November 14, 2023

Via E-Filing on Regulations.gov

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

Dear Administrator Vitelli, Administrator Pasternak, and Director DeBisschop:

On behalf of the National Council of Farmer Cooperatives (NCFC), please accept the following comments on the Department of Labor's (DOL) Notice of Proposed Rulemaking regarding the Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63750 (Sept. 15, 2023) ("Proposed Rule").

Since 1929, NCFC has been the voice of America's farmer cooperatives. NCFC members include regional and national farmer cooperatives, which are in turn composed of over 2,500 local farmer cooperatives across the country. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives—businesses owned, governed, and controlled by farmers and ranchers—are an important part of the success of America's agricultural supply chain that includes suppliers of goods and services to the country's working lands, the farmers and ranchers responsible for the abundance that comes from those lands, and the processing, manufacturing, packaging, marketing, and sale of that abundance to agriculture's customers.

GENERAL COMMENT ON REQUESTED INPUT FROM THE REGULATED COMMUNITY

Generally, the Department's requested evidence and information through public comment has many agricultural employers concerned that the Department views all employers who seek to use a legal, government sanctioned, workforce as somehow trying to exploit workers and attempting to evade the law. The Department says as much in the Notice of Proposed Rulemaking ("NPRM") "the Department is most interested in comments that cite evidence of the need to remedy through this rulemaking ongoing violations, worker abuse or exploitation, coercion, employer or agent subterfuge to avoid the law . . . ."[1] It is difficult for employers using the program correctly to provide this type of evidence the Department is seeking, as they are following the law and are not committing worker abuse or exploitation, coercion, and are not participating in subterfuge to avoid the law. The vast majority of employers who use the H-2A temporary agricultural worker program do so with an eye towards compliance, experts in migration policy at the University of California Davis found that the top 5 percent of U.S. crop farms with labor violations accounted for 70 percent of labor violations detected by Wage and Hour Division ("WHD") and the top 5 percent of farm labor contractors with violations accounted for 65 percent of all violations found to be committed between 2005-2019.[2] Therefore, violations of the H-2A temporary agricultural worker program are concentrated among a small number of employers, while the vast majority of employers are doing their level best to comply with the 209 H-2A rules the government has imposed on employers to hire a legal, government sanctioned, workforce.[3]

The Department has two goals imposed upon it by the Immigration and Nationality Act ("INA"), ensuring U.S. agricultural employers have the necessary access to a workforce when there is not enough able, willing, and qualified U.S. workers available at the time and place needed and that such employment will not adversely affect the wages and working conditions of U.S. workers.[4] As discussed in detail below, some of the 209 current H-2A rules and the additional rules being proposed in this NPRM are frustrating the purpose of the INA and not only adversely affecting the wages and working conditions of the current U.S. agricultural workforce, but also hindering the ability of U.S. agricultural employers to even use the program in a

[1] 88 Fed. Reg. 63753 (Sept. 15, 2023).
[2] *The H-2A Program in 2022*, Rural Migration News, https://migration.ucdavis.edu/rmn/blog/post/?id=2720 (last visited Oct. 31, 2023).
[3] *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers*, David J. Bier, Table C, March 10, 2020, https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire (last visited October 31, 2023).
[4] 8 U.S.C. § 1188(a).

compliant manner. The INA requires the Department to balance the interest of U.S. agricultural employers and the U.S. agricultural worker, this NPRM tips the balance of scale too far against the U.S. agricultural employer trying to put food on America's dining room tables. The Department should focus its attention on the enforcement of the current regulations which are sufficiently protective of both U.S. agricultural workers and foreign guest workers, as has been shown through currently publicized enforcement actions by the Department across the country.

