



**UFW
FOUNDATION**

**Statement of Teresa Romero, President, UFW
House Education and Labor Subcommittee on Workforce Protections
Second Class Workers: Assessing H2 Visa Programs Impact on Workers
July 20, 2022**

Chairwoman Adams, Ranking Member Keller, Chairman Scott, Ranking Member Foxx and distinguished members of the Subcommittee, thank you for the opportunity to testify today.

My name is Teresa Romero and I am the president of the United Farm Workers (UFW). Today I am testifying on behalf of the UFW and the UFW Foundation. The UFW is the nation's first successful and largest farm workers union. Our mission is to help protect the rights and interests of farm workers by creating a safe and just food supply. The United Farm Workers Foundation (UFW Foundation), a sister organization of the UFW, is a dynamic nonprofit organization established in 2006 whose core purpose is to empower communities to ensure human dignity. With offices and staff across Arizona, California, Georgia, Oregon, Washington, and Michigan, the UFW Foundation operates in some of the nation's leading agricultural areas, serving over 100,000 farm workers annually, providing critical services and engaging its members and constituents in systemic change to break the cycle of poverty.

We welcome this hearing on the H-2 visa programs. We are deeply troubled by the many abuses of both H-2A and domestic workers associated with the H-2A program and believe this hearing provides an important opportunity to expose the inherently flawed nature of this program. With a better understanding of the highly problematic H-2A program, we hope that Congress and the Administration will move forward to implement fundamental, needed protections for the H-2A program and impacted workers.

The challenges of the H-2A program cannot be understood in isolation, but instead must be considered in the context of our broken immigration system, long-standing discriminatory labor law exclusions, and widespread violations of farmworkers' limited rights. The H-2A program is one piece of this broken system. I will begin my testimony with an overview of the farm labor system to help provide the needed background to discuss the H-2A program and policy solutions.

I. The Farm Labor System

a. Farm worker demographics

Farm workers are essential to our nation's food security. Every day, farm workers care for livestock, including dairy cows for our milk and other animals for our meat. Farm workers also plant, tend and harvest the fruits and vegetables that we all rely on for our daily meals. Without farm workers, our nation's food system and food security would be devastated.

The agricultural industry and our nation count on approximately 2.4 million farm workers to perform the challenging and skilled work that ensures we have adequate food on our tables.¹ More than half of the farm workforce lacks immigration status or citizenship, and therefore experience limited labor and political rights.² According to Department of Labor (DOL) estimates, the domestic farm worker population includes roughly 56% work authorized individuals, including 36% U.S. citizens and 19% legal permanent residents, along with roughly 44% undocumented workers.³ The vast majority of farm workers are Latino, with about 2/3 of farm workers born in Mexico.⁴ Even though many farm workers are undocumented or born abroad, they have extensive time living and working in the U.S., with DOL data showing that approximately 85% of foreign-born farm workers have lived in the U.S. for at least 10 years; 71% first came to the U.S. at least 15 years prior to their NAWS interview, and the average foreign-born farm worker first came to the U.S. 21 years before their NAWS interview.⁵ H-2A workers are not included in the NAWS survey, but are estimated to make up roughly 10% of the total farm labor population.⁶

Our nation's farm workers face many challenges in their living conditions. Even while farm workers are performing our nation's essential work, far too many farm workers and their families live near or below the federal poverty level. According to the Department of Labor's most recent data, 20% of farm worker families earn below the poverty level.⁷ This is nearly two times the poverty rate of the general U.S. population.⁸ For individual farm workers interviewed in

¹ See Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), available at <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>.

² Id.

³ U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS 2019-2020)*; published January 2022, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf>. Note that the NAWS survey does not include H-2A workers.

⁴ Id. at 4.

⁵ Id. at 5.

⁶ See Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), available at <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>. See also U.S. Department of State, Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY 2020 NIV Detail Table, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY20NIVDetailTable.xlsx>

⁷ U.S. Department of Labor, *NAWS 2019-2020*, p. 42-43.

