

AG ISSUES UPDATE

Edited by Sara Hricko

October 2023

USApple Updates

Department of Labor Announces New Worker Protections for H-2A Program

The Department of Labor announced plans to issue proposed changes to the H-2A program designed to "strengthen worker protections." The draft posted on the website is quite extensive, 327 pages, but even a cursory examination indicates it is highly problematic, adding even more burdens and potential for legal "gotchas" for employers. The proposal is subject to a public comment period before anything is finalized or goes into effect. USApple will analyze the proposal and will consult with legal counsel to craft comments reflecting the impact of the proposed changes on the apple industry. We will coordinate this effort with others in our coalitions so as to speak with a unified voice. We will also share our concerns with Members of Congress and urge action.

More Regulatory Changes Proposed for the H-2A Program

In the past two-weeks the Department of Labor (DOL) and the Department of Homeland Security (DHS) have issued proposed regulatory changes to the H-2A program. If enacted, both will add to the cost and administrative burdens associated with the program.

USApple is consulting with legal counsel and our coalition partners as we begin the process of developing comments. We will be enlisting the assistance of H-2A users in the industry to ensure those comments accurately reflect the impact these proposals would have. We are also reaching out to key Congressional offices and the House Agriculture Labor work group.

The DOL proposal is particularly problematic and under the guise of worker protections would:

- Mandate the new AEWR take effect immediately instead of the current 14-day window to get payroll updated.
- Require employers to provide at the request of a labor organization the names and contact information of all H-2A workers and workers in corresponding employment.
- Allow a worker who is not part of a collective bargaining agreement to designate a representative to attend any meeting in which the worker believes there could be a disciplinary action.

Please reach out to Diane Kurrle dkurrle@usapple.org if you have any questions as we work on this.

Share Your H-2A Frustrations With House Agriculture Committee

House Agriculture Committee Chairman GT Thompson (R-PA) has appointed an agriculture labor working group to gather information and make recommendations to the Committee. Headed by Rep. Rick Crawford (R-AR) and Don Davis (D-NC), the working group has been active in meeting with stakeholders and drilling into the many complexities of the H-2A program. They are now asking growers to submit feedback on this survey (<https://agriculture.house.gov/policy/agricultural-labor-working-group.htm>). If you are a user of the program, please take a few minutes to provide this important information or pass this along to the appropriate person on your team. It is important that the working group hears directly from the apple industry and even though some of the feedback might seem obvious – like the AEWR is too expensive and the program is too complicated – the more they hear it the more impactful it will be. USApple is also providing feedback and is in close touch with the workforce leadership.

USDA Pilot Grant Program

USDA recently announced a \$65 million grant program open to H-2A employers who recruit at least some of their new hires from Northern Triangle countries (Guatemala, Honduras, and El Salvador). Last week, USApple Senior Vice President Diane Kurrle met with the USDA officials who are administering the program.

Grant awards would range from \$25,000 to \$2 million, based on the number of workers and degree of commitments made to “improve working conditions.” To be considered for a larger grant, employers would need to agree to additional protections and incentives such as paying overtime, providing paid sick leave, participating in a collective bargaining agreement, and providing guaranteed bonus pay (not contingent on productivity or other metrics) to all workers. These would apply to all workers, not just those brought in under the pilot. Applications will be accepted through November 28.

USDA began developing the pilot program more than a year ago. USApple participated in several stakeholder meetings with the agency and submitted written comments. Given the escalation of wages and the added cost and burdens of housing and transportation, we encouraged grant money to be made available to all H-2A employers regardless of the country of origin of their workers. We also suggested the best incentive for growers to recruit from the Northern Triangle countries would be to open the program up to jobs currently not allowed, such as those in packing houses. Because USDA made it clear that one goal of the pilot would be to “improve working conditions for all farmworkers,” we also emphasized the strict worker protection and labor standards inherent in the H-2A program. The fact that about 80 percent of workers return each year is evidence that the program is mutually beneficial to employer and employee. Unfortunately, our recommendations were not incorporated in the program.

Additional details on the pilot can be found at https://www.ams.usda.gov/sites/default/files/media/FLSP_NFO.pdf

Talking Points on Apple Prices

A social media post and accompanying article got some traction last week when a TikTok user “called out” a grocery store claiming that it has increased its apple prices. USApple is included in the article, noting that: “Since 2020, the cost to buy apples is up 22%, but the cost to grow apples is 73% up. That

gulf has been growing.” If asked about apple prices, here are some talking points to consider for your use:

- Apple production – growing, harvesting, and packing – is highly labor intensive. Every apple grown in the U.S is picked by hand! Labor accounts for more than half the cost of producing every apple and labor costs continue to rise.
- Unlike other fresh food, apples are hearty and less likely to be wasted. After purchase, they can last weeks in your fridge.
- Year over year, apples have actually seen less of a price increase at grocery stores compared to the produce department as a whole as well as other fresh fruit.
- There’s often a range of apple varieties at stores with different price points, so consumers have options to best fit their needs.