CHANGES TO THE EMPLOYMENT SERVICES SYSTEM

Review and Creation of Debarment Lists

To use the H-2A temporary agriculture worker program employers are first required to file a clearance order with the State Employment Services system, often referred to as the State Workforce Agency ("SWA"). If employers are unable to file clearance orders with the SWA, or receive referrals of U.S. workers through that system, they are effectively debarred from the H-2A program. One such concern many employers have is the proposed Office of Workforce Investment discontinuation of services list. The Department is proposing that the SWA must look at that list prior to placing any clearance order, and if an employer appears to be on the list the SWA will not place the order. As laudable of a goal it is to ensure that employers who have violated labor laws are not able to do so in other states, we want to encourage the Department to ensure that same or similar employer names do not inadvertently debar an employer that is not actually on this list. Further, the NPRM is quite silent on how the Department is going to ensure that SWAs are not inadvertently debarring employers and what employers' due process rights are in getting an order placed if the SWA refuses to publish the order because an employer has the same or similar business name as another entity on the list. The NPRM does not discuss an appeal method if a SWA refuses to post a clearance order, and the Department should ensure there is a method for employers in this situation to ensure their order gets placed timely. Employers have the same concern about requiring the SWA to consult the Office of Foreign Labor Certification ("OFLC") and Wage and Hour Division ("WHD") H-2A and H-2B debarment lists, if employers with same or similar names appear on that list, there must be a method to prove that the employer seeking to have a clearance order filed is not, in-fact, the employer appearing on these lists. The H-2A program is already a lengthy process for employers in planning for their season and even a few days delay can mean peril for a crop.

Proposed Changes to the Discontinuation of Services Process

The Department in the NPRM is proposing to provide additional clarity and instruction to SWAs on when and how to discontinue services to an employer, citing the lack of discontinuation of services from Program Year ("PY") 2012 to PY 2019 and the "glaring disparity between the number of violations found by WHD and the actual discontinuation of services by the SWA during the same time period . . . ."[5] The Department even cites the fact that in order for an employer to participate in the H-2A program they "must first file a clearance order trough the ES . . . ."[6] Allowing a SWA to effectively debar an employer when WHD notifies it of a violation makes sense when WHD also seeks to debar an employer, however if

[5] 88 Fed. Reg. 63761.
[6] *Id.*

WHD, in their investigation, have decided that debarment is not necessary, the SWA should not effectively debar an employer by discontinuing services. The principle of double jeopardy should apply. The Federal government conducted an investigation and issued a sentence that the employer ostensibly paid, now the State government is going to try the case and hand down their own death sentence. How is that fair or equitable?

Further, instructing a SWA to initiate a discontinuation of services in § 658.501(a)(1) because an employer refuses to "correct" terms and conditions the SWA believes to be contrary to employment-related laws is of great concern.[7] As the Department describes on the previous page in the NPRM that "the Department identified that SWAs have made errors regarding citing applicable bases to discontinue services under § 658.501(a), describing necessary facts to justify the discontinuation, and notifying employers of their right to a hearing."[8] Unfortunately, many employers face issues where a SWA asserts that an employment related law means one thing, when it in fact means something different. In fact, the Department's regulations surrounding the H-2A program contemplate these disputes and allow employers to file directly with the Department when the disputes cannot be resolved.[9] How is the Department going to handle a SWA who attempts to discontinue services when an employer follows the regulations and files an emergency application directly with the Department? The Department is now instructing SWAs that when an employer refuses to "correct" a clearance order, they ***must*** initiate discontinuation of services. Will every time an employer files an emergency application under the regulations because of a dispute with the SWA result in an initiation of a discontinuation of services?

If every time a SWA and employer disagree on employment related laws and the employer, under the H-2A regulations, files an emergency application with the Department and the SWA initiates a discontinuation of services, that yet again leads to another ground that the Department is instructing the SWA to discontinue services under § 658.501(a)(8). The instruction by the Department that the SWA must initiate a discontinuation of service for all of these provisions is going to dramatically increase the cost of participation in the H-2A program, as everyone involved is now going to have to administratively litigate with the SWA to ensure that they are not wrongfully discontinuing services to employers, agents, attorneys, agricultural associations, joint employers, farm labor contractors, and wrongfully declared successors in interest.

Since employers, agents, attorneys, agricultural associations, joint employers, farm labor contractors, and wrongfully declared successors in interest are going to be receiving many more notices of intent to discontinue services, it is prudent that the Department is providing instruction to the SWAs of what must be in these notices. However, the removal of the ability to request a pre-discontinuation hearing is concerning. The ability to present facts and information to refute the "evidence" the SWA is relying on to an impartial hearing officer is integral to an efficient ES system. In fact, removing the pre-discontinuation hearing is likely to draw out the process for discontinuation of services for many more months as each successive stage allows the SWA and the employer 20 working days to respond. If an employer were immediately able to request a