⁸ Andrew DePietro, "U.S. Poverty Rate by State in 2021," *Forbes*, Nov. 4, 2021, available at <https://www.forbes.com/sites/andrewdepietro/2021/11/04/us-poverty-rate-by-state-in-2021/?sh=f773a9b1b38f>

2019 and 2020, the mean and median personal incomes for the previous year were in the range of \$20,000 to \$24,999 and the mean and median total family incomes in the previous year were in the range of \$25,000 to \$29,999.⁹ Given these income levels, farm workers often struggle to feed their own families even as they labor to ensure that other families have food on their tables. Farm worker poverty also means that many farm workers live in substandard housing with crowded conditions. Many farm workers have experienced even greater economic insecurity in the face of the COVID pandemic.

b. Labor Conditions: Lack of legal status and a shameful history of excluding the agricultural industry from basic labor laws make farm workers vulnerable to a range of abuses.

1. Racist exclusions of farm workers from basic labor protections

The history of agriculture in the United States is a history of racism.¹⁰ During the “New Deal” period of labor reforms in the 1930s, President Roosevelt and his allies entered into a “grand compromise” with southern congressmen to obtain their support for legislation. This grand compromise included exclusions of farm and domestic work from the protections being afforded to other workers and was widely understood to be a mechanism for excluding Black workers from the laws’ protections, thereby preserving the southern plantation style economic system.¹¹ Members of Congress at the time were explicit that they did not believe Black people deserved the same protections as white people. The exclusion of farm workers from basic workplace protections persists, with farm workers still excluded from FLSA’s overtime protections, many child labor protections, the National Labor Relations Act, many OSHA standards and more. These exclusions have contributed to the poor working conditions facing many farm workers and deprived workers of key tools to help prevent, detect and resolve violations. For example, freedom of association and collective bargaining rights would help provide farm workers, including H-2A workers and U.S. workers in corresponding employment, the ability to communicate about their concerns, demand better conditions, and assert their rights without fear of retaliation.

2. Immigration Status and Widespread Labor Violations

Our nation’s racism and history of discrimination against farm workers has contributed to agricultural work being perceived of as undesirable work by many. As a result, many of the country’s most vulnerable individuals work as farm workers, including a predominantly

⁹ U.S. Department of Labor, *NAWS 2019-2020*, p. 41.

¹⁰ Testimony of Teresa Romero, “From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act” presented before the House Education and Labor’s Workforce Protections Committee on May 3, 2021. This paragraph includes excerpts from my testimony.

¹¹ Lindner, Marc, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *Texas Law Review* 1335 (1987) at 1336. See also Perea, J. F., *Echoes of slavery: Recognizing the racist origins of the agricultural and domestic worker exclusion from the National Labor Relations Act*. *Ohio State Law Journal*, 72(1), 95-138 (2010). See also the testimony I presented at your subcommittee’s hearing titled “From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act” on May 3, 2021.

immigrant workforce, as described above. The lack of immigration status and citizenship means farm workers are often too fearful of retaliation and immigration enforcement to draw attention to themselves by complaining about workplace violations or seeking improved conditions. Lawfully present U.S. farm workers recognize that they can easily be fired and replaced by more exploitable workers if they speak up for their rights. In this way, our nation's racist exclusion of farm workers from key labor protections has perpetuated the vulnerability of agricultural workers, including by depriving them of the political power needed to improve their circumstances.

The vulnerability of farm workers has contributed to pervasive and widespread violations of the limited labor protections available to most farm workers. A 2020 EPI analysis of recent data from the Department of Labor's Wage and Hour Division revealed that the division found employment law violations on approximately 70% of the farms that it investigated.¹² Yet Wage and Hour Division resources and investigations are extremely limited, likely revealing only a small percentage of the wrongdoing that occurs. According to the EPI report, the chance that a farm will be investigated is only about 1.1% per year, and the data reviewed in the report did not include all possible workplace violations, such as those identified by the EEOC or state and local labor agencies.¹³

Farm workers risk their own health and safety to ensure our nation's food supply and security. Every day, farm workers face extreme weather and other dangerous conditions. Agricultural workers face poisoning by pesticides, as well as serious injuries and even death on the job. The fatality injury rate for the agricultural sector is the highest rate for all sectors at 25.3 per 100,000.¹⁴ Farm work requires long days of difficult, repetitive tasks, often in uncomfortable positions, resulting in musculoskeletal injuries. And there are numerous other dangerous conditions, such as working with heavy machinery and at heights, among many other daily challenges.

