to OFLC's National Processing Center (NPC) and the Department of Homeland Security, the worker is not entitled to the three-fourths guarantee. *See* 20 C.F.R. § 655.122(n)(1). An unscrupulous employer may falsely claim that a worker quit or was fired for cause to avoid the three-fourths guarantee.

[50] Haas Farms, 2016-TLC-00032 (Board of Alien Labor Certification Appeals (BALCA Apr. 7, 2016) (year-round work for two interlocking businesses is not seasonal or temporary); Legume Matrix, LLC, 2016-TLC-000008 (BALCA Dec. 8, 2015) (intertwined companies cannot use multiple H-2A applications to create year-round need); Rosalba Gonzales, 2017-TLC-00028 (BALCA Oct. 11, 2017) (same); JBO Harvesting, 2020-TLC-00129 (BALCA Nov. 6, 2020) (overlapping contracts not seasonal under H-2A regulations); Advanced Agriculture, Inc., 2014-TLC-00077 (BALCA Mar. 31, 2014) (employers cannot evade the H-2A seasonality requirements by using two employer entities with overlapping dates of need); Ag-Mart Produce, Inc., 2020-TLC-00097 (BALCA Aug. 13 2020) (need is not seasonal if H-2A workers perform normal, ongoing operations); Farm-Op, Inc., 2017-TLC-00021 (BALCA July 7, 2017) (stringing together overlapping jobs at different jobsites is not seasonal or temporary work); Great Southern Farms, LLC, 2009-TLC-00065 (BALCA Sep. 03, 2009) (two separate groups of workers performing different seasonal tasks with year-round date of need is not seasonal); Bracy's Nursery, 2000-TLC-11 (BALCA Apr. 14, 2000) (overlapping H-2A orders may not be used to fill year-round jobs).

include the non-hourly wage rate on the job order along with the highest hourly rate. The 2024 Rule further requires employers to pay workers' wages using the wage rate that will result in the highest wages for each worker in each pay period.

Before the 2024 Rule, employers would often pay workers according to a piece rate without disclosing the piece rate in the job order. This left prospective H-2A and corresponding workers with no means to accurately predict their pay before accepting employment. Employers would even withhold piece rate information from workers during the entire course of their employment, making it impossible for workers to calculate the wages they were owed according to the piece rate. H-2A employers also often fail to provide paystubs that accurately reflect hours worked. Without accurate information as to either the piece rate or the hours worked, workers have little recourse to ascertain whether they have been paid correctly upon receiving their paycheck. Employers have long been obliged to supplement the income of H-2A workers paid a piece rate if their hourly pay does not meet the highest wage rate. The 2024 Rule improves wage transparency so that prospective H-2A and corresponding workers understand the rate of pay they can expect before accepting a job offer. In doing so, the 2024 Rule improves all workers' ability to ensure that they receive their full wages due. An H-2A worker recently described to CDM how he was originally promised a pay rate of $16.00[51] per hour, but instead was paid a piece rate of 50 cents per pound of blueberries picked at his job. The worker's paychecks did not fulfill the promised hourly pay rate. At the same company, workers who picked pumpkins were paid by the hour instead of by piece rate. Because the employer was not required to advertise the piece rate offered, the employer could pick and choose when and how to implement those piece rates in whatever way maximized their profits and minimized the wages paid to workers. Prospective corresponding and H-2A workers remained in the dark about piece rates until after they had signed their contracts and arrived in the U.S. or to the H-2A worksite.

Failing to include both the piece and highest wage rate on the job order makes the terms of the contract unclear for H-2A and U.S.-based workers alike. It means they accept—or decline—a job without knowing their actual rates of pay. It also makes it challenging for workers to track their earnings and enforce the H-2A wage guarantees by quantifying and addressing wage theft. Requiring upfront disclosure of piece rates makes it easier for workers and advocates to calculate wages due, and makes it more likely that workers will be paid correctly.

Rescinding §§ 655.210(g) and 655.211, which govern rates of pay for herding and range livestock occupations, as well as corresponding changes to § 653.501(c)(1)(iv)(E), which requires wages to be posted on job orders, will further weaken the ability of the Department to enforce prevailing and adverse effect wages by similarly limiting corresponding and H-2A workers' abilities to accurately predict and calculate their wages due. Weakened enforcement harms H-2A and U.S.-based workers alike.

[51] All money amounts are in U.S. dollars unless otherwise specified.

VII. The 2024 Rule's provisions requiring employers to communicate minor delays in start date will allow workers to avoid unnecessary inbound travel costs.