[7] *Id*. at 63762.
[8] *Id*. at 63761.
[9] 20 C.F.R. § 655.121(e)(3).

hearing the decision from the hearing officer would happen much quicker and would be provided by an impartial trier of the facts. Additionally, the Department should provide more clarity on what repeatedly causes the initiation of discontinuation of services under § 658.501(a)(8) is. Is repeatedly after 2 or 3 initiations? More? It is unclear what the Department intends here and since SWAs have not been utilizing this provision, it is unclear how it will be implemented. Further, as stated before, employers are concerned that simple disagreements on terms and conditions and relevant labor laws are going to lead to more initiations of discontinuation and thus this provision is going to be used more frequently.

The Department also requested input on the redesignation of § 658.501(c) to § 658.501(b) and "whether it would be appropriate to limit the scope of previous labor certifications or potential violations of a labor certification to a particular time period."[10] Given that employers in the H-2A and H-2B program are only required to maintain records under the programs for 3 years, it would be appropriate to limit the scope to the time period that is 3 years from the date of certification. Any longer period would frustrate the purpose of the investigation as employers may not have records. Additionally, WHD limits its H-2 investigations to 3 years as well, ostensibly because of the records requirement, but also because the Fair Labor Standards Act ("FLSA") has an ultimate limit of 3 years for willful violations and 2 years for all other violations.

CHANGES SPECIFIC TO THE DEPARMENT'S H-2A REGULATIONS

The Single Employer Test is Flawed and Not the Long-Standing Approach of the Department

The Department's proposal to define the term "single employer" is not a codification of "its long-standing approach to determining if multiple nominally separate employers are operating as one employer for the purposes of the H-2A program."[11] The Department has attempted to make this their approach but has been rebuffed by the Board of Alien Labor Certification Appeals ("BALCA") on a regular basis as the terms employer and joint employer are defined in the regulations and those tests are used to determine who has an employment relationship, under the common law of agency, with an employee. What the Department is proposing is a meaningful change from the long-standing practice of using the common law of agency to determine when two employers jointly employ an employee.

For determining when two entities are in fact a single entity, the Department should continue to determine who in fact has the employment relationship with the employee. The fact that two entities share office space or even addresses does not make them a single entity for the purposes of the H-2A program or employment law in general. The fact that two entities are both agricultural producers, again, does not make them a single entity for the purposes of the H-2A program or employment law in general. The key factor is who controls the wages and working conditions of the employee, that entity is the employer. The Department's use, and proposed use,

[10] 88 Fed. Reg. 63763.
[11] 88 Fed. Reg. 63768. *See Id.* at 63769 (citing that the Department only started attempting to apply the single employer analysis in 2015.) *See also Id.* at 63774 (citing that starting in January 2018, it was not a long-standing practice to provide a 14-day grace period for paying updated wages published in the Federal Register.).

of the single-employer test is flawed and the Department has not sufficiently explained its reversal of its long-standing use of the common law of agency to determine if two employers are joint employers. The Department's findings that some employers' use of creative corporate structure means that all employers do this is unfounded and should be narrowed to target the abuse the Department has highlighted, not burden the whole industry for a few bad apples.

Offered Wage Rate

The long-standing practice when the Department publishes updated wages in the H-2A program has been to allow a 14-day grace period from publication of those wages in the Federal Register to when the updated wage was due. The Department has cited that this would allow employers, mid-season, to update their payroll systems to allow for the new wages to be paid at the beginning of the next pay period. The proposed change to require employers to update the wage immediately upon publication in the Federal Register is a departure from this long-standing practice, and as such, the Department has failed to explain why it is departing from this position, which the Department has held at least as recently as June 16, 2023.[12]

At a minimum, the Department should commit to a certain date each December and each June that they will publish the new wage rates. This would effectuate the Department's concern about the correct wage being paid when work is performed, because employers could be prepared to check the Federal Register on that date. Or as the Department has committed to in this NPRM, know that is the date they need to set their payroll with the wages the Department would have already released in advance of that date. The Department could also allow employers to make payment within 14-days of publication in the Federal Register of all additional wages due upon publication. For some employers it is not always as simple as just changing a few items in their payroll system and some advanced notice or leeway to make additional wage payments would ease the burden on employers during what is often the height of their busy season.