Women farm workers face unique challenges impacting their health and safety, such as significant risks related to sexual harassment and assault, which are all too common in agriculture.¹⁵ Other workplace violations, such as lack of access to toilets, also present unique difficulties for farmworker women.

The dairy industry is an industry that offers year-round employment and could be an attractive job for workers if the wages and working conditions were improved. Unfortunately, many dairy

¹²See Daniel Costa, Phil Martin, and Zachariah Rutledge, "Federal labor standards enforcement in agriculture," Economic Policy Institute (2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>

¹³ Id.

¹⁴ Bureau of Labor Statistics, U.S. Dep't of Labor, Number and Rate of Fatal Work Injuries, by Industry, 2020, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>.

¹⁵ Ariel Ramchandani, "There's a Sexual-Harassment Epidemic on America's Farms," The Atlantic, January 29, 2018, available at <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>

jobs involve dangerous conditions, long hours, and low pay.¹⁶ The dangerous conditions have led to multiple deaths in the last years, including several as a result of drowning in manure pits.¹⁷

Farm work also involves exposure to extreme weather, the dangers of which have been exacerbated by climate change. Farm worker communities are tragically familiar with the impacts of climate change and the dangerous heat they often face in the workplace. Agriculture had the highest average rate of heat-related deaths of all industry sectors, with 35 times the risk of heat related death compared to other industry sectors.¹⁸ In recent years, multiple H-2A farm workers have died of heat-related causes. Farm workers also have faced the dangers of wildfires: while most people flee wildfires, farm workers must often continue to show up to work, working under dangerous fire and smoke conditions to perform essential work.¹⁹

Agricultural workplaces became even more hazardous during the COVID pandemic. Farm workers were determined to be essential workers, and they continued to work even as many other workers sheltered at home. Farm workers paid the price, with high rates of COVID illness, a major concern since most farm workers—52%—lack access to health insurance.

II. The H-2A Program

The current H-2A program was created in the 1986 IRCA legislation, at which time the H program was divided into the temporary, seasonal agricultural H-2A visa program and the temporary, seasonal nonagricultural H-2B visa program. The current DOL regulations largely reflect the protections put into place during the Reagan administration, many of which were based on lessons learned from the infamous Bracero program, which Congress ended in 1964, in part due to concerns about its impact on farm workers.²⁰ Unfortunately, the H-2A regulations are woefully inadequate to protect both H-2A workers and domestic workers.

¹⁶ See, e.g., Olivia Heffernan and Maggie Gray, “Death of a Dairy Farm Worker Exposes Dangerous Conditions and Labor abuse,” Documented, June 1, 2022, available at <https://documentedny.com/2022/06/01/farm-workers-rights-abuse-labor-undocumented/> (“She [deceased worker’s wife] said he had been working 11-to-12-hour days, seven days a week, receiving a weekly wage of \$620 — roughly \$7.70 an hour — and a pizza. New York’s upstate minimum wage was \$12.50 an hour in 2021 and is \$13.20 an hour in 2022. For the 15 months he worked, we estimate Joj was underpaid by about \$28,500.”).

¹⁷ See e.g., Tim Craig, “Deaths of farmworkers in cow manure ponds put oversight of dairy farms into questions,” Washington Post, September 24, 2017, available at https://www.washingtonpost.com/national/deaths-of-farmworkers-in-cow-manure-ponds-put-oversight-of-dairy-farms-into-question/2017/09/24/da4f1bae-8813-11e7-961d-2f373b3977ee_story.html?utm_term=.9c057ce5f408; U.S. Department of Labor OSHA News Release—Region 8, “US Department of Labor cites Colorado dairy farm operator for violations after vacuum truck driver suffers fatal injuries in unguarded manure pit,” September 29, 2021, available at <https://www.osha.gov/news/newsreleases/region8/09292021>