Rescinding § 655.175 of the 2024 Rule, which outlines employers' obligations in case of minor delays in start date, will harm H-2A workers. H-2A workers travel long distances to reach their workplaces, spending large sums of money (often borrowed at significant interest rates) upfront on numerous expenses, including transportation, accommodation, and more to make it to their workplace on time. A delay in start date with no compensating pay would leave H-2A workers with no income to pay for any of these expenses and without income to pay for their basic needs at the time of arrival. H-2A workers would also need to pay for accommodations and other expenses while waiting for work to start. Additionally, H-2A workers' visa terms restrict them from seeking alternative employment; they can only earn income in the United States from the designated H-2A employer.

The 2024 H-2A Rule's requirement for employers to give workers and the corresponding State Workforce Agency (SWA) 10 days notice of a delay in start date gives workers adequate notice to change their travel plans and ensures workers can access employer-provided housing, compensation, and benefits for up to 14 days if this notice requirement is not met. Without these protections, workers will be forced to cover unpredictable travel expenses—expenses that many will have to cover through additional debt, making them more vulnerable to human trafficking.

VIII. Requirement to pay the new adverse effect wage rate (AEWR) immediately upon publication allows all workers to receive their correct, due wages.

Rescinding § 655.120(b)(2)–(3), the requirement to pay an updated adverse effect wage rate (AEWR) immediately upon its "effective date" as published in the Federal Register, would adversely affect H-2A workers and corresponding U.S. workers. The delayed pay increase for both groups of workers would artificially suppress their income for the time it takes for the employer to update the AEWR in their paychecks. Even before the 2024 Rule, H-2A employers were required to pay the highest of the following: the AEWR, prevailing wage, or the federal or state minimum wage. The requirement to pay the new AEWR on time imposes no significant new burdens on H-2A employers, who can sign up for automatic email notifications of updates to the AEWR through the Office of Foreign Labor Certification (OFLC). Moreover, the OFLC consistently publishes updated AEWRs on a regular schedule that H-2A employers can easily anticipate.[52] The 2024 simply clarifies the time frame by which the H-2A employer has the

[52] The AEWR for field and livestock workers based on the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) are published in the Federal Register and effective on or about January 1 every year, while the AEWR for other workers based on the Occupational Employment and Wage Statistics (OEWS) survey are published in the Federal Register and effective on or about July 1 every year. Final Rule, Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 FR 61660 (Oct. 12, 2022); Final Rule, Adverse Effect Wage Rate

responsibility to update the pay rate in their employees paychecks. If the AEWR is updated in the middle of a pay period, the 2024 Rule permits H-2A employers to update H-2A workers' pay to meet the new AEWR requirement at the end of the following pay period. Therefore, there is no significant difference in burden on H-2A employers with respect to paying the AEWR immediately in the 2024 Rule. Workers should therefore be paid the current AEWR as soon as it is posted.

IX. New seatbelt requirements will protect both H-2A and U.S.-based workers from physical harm when traveling for work.

Section 655.122(h)(4) of the 2024 Rule requires that employer-provided transportation have seatbelts if the vehicle was manufactured with them, and that employers require employees to wear seatbelts. Eliminating these requirements would subject both H-2A and U.S.-based workers to a greater risk of physical harm while on the job. The NPRM admits that seatbelts are one of the most effective ways to prevent serious injuries and fatalities during a car crash.[53] Without seatbelts, H-2A and corresponding workers can be severely harmed or killed while on their way to or from work. Just recently, in 2024, eight H-2A farmworkers were killed when their employer-provided transportation—which had no seatbelts—was sideswiped by a pickup truck on their way to work.[54] Requiring seatbelts on H-2A transportation saves lives.

X. Provisions of the 2024 Rule regarding termination for cause advance the enforcement of H-2A regulations.

Rescinding the changes made to §§ 655.122(n)(2), (n)(4)(ii) and (n)(4)(iii), the provisions that pertain to termination for cause and progressive discipline, will weaken the enforcement of the H-2A program and its guarantees. The 2024 Rule outlines the conditions that must be met before an H-2A worker can be terminated for cause, which include making sure that the worker receives information about the policies, rules, performance expectations, and discipline procedure in a language they understand. By clarifying the information that employers need to provide to workers about workplace expectations, including documentation requirements, these

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Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States,88 FR 12760 (Feb. 28, 2023); *see* 20 CFR 655.120(b)(2) (2024). The USDA publishes the FLS data that become the new AEWR for field and livestock workers in November of each year, allowing employers ample time to determine and adjust to the new AEWR. *See* https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.

[53] Recission of Final Rule, 90 Fed. Reg. 28, 919.