Requirement to Offer, Advertise, and Pay the Highest Applicable Wage Rate

The Department's current language on offering, advertising, and paying the highest applicable wage is sufficient to evaluate the labor market and apprise workers of the wages they should expect to receive. However, the Department's proposal will make this simple requirement extremely convoluted and will lead to confusion among both employers and potential employees. The confusion that this proposal creates is how to calculate the appropriate wage when multiple piece-rate wages are involved, and hourly wages are involved. Is the Department suggesting if on an 8-hour shift working the highest piece rate task an employee could make more than the Adverse Effect Wage Rate ("AEWR") the employer must always pay that higher rate even if the employee did not perform that higher rate task? From the proposal it is unclear as § 655.122(l)(2) states "the employer must calculate each worker's wages . . . using the highest wage rate for each unit of pay, and pay the worker the highest of these wages for that pay period. The wage actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job offer." The first sentence in conjunction with the second sentence seems to say that if the job offer was for 8 hour days, and the job offer included prevailing piece rates, that if an employee worked in that task for all 8 hours would make more than the AEWR, even on days that the

[12] *See* 88 Fed. Reg. 39482 (June 16, 2023) (making the wage rates published on June 16th effective on July 1.).

employee did not work on piece rate tasks an employer would be required to pay as if the employee had for all hours worked.

If the situation as described above is the Department's intention, it will further incentivize employers to not pay piece rates where they do not have to and only offer the AEWR. Further, in areas where there is a prevailing piece rate that has been certified by the Department, it will drive employers away from planting crops that have a prevailing piece rate, further harming the domestic workforce. Employers need more clarity as to what the Department's intention is surround offering, advertising, and paying the highest wage as this seems to be a change from the Department's previous practice.

Employer Provided Transportation

The Department should not require employers to become a nanny state when it comes to making employees wear seatbelts. Aside from a requirement to ensure they have seatbelts for each employee in a vehicle and instruct employees to wear those seatbelts, an employer has no effective way to ensure every employee continues to wear a seatbelt through the entirety of a trip in a vehicle. Keeping the seatbelt on is the sole discretion of each employee's own free-choice and an employer should not be penalized if an employee, through their own free-choice, decides to take the seatbelt off.

Termination for Cause or Abandonment of Employment

The Department, in the proposed rule, endeavors to require employers, both big and small, to have a Human Resources team the size of a Fortune 500 company. While some corporate farms may be able to easily comply with the progressive discipline system the Department is proposing to require, the reality is that the type of system and the documentation expected to be retained is not feasible in smaller farming operations. It is likely not feasible in bigger farming operations, as corrections and instructions can happen in the field/orchard on the fly. Is instructing someone how to do their job better now a disciplinary action that must be recorded under this proposed progressive disciplinary system? Should that not be considered training instead? Is that instruction now a violation because the employer was not notified in advance of the instruction that the employee was performing the task incorrectly? As will be explained *infra*, will an employer have to wait to make that instruction until an employee authorized representative arrives? What does the employee do until then since the employer is going to want to protect their crop from damage?

Additionally, these regulations will likely chill an employer from terminating an employee, which clearly is the goal of this regulation. However, consider an employee who is suggesting to other employees to abscond, through no fault of the employer, and word gets back to the employer. Should that employer have to follow multiple rounds of this occurring before being able to terminate that employee? Obviously, the Department believes that absconding and leaving a bad work environment is okay, and we would likely agree in seriously egregious situations. But what about an employee pressuring other employees to violate the terms of their visa and leave? Is that not a violation of the law and thus egregious enough to terminate immediately? How offensive does the conduct need to be so that an employer can rightfully

terminate an employee? The Department mentions assault, but is that just physical, or can it be verbal? These types of questions will chill employers' ability to terminate otherwise toxic employees that then open employers up to hostile workplace claims, which then may open employers up to constructive termination as the Department describes.