USDA Announces State Block Grant Awards

USDA recently announced the recipients of the fiscal year 2023 block grants totaling nearly \$73 million. The grants are distributed to State Departments of Agriculture based on specialty crop production. The top apple states fared well with Washington receiving \$4.8 million, New York \$1.28 million, Michigan \$2.25 million and Pennsylvania nearly \$1.1 million.

Apple projects were funded in a number of states beyond the top four for a wide range of initiatives from marketing to food safety, research and career development. The block grant program is funded through the Farm Bill and a top priority for USApple and the Specialty Crop Farm Bill Alliance (SCFBA). It was through our collective efforts that the program was first created and funded in the 2008 Farm Bill and has been further improved in subsequent legislation. USApple and the SCFBA are prioritizing improvements and additional funding for the program to be included in the new Farm Bill which is currently being crafted and will likely be voted on early next year.

National Council of Agricultural Employers (NCAE) Labor Updates

September 20, 2023

National Council of Agricultural Employers’ (NCAE) Statement on Department of Labor’s (DOL) Notice of Proposed Rulemaking (NPRM)

It was with a great deal of chagrin and shock that the members of NCAE received the Wage and Hour Division’s (WHD) NPRM entitled “Improving Protections for Workers in Temporary Agriculture Employment in the United States”, last week. NCAE is the national trade association representing agricultural employers before regulatory agencies and the Congress. Our shock and chagrin were ignited by the pejorative nature and tenor of the Notice and its blatant vitriol targeted at the farm and ranch families forced to use the H-2A Program for workers who are ready, willing, and available, to help us plant, nurture, and harvest crops that feed America. The language used by the agency in its announcement was stunning in both its arrogance and its disconnectedness from the reality of the DOL’s own evidence in what seems an

apparent attempt to cast shade falsely and disrespectfully at farmers and ranchers. It was demoralizing to the women and men who struggle mightily to always comply with a complex regulatory scheme, simply to keep their legacy farm and ranch business sustainable for the next generation.

NCAE works with members and the government agencies themselves including WHD to advance compliance with more than just the H-2A regulations. Our members regularly study cases and law related to the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, and rules promulgated by the Occupational Safety and Health Administration. In fact, NCAE members and their Human Resource teams spend hundreds of hours becoming educated on agricultural employment law and best practices to maintain compliance and do this at significant expense to their operations. NCAE members do this because it is the right thing to do.

DOL's own data indicates that unfortunately some employers do not follow the lead of NCAE's members. Their data indicates that 5% of agricultural employers account for 95% of the violations uncovered in investigations. These 5% are not NCAE members. Perhaps it is in this noncompliant subset of employers that WHD feels they had license to attack near unanimously compliant employers.

The DOL in this proposed rule seems intent on thumbing its nose at the U.S. Supreme Court's 2021 decision in *Cedar Point, et al, v. Haddid, et al*, which found that a regulation providing union activist's access to farms and ranches was an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments. The DOL's NPRM is an undisguised end run around the Court and the Constitution of the United States of America.

Employees were thrilled by the Court's action, believing they would no longer be subject to the incessant threats, coercion, intimidation, abuse, harassment, and misrepresentation, of union representatives at their place of work. DOL's NPRM would cast aside this most critical worker protection and again make them vulnerable to these union organizing tactics to which we and our employees object.

America's farmers, ranchers, our employees, and the American public who eats, deserve better

Penn State Agricultural Law Weekly Review – September 25th, 2023

Agricultural Labor: Department of Labor Publishes Proposed Rule Amending H-2A Regulations

On September 12, 2023, the U.S. Department of Labor (DOL) Employment and Training Administration (ETA) published in the Federal Register a proposed rule (88 FR 63750) titled "Improving Protections for Workers in Temporary Agricultural Employment in the United States," amending several H-2A program regulations. Also announced by DOL, the agency states that the proposed rule, among other things, will

- “Clarify workers’ rights to invite and accept guests—including labor organizations—to employer-provided housing”;
- “Clarify that an employer only terminates a worker ‘for cause’ when the worker either fails to meet pre-specified productivity standards or fails to comply with employer policies after the employer applies a system of progressive discipline”;
- “Require employers to provide a copy of all agreements with any agent or recruiter the employer engages in recruiting prospective H-2A workers to the department, regardless of whether the agent is in the U.S. or abroad”;
- “Require employers to identify and disclose the name and location of anyone soliciting H-2A workers on their behalf”;
- “Prohibit the use of any employer-provided vehicle to transport H-2A workers unless each occupant is wearing a seat belt before the vehicle is operated”; and
- “Mak[e] new wage rates applicable immediately upon their publication in the Federal Register rather than weeks later.”

