



The Bush Administration's Shameful Legacy for Farmworkers: Midnight Regulations on the H-2A Guestworker Program

The Bush Administration has released midnight regulation changes to slash wages, make it easier to hire foreign workers, and reduce worker protections under the H-2A agricultural guestworker program. The H-2A guestworker program is intended to allow agricultural employers to hire temporary workers from abroad only if they can prove there is not a sufficient supply of U.S. workers and that the wages and working conditions they are offering will not adversely impact U.S. workers. Because it is tempting for employers to replace their U.S. workers (who could demand higher wages and better working conditions) with temporary foreign labor (more vulnerable and easily abused), protections—some, but not enough – were gradually built into the program

In February 2008, the Bush Administration proposed an overhaul of the H-2A program regulations that would reduce or eliminate many of those longstanding protections. The public was given a short opportunity to comment on the extensive proposal before it was finalized by the U.S. Department of Labor (with some changes by the Department of Homeland Security).

DOL's final rule contains hundreds of pages of detailed changes and attempts to justify its harmful contents. Following are some examples of how the changes would harm workers.

- DOL has changed the recruitment requirements so that employers claiming a labor shortage will not have to engage in meaningful recruitment of U.S. farmworkers and the state job service agencies will not be permitted to be effective in referring job applicants to H-2A employers. The DOL has decided that H-2A employers need not engage in positive recruitment in known areas of farm labor supply if those areas have agricultural employers looking for farmworkers. Despite their claim to be free market supporters, the Administration's officials are by regulation ending competition among employers. Furthermore, DOL is withdrawing the obligation to engage in the same kind and degree of recruitment for US workers as it does for foreign workers. This allows employers to claim that they can't find any US workers, while not making any real effort, while at the same time engaging in huge recruitment campaigns in Mexico, Guatemala, Thailand and other nations in the effort to find exploitable guestworkers.
- The law requires an employer seeking to bring in temporary foreign labor to obtain from DOL a certification that there is a shortage of U.S. workers and that the employer offered competitive wages and working conditions. DOL has violated the law's explicit requirement that there be a labor certification. DOL will allow a labor attestation, which means that the employer may check off a few boxes and promise to comply with the law. DOL will not engage in any meaningful up-front review of the wages or working conditions or recruitment of U.S. workers. This illegal reduction in government oversight invites abuse. Workers' rights in the H-2A program are already routinely violated—greater enforcement is needed, not less.
- For the first time since the program's creation, U.S. workers could be paid less and receive fewer benefits than the H-2A workers with whom they work side-by-side, if the grower says they were hired before the H-2A workers. Allowing such disparate pay and benefits undermines the law's goal of ensuring that U.S. workers are not adversely affected by the presence of temporary foreign workers.

- All farmworkers will suffer from lower wage rates. Currently, DOL requires H-2A employers to offer workers at least the average regional hourly wage for farmworkers as determined by the USDA Farm Labor Survey, with one wage rate issued per state. Although this survey's results are low because of the presence of a large number of undocumented workers, DOL has decided to lower the wage rates even further by switching to the Bureau of Labor Statistics' Occupational Employment Survey, which does not even survey farms, but surveys farm labor contractors, the lowest paying employers of farmworkers. DOL also will allow employers to choose from four "wage levels." Most employers will offer the lowest level, which is the average wage received by the lowest-paid one-third of farmworkers in a geographic area, (i.e., the 16th percentile). The only real floor is the state or federal minimum wage even though many farmworkers already earn more.
- The H-2A law and the current regulations require employers to provide workers with housing that is certified as meeting federal and state safety standards. DOL's new rules will permit substitution of rental or public accommodations for certified housing in the event that housing becomes unavailable through no fault of the employer. This gaping loophole will allow employers to claim that they face an emergency unavailability of housing and must put the farmworkers up in a decrepit former motel or substandard mobile homes.
- The H-2A program for decades has required employers to reimburse the workers for their long distance travel costs to the place of employment upon completing the first half of the season, and then pay for their way back to their homes if they complete the season. DOL now will only require employers to pay the costs of transportation to and from the U.S. consulate or port of entry, even though workers often live far from these location and are recruited where they live, not near the consulate.
- For years, the H-2A program has protected the rights of US workers to H-2A jobs by giving them preference to these jobs for the first 50% of the contract period. DOL guts this protection by eliminating it over a five-year period, during which time workers will only have a 30-day preference. This change means that US workers applying for an H-2A job lasting 9-10 months will be ineligible for the job after the first 30 days, even if they have always worked for that employer. Many agricultural jobs have peak seasons and a need for increased numbers of workers long after the initial 30 days.

In response to DOL's changes to the program, Farmworker Justice released a report, *Litany of Abuses*, documenting abuses that have occurred under the current H-2A program due to lack of enforcement and government oversight. These abuses are just the tip of the iceberg as most guestworkers are reluctant to complain given their vulnerability and dependence on their employers. As the report demonstrates, farmworker conditions are an embarrassment; they need to be improved not worsened. The Administration should not finalize this rule. The Administration's plan will cause turmoil in the farm labor market rather than the stable farm workforce and stable policy framework America needs. If the Administration does publish these final regulations, we call upon Congress to overturn the regulations.

Instead of these one-sided changes to the H-2A program, Congress should act to pass the bipartisan, labor-management compromise known as "AgJOBS," which would provide an earned legalization program and reform the H-2A program in balanced and fair ways that workers and employers agreed to after years of conflict.