¹⁸ See Gubernot, D. M., Anderson, G. B., & Hunting, K. L. (2015). Characterizing occupational heat-related mortality in the United States, 2000-2010: an analysis using the Census of Fatal Occupational Injuries database. *American journal of industrial medicine*, 58(2), 203–211. <https://doi.org/10.1002/ajim.22381>

¹⁹ Teresa Cotsirilos, “The Farmworkers in California’s Fire Zones,” Food and Environment Reporting Network, Nov. 23, 2021, available at <https://thefern.org/2021/11/the-farmworkers-in-californias-fire-zones/>

²⁰ See e.g., Phil Martin, “Mexican Braceros and U.S. Farmworkers,” Wilson Center, July 10, 2020, available at <https://www.wilsoncenter.org/article/mexican-braceros-and-us-farm-workers>. Note that there have been H-2A rule changes under the Bush administration, which gutted H-2A protections to the detriment of both domestic and H-2A farmworkers, resulting in the loss of approximately \$121.2 million in wages for all H-2A workers in a 12-month period. The Trump administration also sought to make harmful changes to the H-2A program by eliminating worker protections, streamlining the application process to the detriment of workers, and lowering wages. The UFW and

An ever-growing segment of the agricultural workforce is present in the country on precarious H-2A temporary work visas. Despite agricultural employer complaints about how difficult the program is to use, the program has grown almost 4-fold since FY 2011, with over 317,000 positions certified by the DOL in FY 2021 as compared to 77, 246 positions in FY 2011.²¹ From FY 2020 to FY 2021, the number of applications received grew by 17%, with similar growth for the first two quarters of FY 22.²² Indeed, many employers have successfully grown their businesses using the H-2A program. A manager for one labor placement firm shared that “virtually all growers who get a year under their belt tell me they wish they had started using the program 10 years ago. H-2A visas topped to 200,000 in 2017. That is double the number of visas in 2013, which tells you something about the growing popularity of the program.”²³ And the H-2A program has no cap—there is no limit to the number of workers that an employer can petition for. In fact, approximately 96% of positions requested were approved by DOL in FY21. The rapid growth of the H-2A program is alarming given the serious abuses of both domestic and H-2A workers in the program.

As the Operation Blooming Onion investigation and indictment have shown, the H-2A program presents tremendous dangers for farm workers. The allegations in the Blooming Onion case are devastating and include criminal charges for multiple deaths, rape, and forced labor. The Blooming Onion case demonstrates not just the inherent flaws of the H-2A program, but also the government’s inability to effectively enforce the modest H-2A protections that do exist. It is deeply troubling that no government agency appears to know how many potential victims there may be as a result of the Defendants’ actions. The Blooming Onion indictment makes reference to at least 100 victims, but it appears that the Defendants petitioned for over 70,000 workers over multiple years. This case reveals how little is known about the well-being of the hundreds of thousands of H-2A workers that come to the U.S. each year, trusting our government to protect their rights. Unfortunately, the violations exposed in Operation Blooming Onion are not isolated instances. We and other advocates have seen countless other violations of workers’ rights resulting from the vulnerability of the workforce and the lack of accountability in the H-2A program. A federally administered program with multiple deaths, rapes, trafficking, criminal indictments and rampant workplace abuses must not be allowed to continue as is. Congress and the Administration have an obligation to make meaningful reforms.

A. Program flaws

UFW Foundation successfully sued the DOL to enjoin and vacate the Trump wage rule. The remainder of the Trump rule is still pending with the DOL. For an overview of H-2A regulations, see the Farmworker Justice report, *No Way to Treat a Guest*,” available at

²¹ H-2A Temporary Agricultural Program - Selected Statistics, Fiscal Year (FY) 2021 EOY, Office of Foreign Labor Certification, Employment and Training Administration, U.S. DOL, available at <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

²² Id., H-2A Temporary Agricultural Program - Selected Statistics, Fiscal Year (FY) 2022 Q1-Q2, Office of Foreign Labor Certification, Employment and Training Administration, U.S. DOL, available at <https://www.dol.gov/agencies/eta/foreign-labor/performance>

²³ Frank Giles, “More Farms Growing with H-2A Help,” *Growing Produce*, March 18, 2019, available at <https://www.growingproduce.com/fruits/more-farms-growing-with-h-2a-help/>

The H-2A program is fundamentally flawed due to the dependence of H-2A workers on their employers for their visa status and work. The H-2A visa places a worker's legal status entirely in the hands of their employer. The unequal power and control in the H-2A employer/employee relationship not only harms H-2A workers, but also leads employers to discriminate against U.S. workers, creating downward pressure on their wages and working conditions.