Disclosure of Employers, Owners, Operators, Managers, and Supervisor Information

Although it is understandable that the Department would want to collect information of owners of the employer to ensure employer is not a restructured company of someone who has been debarred, the vast majority of employers and those who work within the H-2A program are not debarred employers or individuals. In fact, there are only 32 employers and individuals in the entire country that are debarred from the H-2A program, when by rough estimates using 2023 USCIS H-2A Data Hub results there are over 11,000 unique employers in the H-2A program, that means debarred employers make up 0.00029% of the H-2A users.[13]

This information collection is onerous and unnecessary to catch the 32 employers debarred from the H-2A program from reconstituting as another employer. What makes this even more onerous and unnecessary is the proposal that not only does the Department want to collect all owner information, even silent partners and minority shareholders, but the Department is now proposing to obtain the information of all managers and supervisors of any location employees under the job order will work, regardless of if they are employees of the employer filing the job order. This information is unnecessary at the application stage of the H-2A program and is easily and regularly attainable at the enforcement stage of the H-2A program. Further, if an employer refuses to cooperate with a WHD enforcement seeking information, that is a violation of the program that should be cited, but obtaining such an onerous amount of information just to file an application is unnecessary and starkly against the requirements of the Paperwork Reduction Act and the Small Business Regulatory Enforcement Fairness Act.

The Department's analysis under both of those acts of impact and burden is drastically low. This is evidenced by the Department's claim that small businesses will be faced with a mere one-time cost of $54.00 to familiarize themselves with this rulemaking, only $108.00 to complete the new application with all owner, manager, and supervisor information.[14] First, this proposed regulation spans some 83 pages of the Federal Register in tri-column fashion, the final rule is likely to be similar. The Department's assumption that this proposed regulation and whatever form the final regulation takes will consume only an hour to read is greatly underestimated. If the onerous nature of the information collection were not enough, many employers have concerns over Personally Identifiable Information ("PII") being requested from such a large number of individuals. Since the Department posts disclosure data on its website will this information be included? How will this information be protected from unlawful disclosure under the Freedom of Information Act?

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[13] *See* U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Program Debarments, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf (last visited October 31, 2023). *See also* U.S. Citizenship and Immigration Service, H-2A Employer Data Hub, https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub (last visited October 31, 2023).
[14] 88 Fed. Reg. 63816.

THE DEPARTMENT'S ATTEMPT TO CIRCUMVENT NATIONAL LABOR RELATIONS ACT ("NLRA") PREEMPTION

The Department's proposal to provide NLRA-like protections to agricultural employees under the H-2A program is in fact preempted by the NLRA. "It seems clear from the legislative history . . . that Congress meant to exclude agricultural laborers from the provisions of the Act. The Senate Report on the bill which became the original National Labor Relations Act, says that . . . 'the committee deemed it wise not to include under the bill agricultural laborers . . . .'"[15] Congress explicitly meant to exempt agricultural employees from the protections and penalties of the NLRA, the Department here saying that because they are exempt from the protections and penalties of the NLRA means that the Department is free to provide those protections, and conversely not provide those penalties, is inapposite to Congress' legislative intent. At best the Department can say states enact labor protections for agricultural workers therefore Congress has not spoken on this topic. However, that negates the point that Congress spoke as to what the Executive could do when it comes to agricultural workers, and they are exempt from the provisions of the NLRA.

Activities Related to Self-Organization and Concerted Activity

The Department, in proposing § 655.135(h)(2), is both preempted and exceeding its statutory authority under the INA. The Department is preempted as discussed *supra*. Further, as the Department has stated, the INA requires it to protect the working conditions of those U.S. workers similarly employed.[16] However, similarly employed U.S. workers do not have this protection the Department is purporting to bestow upon H-2A workers.[17] The Department is trying to make job contracts under the H-2A program more attractive to U.S. farmworkers, which is not what the INA allows the Secretary to do.[18] Interestingly, proposing to allow concerted activity and secondary boycotts by agricultural workers, the Department cites a case that says agricultural workers are exempt from the provisions of the NLRA that protect employers from concerted activity, but workers who also joined in secondary boycotts that were not agricultural workers committed an unfair labor practice under the NLRA.[19] The Department cannot have their preverbal cake and eat it too, this proposed section as drafted forgets the other requirement of the Secretary under the INA, the availability of a workforce to the U.S. farmer when U.S. workers are not available. This is more than the statutory authority given to the Department and should be removed from any final rule.