[54] Hannah Critchfield and Juan Carlos Chavez, *When a bus without seat belts met a dangerous driver, Florida farmworkers paid the price*, Tampa Bay Times (May 17, 2024), https://www.tampabay.com/investigations/2024/05/17/when-bus-without-seat-belts-met-dangerous-driver-florida-farmworkers-paid-price/; Exhibit I, Mike Schneider and Terry Spencer, *8 dead, at least 40 injured after pickup collides with a farmworker bus in central Florida*, PBS News (May 14, 2024), https://www.pbs.org/newshour/nation/8-dead-at-least-40-injured-after-pickup-collides-with-a-farmworker-bus-in-central-florida

provisions protect both H-2A and corresponding workers from ambiguous or immediate retaliatory firings that they may otherwise face when speaking up about workplace abuses. These provisions protect workers' ability to raise concerns about workplace issues to the Department, or other federal, state, or local agencies.

Eliminating the corresponding recordkeeping requirements found at § 655.167(c)(10) and (11) would nullify the termination for cause rule, so they should remain along with the main rule.

Rescinding the requirement at 20 C.F.R. § 655.122(l)(3) to disclose minimum productivity standards to employees would keep H-2A workers in the dark about the terms of their employment and at risk of unjust firings. Before the 2024 Rule, only employers who paid by piece rate were required to disclose minimum productivity standards for continued employment. The 2024 Rule now requires every employer to disclose to workers minimum productivity standards that are required for workers to retain their jobs. Disclosing this requirement helps ensure that workers know the material terms and conditions of their employment. This rule also helps ensure that employers cannot raise productivity standards mid-contract as a pretext for terminating workers.

XI. The rescissions relating to the Wagner-Peyser Act would weaken the enforcement ability of the Department and the rule of law within the program.

The NPRM proposes rescinding the 2024 Rule's changes to the Wagner-Peyser Employment Service (ES) regulations, which would weaken the enforcement ability of the Department, SWAs, and other labor agencies. Without these provisions, it will be more difficult to enforce H-2A rules evenly across the U.S.

For example, the NPRM proposes eliminating the language at §§ 658.503–504 that requires SWAs to notify the Employment & Training Administration (ETA) Office of Workforce Investment (OWI) of a discontinuation of services to specific employers. The 2024 Rule made such discontinuations system-wide. Once one state discontinues services to an employer, they must notify the OWI so that employer is debarred from the program nationwide. Without these provisions, unscrupulous employers could simply move their operations to different states in order to avoid debarment and exclusion from the H-2A program. This would cause uneven enforcement of labor law and make specific states safe havens for bad actors within the program. Beyond that, this uneven enforcement would harm law-abiding employers, who would be put at an economic disadvantage for following the law while being forced to compete with employers who do not. Not only were these provisions meant to help facilitate prompt implementation and maintenance of the discontinuation of services list, they also were meant to provide prompt access to H-2A employment services for employers who had been reinstated. As such, this provision also helps employers get H-2A services reinstated more quickly.

The NPRM also proposes to rescind the language of § 653.501(b)(4), which requires employment services staff to consult the OWI discontinuation of services list prior to clearing a job order. This requirement would ensure that employers on the list do not slip through the cracks and maintain access to the H-2A program despite their debarment. This requirement is necessary in order to properly enforce the discontinuation of services to bad actors and to maintain the integrity of the H-2A program. When the rule was first proposed in 2024, there were concerns about the possibility of a farmer or employer facing unfair consequences in the form of discontinuation of services simply for having a similar name to another business that was banned from the program. The 2024 Rule made clear that if an employer did have a similar name, they could continue to use the services of the H-2A program throughout the process of contesting or appealing such a determination. In this way, the burden on similarly-named employers is minimized. In return, the checking of such a list before clearing a job order serves to strengthen the enforcement ability of the Department and other labor agencies by catching a discontinuation of service earlier on and making sure that bad actors do not continue to reap the benefits of the H-2A program without following its rules.

Sections 658.502(b) and 658.503(b) of the 2024 Rule remove an employer's option for pre-final determination hearings and allow employers to request a hearing only after the State makes a final determination. Rescinding this provision will only serve to muddy the waters on final determinations on appeal without offering substantially different due process rights to employers. Employers already have the ability to make an appeal after a final decision has been reached, which allows them to contest debarment as well as other determinations. Allowing for intermediary hearings does not substantially change these rights of contestation, only the timing. In reality, the 2024 Rule allows for a more efficient process without removing due process for employers, mirroring the ES Complaint System at §§ 658.411(d) and 658.41, which is not contested or mentioned by this NPRM.