Comments on the proposed rule may be submitted until November 14, 2023.

<https://www.federalregister.gov/documents/2022/10/12/2022-20506/temporary-agricultural-employment-of-h-2a-nonimmigrants-in-the-united-states>

Agricultural Labor: DHS Publishes Proposed Rule Amending H-2 Program

On September 20, 2023, the U.S. Department of Homeland Security (DHS) published in the Federal Register a proposed rule (88 FR 65040) titled “Modernizing H-2 Program Requirements, Oversight, and Worker Protections.” Also announced by DHS, the proposed rule would “provide H-2A and H-2B workers [who report their employers for program violations] with ‘whistleblower protection’ comparable to . . . that . . . currently offered to H-1B workers” and “extend grace periods for [workers] seeking new employment, preparing for departure from the United States, or seeking a change of immigration status.” The proposed rule would also establish permanent H-2 portability, “which would allow employers who are facing worker shortages to hire H-2 workers who are already lawfully in the United States while the employer’s H-2 petition for the worker is pending.” Comments on the proposed rule may be submitted until November 20, 2023.

Shapiro Administration Awards \$1.6 Million 39 Foodbanks, Pantries, and Soup Kitchens

BETHLEHEM, Pa. — Agriculture Secretary Russell Redding visited New Bethany Choice Food Pantry in Bethlehem to announce awards of more than \$1.6 million to 40 food banks, pantries, shelters, and soup kitchens across Pennsylvania through The Emergency Food Assistance Program (TEFAP) Reach and Resiliency Grants. Today’s grant awards recognize Hunger Action Month, and demonstrate the Shapiro Administration’s commitment to fighting hunger and food insecurity and increasing access to healthy food for Pennsylvanians, wherever they live.

“No one should go hungry in a state with the wealth and bounty we have in Pennsylvania,” Secretary Redding said. “But far too often families do not know where their next meal is coming from and they need our help. Expanding the capacity of organizations like New Bethany to supply fresh, healthy food to families in need is just one part of a broad Shapiro Administration strategy to work toward a healthier, more secure Pennsylvania.”

New Bethany is receiving \$23,610 to reconfigure the space in their Choice Food Pantry, allowing them to increase cold storage capacity, offer a greater variety of fresh, nutritious food, and more efficiently serve more people in need of food assistance. New Bethany offers hope and support to people experiencing poverty, hunger, and homelessness. The organization provides food, wellness programming, transitional housing, permanent affordable housing, and financial case management to those working toward self-sufficiency.

“More people than ever are relying on New Bethany’s Choice Food Pantry to supplement their grocery budgets,” New Bethany Executive Director Marc Rittle said. “In fact, we have nearly doubled our output of USDA food. TEFAP is essential to us in this work, as we expand our services in the Bethlehem Area.”

TEFAP Reach and Resiliency Grants are being awarded to organizations distributing USDA Foods through TEFAP contracts with the state, county, or a county-designated Lead Agency.

Funded projects include expanded cold storage, warehouse space and equipment, delivery vehicles for food distribution, and other investments that expand TEFAP’s reach into isolated or underserved rural or low-income communities.

The department will be announcing a second round of TEFAP Reach and Resiliency Grants, with more than \$2.5 million in available funding, in October 2023.

According to Feeding America’s Map the Meal Gap, in 2022, more than 1.1 million Pennsylvanians, or 8.9% of everyone in the state, and 13% of our children, may not know the source of their next meal.

The Governor’s 2023-24 budget includes:

- **\$46.5 million** in funding to provide universal free breakfast to all of Pennsylvania’s 1.7 million public school students and free lunch to all 22,000 Pennsylvania students who are eligible for reduced-price lunches through the National School Lunch Program;
- **\$2 million** to fund the Fresh Food Financing Initiative that will contribute to better health outcomes by improving access to PA-grown, processed, and produced foods; and
- **\$2 million** increase to the State Food Purchase Program to provide state funds for emergency food assistance for low-income Pennsylvanians, connect surplus food donated by farmers through the Pennsylvania Agricultural Surplus System Opens In A New Window to food banks and food pantries statewide, and connect low-income seniors to Senior Food Boxes Opens In A New Window filled with nutritious dietary staples.

Find foodbanks, pantries and other resources in your area, plus information on food insecurity and what you can do to help or find help at agriculture.pa.gov/foodsecurity. *Morning Ag Clips, September 20th, 2023*