WORKER VOICE AND EMPOWERMENT

The Department has not sufficiently explained how being a member of a union provides any additional protection to H-2A workers, except through hyperbole and anecdotal examples of

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[15] *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 646 (1951).
[16] 88 Fed. Reg. 63793.
[17] *See* 29 U.S.C. § 152(3)
[18] *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir. 1976) ("Clearly, his authority to insure against a lowering of wages is hardly synonymous with the affirmative power to *raise wages* which Williams here proposes. Attractiveness is the wrong test for measuring the Secretary's determination.") (internal quotations omitted emphasis in the original).
[19] *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 643 (D.C. Cir. 1951).

the few H-2A employers that commit egregious violations of the program.[20] Further, the Department has failed to explain how there is an adverse effect on U.S. workers, who themselves have no right to organize, that giving the right to organize to H-2A employees will alleviate said adverse effect. Finally, if this proposed regulation does anything it exceeds the authority of the Department under longstanding precedent by trying to make H-2A jobs more attractive to U.S. workers by providing them NLRA type protections they are statutorily exempt from receiving unless they join an H-2A contract.[21]

Employee Contact Information

Employers are very concerned by the proposal that employers be required to provide employee contact information to a non-recognized union or even a union supported by cards signed by less than a majority of the represented unit. The Department's proposal that this list also include each "worker's full name, date of hire, job title, work location address and ZIP code, and (if available to the employer) personal email, personal cellular number and/or profile name for a messaging application, home country address with postal code, and home country telephone number" is excessive over and above the NLRB requirements for voter lists.[22] At least under the NLRB rules a majority of the employee unit signed union cards to seek representation. Under the Department's proposal any group claiming to be a labor organization, which is also broadly defined in the proposal to potentially include labor organizations that would not be eligible labor organizations under the NLRB rules, may request an employer provide such PII. Additionally, the employer may be asked to update the information, likely in the midst of the height of their season. Employers are worried this is a method to harass employers during their busiest times, something that would likely be considered an unfair labor practice under the NLRA, which the Department decided in this proposal to not include.

The Department claims that the need to organize earlier in the process than the normal NLRB process, ostensibly because of the limited duration of H-2A contracts, outweighs the privacy concerns of employees. Has the Department queried H-2A workers if they think this concern outweighs their privacy rights? The Department asks if there should be an opt-out ability for workers to decline their information to be provided, first this provision should be stricken, but if it remains then yes. Workers' private information should not be shared without their permission to anyone not entitled to that information without their consent. The Department next asks if the already expansive definition of labor organization should be further expanded to include key service providers, it should absolutely not. Though worker advocates lovingly claim they are only trying to protect the rights of workers, their other goal has long been to harass employers. This proposal would allow unscrupulous groups to continually ask employers for updated lists. Additionally, this proposal does not limit the number of groups that can ask for the employee list, if this remains a cap should be placed on the time an employer has to provide the list, the arguable update the list later in the season and provide it again to an untold number of organizations.

Right to Designate a Representative

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[20] *See Supra* re discussion on the 32 employers debarred compared to the over 11,000 unique H-2A employers.
[21] *See Williams*, 531 F.2d at 307.
[22] 88 Fed. Reg. 63798.

First and foremost, as proposed, and even as considered expanding, the Department's proposal to allow a non-employee third-party representative to enter employers' private property is a taking under the fifth amendment. As proposed, this NPRM would allow a government-authorized physical invasion of a person or entity's property. Such actions have recently been described as a *per se* taking requiring just compensation.[23] "[T]he right to exclude falls within the category of interests that the Government cannot take without compensation."[24] "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking."[25] It is clear under the *Cedar Point* analysis that as proposed this NPRM would amount to an uncompensated taking when restricting a property owner's right to exclude third-party individuals from their property.

Additionally, agricultural employers in the United States put food on the tables of American families. As such, we a charged with ensuring the food supply is not tainted. Hence, agricultural employers' reluctance on allowing just anybody entering their property. Allowing an individual who is potentially unaware of food safety protocols endangers the food supply chain and endangers the nation's national security. Further agriculture employers are required to follow the Food Safety Modernization Act and regulations implementing the act, which include requirements that visitors must comply with the policies and procedures of the act and regulations.[26] Additionally, many agricultural employers are required to participate in the Global Food Safety Initiative to sell their agricultural products to major companies such as Walmart, Costco, and others. These generally accepted practices require employers to restrict access to only authorized personnel who are trained in practices of ensuring food safety. So, this provision could cause many employers to fall out of compliance by allowing unauthorized non-employee third-parties access to an employer's private property.