Abuse and vulnerability of H-2A workers begins in their countries of origin. Many H-2A workers come from countries with emerging economies where employment opportunities are scarce and available jobs pay significantly less than jobs in the U.S. Because there are a greater number of potential workers than there are job opportunities and because recruiters control access to these limited job opportunities, the recruitment process is rife with abuse. Reports and worker stories have long exposed the many abuses that take place during international recruitment, including fraud, illegal recruitment fees, discrimination and other abuses.²⁴ Recruitment fees are all too common, with one report finding that 58% of workers interviewed reported paying recruitment fees.²⁵ H-2A workers who arrive indebted from recruitment fees, travel costs and other expenses are reluctant to enforce their workplace rights as they are desperate for work to repay their debt, and also understand that they or their families may face other repercussions if they do not successfully complete their contract.

Existing DOL and DHS regulations do not protect workers from recruitment abuses, and have even had the opposite effect. The existing rules disincentivize workers from reporting illegal recruitment fees, as they fear, often rightly so, that they may lose their visa and opportunity to work in the United States. And for workers who are in the U.S., the DHS regulation requiring employers to report workers as having absconded is regularly used by employers who threaten to report workers to immigration in order to keep workers compliant and submissive.

H-2A workers' dependency on their employers and desperation to keep their jobs makes H-2A workers vulnerable to labor violations, all too frequently rising to the level of human trafficking and slavery.²⁶ Polaris's recent reports reveal alarming statistics about trafficking in the H-2A program, with multiple reports noting that the visa category with the most reported trafficking

²⁴ See, e.g., Polaris, "Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic," June 23, 2021, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F06%2FPolaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf&clen=10855098&chunk=true; Centro de los Derechos del Migrante, "Ripe for reform: Abuse of Agricultural Workers in the H-2A Visa Program," 2020, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2020%2F04%2FRipe-for-Reform.pdf&chunk=true>

²⁵ Centro de los Derechos del Migrante, Inc. Recruitment revealed: Fundamental flaws in the H-2 temporary worker program and recommendations for change, available at http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

²⁶ Maria Pérez, Drew Favakeh and Abraham Kenmore, "'Beyond troubling': Current, former government officials tied to human trafficking probe in Georgia," Maria Pérez, Drew Favakeh and Abraham Kenmore, USA Today, April 19, 2022; Polaris, "Labor Trafficking and H-2A Visas: Employer Essentials," 2021, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F10%2FEssential-Guide-for-H2A-Visa-Sponsors.pdf&clen=3860495&chunk=true> (last visited 3/31/22)

cases workers is the H-2A program.²⁷ Operation Blooming Onion is one stark example of such trafficking cases.

There is widespread evidence of other violations as well. Centro de los Derechos del Migrante, a binational nonprofit that advocates on behalf of migrant workers, surveyed returned H-2A workers in Mexico and found that all of the 100 H-2A workers interviewed reported at least one serious violation of their worker rights, with 94% reporting three or more violations.²⁸

Compounding these labor violations is the fact that growers are increasingly relying on farm labor contractors (FLCs) to recruit, hire, supervise, transport and/or house H-2A workers. Much of the H-2A program's recent growth has been driven by the increased use of the H-2A program by H-2A Labor Contractors. According to research by USDA, the share of H-2A employers who were farm labor contractors (FLCs) increased tremendously from 2010-2019—from 15 to 42 percent.²⁹ As a result of this rapid growth, in some industries FLCs overtook individual employers in terms of the number of labor certifications approved by DOL.³⁰

