



National Association of State Departments of Agriculture
4350 North Fairfax Drive
Suite 810
Arlington, VA 22203
Tel: 202-296-9680
www.nasda.org

November 13, 2023

Mr. Brian Pasternak
Administrator, Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

Re: **DOL Docket No. ETA-2023-0003 - Improving Protections for Workers in
Temporary Agricultural Employment in the United States**

Administrator Pasternak:

The National Association of State Departments of Agriculture (NASDA) represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs, including food safety, conservation, and fostering the economic vitality of our rural communities. NASDA is committed to working with the federal government, private industry, and academia to identify and address agricultural workforce challenges. The H-2A program must provide farmers and ranchers with a legal, reliable workforce to support the industry while also protecting agricultural workers. However, NASDA is concerned with the proposed rule issued by the Department of Labor (DOL).

NASDA believes the system for recruiting and obtaining the current H-2A visa for temporary agriculture workers and the H-2B visa for temporary non-agricultural workers is complicated and broken. While NASDA still supports statutory changes and improvements to the H-2A program more broadly, this proposed rule would negatively impact agricultural producers seeking to utilize the H-2A program for its intended purpose – to fill immediate labor shortages and gaps in agricultural operations.

The proposed rule will be costly and difficult for employers to navigate. First, the proposed rule would eliminate the current 14-day window farmers have to update their payroll systems and force farmers to regularly monitor the Federal Register for updates on the Adverse Effect Wage Rate. According to the Federal Communications Commission, approximately 14.5 million Americans do not have broadband access and USDA reports only 51 percent of farms can connect to the Internet through a broadband connection.¹ It is simply unreasonable to expect that

¹ “Technology Use (Farm Computer Usage and Ownership),” USDA, Aug. 2023.
<https://downloads.usda.library.cornell.edu/usda-esmis/files/h128nd689/4j03fg187/fj237k64f/fmpe0823.pdf>

a farmer can closely and regularly monitor the Federal Register and implement instant changes to payroll several times a year.

NASDA supports labor policy that protects employers of non-U.S. citizens when those employers make reasonable efforts to document labor status. As with any program, employer involvement and full compliance are key to ensuring the best outcomes for both the agricultural employer and the employee.

NASDA remains concerned that the proposed rule seeks to expand labor organizations' access and input to the H-2A program in a manner that will be inefficient and potentially undermine the program's goals and use it entirely as a labor organization mechanism. Specifically, the proposed rule's mandate to discontinue services to agents and attorneys, as well as the actual employer, joint employers, farm labor contractors, agricultural associations, and any successor of interest if one of the eight bases for discontinuation is met. Of course, NASDA supports employers abiding by the laws and regulations of the H-2A program. However, NASDA is concerned that the proposed rule does not distinguish between the differing levels of severity of an infraction as well as the frequency of violations. This could create a situation where a first-time user of the H-2A program could potentially unknowingly commit a minor violation and be expelled from the program.

The proposed rule also reduces the period from the current 30 calendar days to 14 calendar days after a Notice of Debarment for an employer to file rebuttal evidence of employer wrongdoing or to request a hearing. This raises concerns with due process and NASDA encourages DOL to at least maintain the current 30-day threshold and form a distinction between the severity and frequency of any infraction.

State departments of agriculture often work closely with their state workforce agencies (SWA) on a variety of topics and issues and would encourage SWAs to make the same distinctions and provide due process to agricultural employers wherever applicable. Still, concerns remain that the requirements of SWA will increase without consideration for the potential lack of state resources and staffing to accommodate such changes to the program. NASDA encourages DOL to work quickly and transparently with SWAs and engage with other state-level organizations, including NASDA, to allow for swift compliance and updates to the program in a transparent manner.

DOL is proposing an expansion of labor organizing rights under this rule. NASDA is concerned about the proposed rule's mandate requiring employers to provide, at the request of a labor organization, the names and contact information of all H-2A workers and any workers at the corresponding place of employment on their H-2A application within one week of the request. This proposal raises significant questions about the protection and distribution of such information and privacy concerns.

The proposal also seeks to provide labor organizations with access to employer-provided housing. If that housing is not publicly available, the proposed rule would grant access to employer property for up to 10 hours per month without explicit invitation. Agricultural employers utilizing the H-2A program have long been required to provide adequate and

accessible housing, a requirement that is not necessarily required or common across other labor sectors. While H-2A employees should not be subject to substandard living conditions, this is a significant cost and burden for agricultural employers. Increasing public access to these areas raises significant security, privacy, safety, and biosecurity concerns for any agricultural operation.

The range and diversity of agricultural operations across the states and territories are vast and complex. NASDA is concerned that this proposed rule will adversely impact smaller agricultural employers and operations, who, at times, have limited or lessened access to financial and technical resources to help them navigate complex regulatory environments. NASDA is concerned that smaller producers may not have the resources, legal expertise, and technical experience to adapt to the proposed changes quickly and effectively, potentially jeopardizing the success of their farm and the H-2A program. NASDA supports agricultural operations of all shapes and sizes, but strongly encourages the DOL to make all efforts to reach and inform smaller producers of these proposed changes and the potential business impacts, which remains very vague in the proposed rule.

NASDA is very concerned with the overwhelming number of proposed changes and potential opportunities related to the H-2A program. While producers are considering DOL's proposed changes and seeking to understand the complexities of prior recent rulemakings, they are also simultaneously evaluating a new rulemaking by the Department of Homeland Security (DHS) on *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, with a comment deadline of November 20, 2023, along with a recent Notice of Funding Opportunity from the United States Department of Agriculture (USDA) for the *Farm Labor Stabilization and Protection Pilot Program*, with a deadline of November 28, 2023. Each proposed rulemaking or agency action requires a significant amount of stakeholder engagement and competing timelines and comment periods have not provided NASDA members, nor the agricultural employers and producers in their states, enough time for thorough review and comment.

American agriculture continues to face a critical shortage of labor that impacts annual harvests, animal agriculture production, and processing facilities throughout the entire supply chain. This damages American competitiveness and overall food and national security. According to USDA's Economic Research Service, agriculture, food, and related industries contributed roughly \$1.264 trillion to U.S. gross domestic product in 2021, a 5.4% share. If faced with these changes DOL proposes, producers may have no choice but to change their entire operations and grow or raise less labor-intensive agricultural products. This has the potential to change the entire U.S. agricultural industry, including both imports and exports of fresh produce and other products. NASDA urges DOL and the Administration to consider the lasting impacts these proposed regulations will inevitably have not just on agricultural producers – but the entire supply chain and ultimately, the American consumer. The increased costs associated with these proposed changes will change, and have already impacted, the way producers structure their businesses and the cost of food.

This administration has finalized or initiated eight new labor rulemakings, which has created additional regulatory uncertainty for producers. The overwhelming regulatory burden that agricultural employers face, especially as they emerge from a global pandemic, is unreasonable.

NASDA strongly encourages the DOL to reconsider many of the proposed reforms and consider the impacts such reforms will have – including administrative delays, higher costs for the agricultural employer, work disruptions, and ultimately, severe impacts to our nation’s food supply chain.

Should you have any questions, please contact Stephanie McBath, Associate Director of Public Policy, at Stephanie.McBath@nasda.org.

Sincerely,

A handwritten signature in black ink that reads "Ted a McKinney". The signature is written in a cursive style with a large, looping flourish at the end.

Ted McKinney
Chief Executive Officer