



Becker Forum
January 13, 2020




The Future of H-2A

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Proposed “Reform” Efforts


- July 26, 2019:** DOL published its 489-page **Notice of Proposed Rulemaking (NPRM)** to “modernize” and “improve” the H-2A program.
 - Public comment period ended September 24, 2019
 - 83,413 comments submitted; DOL indicated that less than 900 of them were considered “original” and “substantive”
 - Assuming no legislative action, will likely publish final rule sometime in 2020 (or early 2021)
- December 11, 2019:** The House passed H.R. 5038, the **Farm Workforce Modernization Act (FWMA)**.
 - Passed 260-165, with 34 Republicans voting in favor
 - Must now pass Senate and be signed by President Trump to become law

Rep. Zoe Lofgren (D-CA), sponsor of the FWMA

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Current H-2A Regs v. NPRM v. FWMA			
Issue	Current H-2A Regs	NPRM	FWMA
Eligibility	Ag employers with temporary or seasonal labor need	No change	Ag employers with temporary or seasonal labor need (uncapped); year-round ag employers (capped at 20,000 visas annually for first 3 years).
Application Process	File with SWA up to 75 days before date of need (no later than 60 days). File with DOL upon SWA approval or no later than 45 days before date of need. File visa petition with CIS upon DOL certification.	No change, although DOL acts as intermediary between employer and SWA. (NOTE: Currently in practice with new FLAG system).	No change to process, but requires DOL/CIS to create a single electronic filing system for all steps in the process.
Start Dates	One start date per application; staggered start dates require multiple labor market tests	Permits staggered start dates in first 120 days if employer provides notice to DOL; recruitment extends through last staggered start date	Permits staggered start dates in first 120 days if employer provides notice to DHS; all staggered start dates must have the same end date; FLCs not eligible unless they are joint employers or obtain “premium surety bond”

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Issue	Current H-2A Regs	NPRM	FWMA
Hours Guarantee	Must offer three-fourths of the work hours specified in the H-2A contract	No change	No change
Corresponding Employment	Workers are “corresponding” if they perform any duty listed in the job order, or any job duty performed by H-2A workers	No change	Changes term to “similarly employed”; workers are similarly employed if they are in the same occupational classification as the H-2A worker
Housing	Must provide housing at no cost to all non-local workers, inspected annually by the SWA	Same as current regs, but allows for 2-year certifications by the SWA on compliance and has provision for self-inspection	Same as current regs, except that year-round employers must provide family housing; federal grants for farmworker housing
Transportation	Must pay/reimburse inbound travel (transportation, subsistence, lodging) from worker’s home to consulate, and from consulate to place of employment.	Same as current regs, except employer not responsible for worker’s travel to consulate.	Same as current regs, except employer not responsible for worker’s travel to consulate if worker lives within 50 miles of consulate

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Issue	Current H-2A Regs	NPRM	FWMA
Wages	AEWR by region; must pay highest of AEWR, state prevailing wage, collective bargaining wage, or state/federal minimum; effective upon publication (even mid-contract)	Same as current regs, except AEWR is by state disaggregated by job classification; for duties that fall into multiple classes, must pay highest applicable wage; no downward adjustments mid-contract if AEWR declines	Same as current regs, except AEWR is disaggregated by job classification; for duties that fall into multiple classes, must pay highest applicable wage; 4.5% cap on annual increases to AEWR (but <u>not</u> prevailing wages); re-evaluated by DOL in 10 years
Recruitment	SWA posts job order; DOL posts job on seasonaljobs.dol.gov; must offer re-employment to former workers; must recruit U.S. applicants through the <u>50% point</u> in the contract	Same as current regs, except must recruits U.S. applicants through <u>first 30 days</u> of the contract (or through latest staggered start date)	Same, except must recruit U.S. applicants through the <u>later of 30 days or the 33% point</u> in the contract; employer bears burden of proof to show applicant rejected for lawful, job-related reason
Former U.S. Employees	Required to offer re-employment to any U.S. worker formerly employed at the place of employment within the last year, except those terminated for cause or who abandoned employment	Same as current regs, except employers are required to offer re-employment to terminated or AWOL workers if they failed to report them to DHS/DOL	Same as current regs, except offer for re-employment must occur at least 45 days before each start date in the petition; also required to post notice of the job opportunity at the place of employment (similar to H-2B)
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Issue	Current H-2A Regs	NPRM	FWMA
Area of Intended Employment	Geographic area within normal commuting distance of place of employment (based on MSA and other factors); only FLCs restricted to one area of intended employment in a single application	Re-evaluating criteria for area of intended employment; all employers limited to one area of intended employment; pickup/delivery points for truck drivers considered "worksites" for this purpose	No change
Post-Certification Amendments	Employers may add housing units if certified housing becomes unavailable; custom combine operators may add worksites within same area of intended employment	Same as current regs, except that all employers may add worksites within same area of intended employment upon showing of good and substantial cause	Requires DOL to allow non-material changes to the labor certification (likely worksites, number of workers, etc.)
Early Departure Notice	Must notify DHS if foreign worker separates employment more than 30 days before contract end date; must notify DOL if any worker (foreign or corresponding) is terminated for cause or abandons employment; employers bound by three-fourths guarantee and return travel if they fail to report within 2 working days	Same as current regs, except early departure notice added as document retention requirement	Appears to remove the notice requirement from the three-fourths guarantee provision
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Issue	Current H-2A Regs	NPRM	FWMA
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	H-2A workers excluded from MSPA	Explicitly applies MSPA transportation safety requirements to H-2A employers (NOTE: DOL currently enforces this, even though existing regs are ambiguous)	Applies MSPA to H-2A workers; provides express private right of action for employees to sue H-2A employers; third-party groups (legal services) can file complaints against H-2A employers with DOL; new authority for DOL to sue employers
Foreign Recruitment	Recruiters prohibited from seeking or receiving fees from workers	No change	Creates FLC-like registration/licensing for foreign recruiters; requires recruiters to post bonds based on # of workers; recruiters must file annual report to DOL; private right of action to sue employers for recruiting violations
Appeals	De novo hearing or expedited admin review of deficiencies and denials	Eliminates appeal process for deficiencies	Eliminates appeal process for deficiencies AND eliminates de novo hearings for denials
Visa Term	Length of certified period of employment + 30 days to find subsequent employment	No change	Length of certified period of employment + 45 days to find subsequent employment
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Issue	Current H-2A Regs	NPRM	FWMA
Heat-Illness Plans/Training	N/A	N/A	Employers must create plans and provide training on heat illness, access to water, shade, breaks, and emergency response
At-Will Employment	N/A	N/A	Creates 5-year pilot program for portable H-2A visas, capped at 10,000 workers
E-Verify	N/A	N/A	Mandatory for agriculture, phased on by size of farm (all farms required to use E-Verify in Year 4 after bill signed into law)
Legalization	N/A	N/A	Current undocumented workers legalized as "Certified Agricultural Workers" (CAWs) if they worked 180 days in agriculture in the 2 preceding years; CAWs considered "U.S. workers" for purposes of H-2A recruitment; eligible to apply for Green Cards as early as Year 4
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Issue	Current H-2A Regs	NPRM	FWMA
Online Application	SWA and DOL processes centralized through the Foreign Labor Application Gateway (FLAG) system; no online process for DHS visa petitions	Centralizes application process through FLAG (NOTE: Already in practice; DOL didn't want to finalize rule!)	Requires DOL/DHS/USDA/State Dept. to create single online portal for entire process.

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Questions? Please ask.

Or follow up with us directly:

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