The rapid growth of farm labor contractors in the H-2A program is very troubling. Labor contractors are often small, poorly capitalized, small entities or individuals that have little bargaining power with the growers to whom they provide labor, often bidding down their fees for job opportunities.³¹ If workers seek relief for any workplace violations, the farm labor contractor is often unable to afford the required remedies given their thin margins. Many of the growers that hire FLCs deny responsibility for farm workers working on their farms, and they often use the FLCs as a shield to accountability for any potential immigration or labor violations. A recent study by the Economic Policy Institute includes data supporting the high incidence of abuses associated with farm labor contractors. The 2020 study found that while labor contractors constituted only 14% of agricultural employment, they represented 24% of all wage violations investigated by the Wage and Hour Division in the agricultural sector.³² In California and Florida, FLCs accounted for about half of all labor violations detected in those states.³³

While DOL has included some additional requirements for farm labor contractors in the H-2A program (referred to as H-2ALCs), the requirements are inadequate to protect farm workers, both domestic and H-2A.

²⁷ Polaris, "Labor Trafficking on Specific Temporary Work Visas Report," July 2022, available at <https://polarisproject.org/labor-trafficking-on-specific-temporary-work-visas-report/>; see also Polaris, "Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017," June 2018, p. 20, available at <https://polarisproject.org/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/>.

²⁸ Centro de los Derechos del Migrante, *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program* (2020), <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>.

²⁹ Castillo, Marcelo, Skyler Simnitt, Gregory Astill, and Travis Minor. August 2021. "Examining the Growth in Seasonal Agricultural H-2A Labor," EIB-226, U.S. Department of Agriculture, Economic Research Service. p. 2.

³⁰ Id at pp 10-11.

³¹ See Maria Perez, What led to a migrant worker's death from heatstroke?, USA TODAY (Dec. 17, 2021), <https://www.usatoday.com/in-depth/news/investigations/2021/12/17/migrant-guest-workers-risks-farm-labor-contractors/8808652002>.

³² Daniel Costa et al., Federal labor standards enforcement in agriculture, ECONOMIC POLICY INSTITUTE (Dec. 15, 2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>.

³³ Id.

The recent Blooming Onion H-2A investigation and criminal indictment in Georgia highlights the challenges associated with farm labor contractors. Of the 24 defendants, only two of those Defendants were fixed-site business owners; the rest were farm labor contractors or recruiters.³⁴ The growers who benefitted from the labor of these trafficked workers have not been held responsible for their treatment.

Workplace violations also undermine worker safety and health by forcing workers to live in unsafe housing, eat substandard food, and work in dangerous conditions. For workers who are already working to the limits of their endurance, a heat wave can result in illness or even death. This danger is exacerbated when workers lack access to rest and shade, and even water is limited. Sadly, multiple H-2A workers, including at least 3 in Georgia over the last few years, have died of heat stress. Miguel Angel Guzman Chavez was one such worker. Miguel was a 24 year-old farm worker who came to the U.S. under the H-2A guestworker program. He died from heat on June 21, 2018, five days after he arrived in the U.S. from Mexico. Our staff on the ground in Georgia and other states share that multiple H-2A workers have complained to them about the lack of access to drinking water in the fields and heat illness.

Along with frequent violations of their rights, the vulnerable H-2A workforce typically faces increased demands regarding hours, work pace, and productivity. This in turn harms the working conditions of U.S. workers who work alongside H-2A workers or are competing for jobs. And because the H-2A program often becomes the predominant source of labor in many crops or geographic localities, the wages and working conditions of H-2A workers can impact the broader industry, not just H-2A workplaces.

The fact that H-2A workers are captive workers also results in discrimination against domestic workers. Witness Mr. Ty Pinkins with the Mississippi Center for Justice will speak to the experience of African American workers in Mississippi who faced outrageous and sickening acts of discrimination. While the experience facing Mr. Pinkins' clients may not be the same as discrimination facing other domestic workers, the fact is that discrimination is rampant in the H-2A program. Discrimination begins during the recruitment of H-2A workers. H-2A employers engage in blatant gender, age, and national origin discrimination—typically hand-picking their ideal worker demographic—as demonstrated by the fact that H-2A workers are predominantly young, Latino men.³⁵ In fact, some advertisements for H-2A workers blatantly discriminate against women and older workers with specific requests for men between certain age ranges.³⁶ As a result, U.S. workers that don't meet employers' desired characteristics—older workers, women, parents, and workers from different races and nationalities—face discrimination.³⁷

³⁴ Indictment, U.S. v Patricio et al., CR 521-0009, S.D. Ga, 2021; see also “In ‘modern-day slavery’ bust, arrests largely spared farmers. Here’s why.” Lautaro Grinspan, Atlanta Journal and Constitution, 12/20/21.