Further, as proposed and mentioned *supra*, the Department wants an employer not to provide instruction to a worker while they are in the field, until an unauthorized third-party representative arrives at the field so they can attend the meeting. As proposed, this is completely unworkable for agricultural employers, and likely is one of the reasons that Congress made the determination that agricultural employees be exempt from the NLRA. Food safety cannot be maintained when unauthorized third parties are trapsing through fields of agricultural product, employers cannot be expected to pull an employee from the fields till an unauthorized third-party arrives for the simple instructional meeting. This interruption to the workday is why the NLRA allows representatives at "investigative interviews" but not at other disciplinary correction actions such as training corrections. As with many other sections of this proposed rule, the Department has exceeded the authority the Department has under the INA and trudges on other laws that agricultural employers must follow.

Prohibition on Coercive Speech

[23] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021)
[24] *Id*. (cleaned up and internal quotations omitted).
[25] *Id*. at 2075.
[26] 21 C.F.R. § 112.33(a).

Employers have long recognized that H-2A employees have free choice for many things, including the right to not listen to an employer's opinion on the merits or lack thereof of unionization. It is interesting that the Department recognizes that H-2A employee have free choice as well.[27] Since the Department has proposed on multiple occasions throughout the NPRM to not allow H-2A employees to have free-choice, such as making the free-choice to refuse meals on a given day and not have a deduction taken from their check, making the free-choice to not want to wear a seatbelt, and making the free-choice not to have their PII shared with representatives of labor organizations. The Department should return to the other sections of this NPRM when looking to go final and ask a simple question. Are we, The Department, taking away an H-2A employee's free choice?

Access to Work Housing

The Departments proposal to require access to H-2A worker housing by invited guests of the H-2A workers while allowing reasonable restrictions to protect the health and safety of other workers in shared housing is reasonable. The Department should provide additional examples of what they deem reasonable, as it makes it difficult for employers to meaningfully comment on this provision with the limited discussion in the NPRM. However, what is not reasonable is yet again the Department effectuating another taking under the fifth amendment.[28] § 655.135(n)(2) goes a step too far and the Court in *Cedar Point* articulated that very clearly. Under § 655.135(n)(1) an H-2A worker could invite a union representative to the employer's property, and as an invited guest made by the free-choice of the H-2A worker it would not be a taking under the fifth amendment. But allowing 10 hours a month for a labor organization representative to just waltz through an employer's property, at the labor organization's discretion, is clearly a taking under the fifth amendment.

Even if the provision in § 655.135(n)(2) were implemented and survived litigation, which it will not under *Cedar Point*, how will the Department implement and police the 10-hour provision? Further, to the Departments question of should this be expanded to other key service providers, the answer is again that would be a taking under the fifth amendment and it should not be expanded or even kept in a final rule.

INTEGRETY MEASURES

The Department is proposing to shorten the period for an employer to submit rebuttal evidence or appeal a Notice of Intent to Debar from 30 calendar days to just 14 calendar days. In order to ensure employers have the time to secure counsel and gather any rebuttal evidence the Department should not move forward with this proposal. First, the Department is proposing to cut in half the time to gather all evidence an employer would need to submit rebuttal evidence. Second, this extremely shortened timeframe impinges on an employer's ability to obtain counsel if they do not already have counsel representing them. Although filing for a notice of hearing is a relatively simple process, employers still need time to find counsel. As a secondary proposal, the Department could implement a staggered approach, allowing employers a period to notify the Department of their intention to seek a hearing or their intention to file rebuttal evidence. For

[27] 88 Fed. Reg. 63798.
[28] *See supra.*

instance, employers within 14 days could request a hearing or within 14 days notify the Department they are going to file rebuttal evidence. At that point, employers would then have 30 days from the initial notice to file such rebuttal evidence. Employers should still be able to request a hearing after the final determination by the Administrator and that could be required within 14 days. This would be a reasonable compromise to allow employers sufficient time to obtain counsel and to compile such evidence that needs to be submitted or request a hearing.

CONCLUSION

We thank you for the opportunity to comment on this proposed regulation. While we disagree with the Department on the majority of the substance of this proposed regulation, it is important for the purposes of the Administrative Procedure Act protections afforded the regulated community that this opportunity to comment was presented and we hope the Department takes meaningful and due consideration of these comments.

Sincerely,

Charles F. Conner
President & CEO