XII. CDM supports the Department's proposal to retain certain parts of the 2024 Rule that strengthen the Department's enforcement capabilities and protections for workers.

a. Retention of Passport/Identification Documents

We support the Department's proposal to retain the language of § 655.135(o) of the 2024 Rule, which prohibits the holding of passports or identification documents by employers. As described earlier in the comment, H-2A workers are at particularly high risk of labor exploitation and trafficking. When employers withhold passports and other identification documents, they effectively weaponize H-2A workers' immigration status. Workers understand they will be unable to prove their lawful presence in the U.S. without their passport and other documentation,

so workers become more inclined to do what their employers ask, with the hope of recovering their documents in the future. In a report based on data received from incoming calls to their Human Trafficking Hotline, Polaris found that 33% of the H-2A workers they spoke to had their passport or other important documents confiscated or destroyed by traffickers.[55]

When employers exploit this structural vulnerability that H-2A workers face, they wield a powerful tool of intimidation that forces workers to endure horrible and unlawful working conditions. We agree with the NPRM that this rule does not impose a high burden on employers given the seriousness of such an action and the fact that it is illegal in many states already.[56]

b. Severability

We also support the Department's proposal to retain the language of 20 C.F.R. § 655.190 and 29 C.F.R. § 510.10, which allows portions of the H-2A rule to be severed from the rest of the regulations if they are found to be unenforceable. This is appropriate because each provision in the H-2A regulations is capable of operating independently from the others, including where the Department proposed multiple methods to strengthen worker protections and to enhance the Department's capabilities to conduct enforcement and monitor compliance. It is also important to the Department and the regulated community that the H-2A program continue to operate, even if a portion of the H-2A regulations is found to be invalid or unenforceable.

c. Requirements for employers to specify in the job order any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours will be paid

We also support the Department's proposal to retain the language of §§ 655.122(l)(4) and 655.210(g), which require the employer to specify in the job order any applicable overtime premium wage rates for overtime hours worked and the circumstances under which the wage rates for such overtime hours will be paid. This is simply a clarification of the Department's longstanding regulations that an H-2A employer must assure that it will comply with all applicable federal, State, and local laws, including any applicable overtime laws, during the work contract period,[57] and that an H-2A employer must accurately disclose the actual, material terms and conditions of employment, including those related to wages, in the job order.[58] The clarification makes it easier for employers to understand their obligations under the H-2A program and therefore makes their implementation more likely. This allows for H-2A workers and workers in corresponding employment to be apprised of all the material terms of their contract and to have knowledge of their rights under the program, facilitating their ability to

[55] Polaris, *supra* note 12, at 26.
[56] Recission of Final Rule, 90 Fed. Reg. 28, 919.
[57] 20 C.F.R. § 655.135(e).
[58] 20 C.F.R. §§ 655.135(e), 655.103(b), 655.121(a)(3), and 655.122(l).

exercise their rights and keep unscrupulous employers accountable.

d. Definitions

We support the NPRM's retention of specific definitions in § 651.10, including the definitions for "successor in interest", "agent", "farm labor contractor", "criteria clearance order", "discontinuation of services", "employment-related laws", "joint employer", "non-criteria clearance order", and "week". These definitions help to clarify employer obligations and employee rights under the H-2A program. This will aid the Department's enforcement efforts by removing ambiguities from the H-2A rules and ensure employer compliance.

e. Requirements for States to consult the Office of Foreign Labor Certification (OFLC) and the Wage and Hour Division (WHD) debarment lists and discontinue services to any employer debarred from H-2A or H-2B programs

We also support the retention of § 653.501(b)(4)(i), which requires States to consult OFLC and WHD debarment lists and discontinue services to any employer debarred from H-2A or H-2B programs.This provision helps with the even enforcement of labor law throughout the country, protecting H-2A workers from employers on the OFLC and WHD debarment lists no matter which state they work in. This provision also ensures that H-2A and U.S.-based workers are protected from employers the Department has already found to have committed significant violations sufficient to justify their debarment from the labor certification program.

f. Clarifying Changes

CDM also supports the retention of clarifying changes at §§ 658.501(a), 658.502(a), 658.501(b), 658.503(a), (c), (d) and (f) which explain more fully the process preceding the discontinuation of services and the discontinuation of services themselves on the basis of debarment or fraud. This clarification will allow employers to more easily understand these processes and will also streamline and standardize these processes for the Department.

Conclusion

Centro de los Derechos del Migrante strongly opposes the proposed rescissions to the 2024 H-2A rule.

Sincerely,

Centro de los Derechos del Migrante