³⁵ See Migrant Women’s USMCA Complaint, filed 3/23/2021 and amended versions, available at <https://cdmigrante.org/migrant-worker-women-usmca/> and chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2021%2F03%2FUSMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf&chunk=true

³⁶ Id. at Appendix G.

³⁷ Jordan, Miriam, “Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More,” New York Times, Nov. 12, 2021.

There are additional reasons for employer preferences for H-2A workers, including that they are not currently covered by the main law that protects agricultural workers, the Migrant and Seasonal Agricultural Worker Protection Act, which allows farm workers to sue in federal court to enforce their housing, transportation and working arrangements.³⁸ Also, H-2A employers do not need to pay the Federal Unemployment Insurance or Social Security taxes on H-2A worker wages, resulting in savings of about 8%.³⁹

III. Solutions

A. Legislation

There are several pieces of legislation pending in Congress that will go a long way towards addressing our broken farm labor system and the inequity that has persisted for too long.

First, Congress must pass the Farm Workforce Modernization Act (“FWMA”), H.R.1603. The FWMA is a bipartisan compromise that will help stabilize our agricultural labor system and address some of the H-2A program’s flaws. FWMA passed the House in both the 116th and the 117th Congress, and with overwhelming support, including 30 Republicans. FWMA includes important new protections for the H-2A program, including recruitment protections that will create greater transparency and accountability; coverage of H-2A workers by the Migrant and Seasonal Agricultural Worker Protection Act; and, for the first time, a path to lawful permanent residency and green cards for H-2A workers that recognizes the valuable contributions of H-2A workers. Despite the concessions we made to reach this agreement, we believe the FWMA will improve the lives of farm workers and address significant flaws in the H-2A program, including worker abuses and displacement of domestic workers.

I also want to note our strong opposition to the year round H-2A rider that was recently included in the House DHS FY 23 appropriations bill. This rider would fundamentally change the H-2A program to allow unlimited access to year round employment in the H-2A program. Not only does this amendment expand the exploitative H-2A program without fixing any of the problems we have discussed and without providing the current workforce an opportunity to earn legal immigration status, it also harms bipartisan efforts to pass the FWMA. While the FWMA does include limited year-round visas, this provision was only accepted as part of a compromise that included legalization and new H-2A protections, as well as caps and additional protections for the year-round visas.

We also call on Congress to begin to address the structural racism and inequity facing farm workers. Congress must pass the Fairness for Farm Workers Act. The Fairness for Farm Workers Act would end the discriminatory treatment of agricultural workers regarding overtime

³⁸ 29 U.S.C. 1801 et seq.

³⁹ See Calvin, Linda, Philip Martin, and Skyler Simnitt July 2022. Adjusting to Higher Labor Costs in Selected U.S. Fresh Fruit and Vegetable Industries, EIB-235, U.S. Department of Agriculture, Economic Research Service, p. 21, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ers.usda.gov/webdocs/publications/104218/eib-235.pdf?v=1595.3>

pay and minimum wage in the Fair Labor Standards Act. The legislation would phase in overtime pay over a period of 4 years and would give smaller employers additional time to adjust to these changes. California, Washington and other states have already taken action to ensure that farm workers are provided the same right to overtime pay as other workers, and Congress must ensure farm workers and employers across the country are on the same playing field as other workers and employers.

Congress must also pass legislation addressing the hazardous nature of agricultural work. As discussed earlier, there is no federal heat standard that ensures the safety and health of workers who are exposed to dangerous heat conditions in the workplace. California, Oregon, Minnesota, and Washington, as well as the U.S. military, have already adopted their own heat stress standards successfully. Although the DOL has announced work to begin creating an OSHA heat standard, the process is lengthy, and farm workers need protection from the heat urgently. Congress must pass the Asunción Valdivia Heat Illness and Fatality Prevention Act, which would protect all U.S. farm and indoor and outdoor workers from death and illness caused by extreme heat. Farm workers—deemed essential by the federal government during the global pandemic—deserve protections from heat-related death and illness. We also urge support for legislation and regulations that seek to protect farm workers, their families and their communities from the harmful effects of pesticides, such as the Protect America's Children from Toxic Pesticides Act, S. 3283.

1. Administrative regulations, policy and programs

A. Regulations

Given the many abuses in the H-2A program, the Administration must engage in rulemaking to strengthen protections for workers and ensure greater accountability in the H-2A program. International recruitment violations, lack of employer accountability, and captive workers are key problems that the government must address in order to protect both domestic and H-2A farm workers. Congress made clear in the INA that the Department of Labor must ensure that U.S. workers' wages and working conditions are not adversely affected by the hiring of temporary foreign workers.⁴⁰ We recommend the following protections to improve conditions for both domestic and H-2A workers: 1) stronger and more effective recruitment and anti-trafficking protections, 2) joint employer liability of farm labor contractors and the fixed site employers who benefit from the labor of H-2A workers, and 3) freedom of association and collective bargaining agreements at H-2A workplaces. These protections are key to protecting against labor trafficking and to ensuring that workers have the tools to assert their protections, including the ability to raise their voices without fear of retaliation or blacklisting. Without these protections, labor requirements will continue to exist on paper, but be meaningless for many workers.

The pending Trump rule is not an adequate vehicle for DOL to make needed changes. New rulemaking must be undertaken to undertake substantial reform of the H-2A program. We

⁴⁰ 8 USC 1188(a)(1)(B).

appreciate DOL’s tweet recognizing the need for additional rulemaking in the H-2 programs “to promote worker voice and worker protections” and their intent to engage in such rulemaking.⁴¹

B. Policies and Programs

The Administration can also take immediate action to begin addressing H-2A abuses. DOL’s enforcement must prioritize joint employer liability and include coordination with community-based groups, who have trusted relationships with farm workers on the ground. In addition, DOL, DHS and the State Department must work together, coordinating effectively and in real time, to enforce H-2A and other labor protection for H-2A and domestic farm workers. This coordination must include rapid responses for workers who speak up to assert their rights to ensure they do not face retaliation or immigration repercussions. DOL’s recently announced policy⁴² of supporting workers who assert their labor rights by issuing letters of recommendation to DHS for prosecutorial discretion is an important step forward, but must be accompanied by a realistic and efficient DHS process to ensure workers are given prompt access to work authorization and protection from deportation. In circumstances involving potential forced labor or trafficking or other life-threatening situations, DHS and DOL must establish a centralized, coordinated process to ensure a prompt interagency response to provide appropriate and rapid relief to workers and to ensure that employers who violate the law are not permitted to continue using the H-2A program.

USDA has also recently announced a pilot program “to promote a safe, healthy work environment for both U.S. workers and workers hired from Northern Central American countries under the seasonal H-2A visa program.”⁴³ The UFW looks forward to partnering with the USDA and working collaboratively with stakeholders to seek to “improve working conditions for both U.S. and H-2A workers and ensure that H-2A workers are not subjected to unfair recruitment practices.”⁴⁴

We thank you again for this opportunity to share our experiences and recommendations and look forward to working together to address this serious problem.

⁴¹ DOL tweet, June 9, 2022, available at

<https://twitter.com/WHDDOL/status/1534913251502268421?s=20&t=ngpFKeWEVtCBE-C73hN74w>.

⁴²DOL, Office of the Solicitor, News Release, “US Department of Labor Posts Process For Seeking Its Support for Immigration-Related Prosecutorial Discretion during Labor Disputes,” July 6, 2022, available at <https://www.dol.gov/newsroom/releases/sol/sol20220706>.

⁴³ USDA News Release, “U.S. Department of Agriculture to Invest up to \$65 Million in Pilot Program to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers,” June 10, 2022, available at

<https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program>

⁴⁴ Id.