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ALERT

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H-2A Farmworker Proposal Would Promote Union Organization in Agriculture

A proposed Department of Labor (DOL) rule was announced on September 13, 2023, to provide federal labor law protections similar to those under the National Labor Relations Act (NLRA) to H-2A farmworkers. The H-2A Program allows agricultural employers to hire farmworkers for temporary and seasonal jobs when they cannot find sufficient domestic labor, and where doing so would not adversely affect U.S. workers. Unlike a majority of private industry workers, farmworkers on H-2A visas are not covered by the NLRA, a federal law guaranteeing private sector worker's right to organize for better conditions on the job. The DOL's proposed rule would provide various protections such as allowing farmworkers on H-2A visas to invite union representatives onto employer-provided housing, banning captive audience meetings, and requiring that employers provide a list of workers to labor organizations that request them. It would also allow farmworkers to consult with key service providers on the H-2A Program and file complaints related to relevant local, state or federal laws, while protecting activities like boycotts and picketing, as well as other activities related to improving wages or working conditions.

In essence, the new proposed regulations not only incorporate major proportions out of the NLRA into the H-2A Program, but actually in some ways give unions broader rights than under the NLRA. For example, the regulations apparently contemplate allowing secondary boycotts illegal under the NLRA and suggest employers bargain in good faith with a union over a "neutrality provision," in which employers could agree to do nothing to discourage union organization.

The stated theory behind the new proposal is that labor organization representatives can monitor agricultural employers' compliance with applicable laws and rules, rather than having that burden solely on the federal government. Other approaches could have been used such as allowing such workers a longer period to switch employers for better working conditions.

Other provisions of the new proposed rule clarify justifiable termination for cause; provide for an immediate effective date for updated adverse effect wage rates; expand disclosure requirements; require disclosure of minimum productivity incentives, applicable wage rates, and overtime opportunities; enhance transportation safety requirements; limit passport and other immigration document withholding; provide protections in the event of a minor delay in the start of work; reduce submission periods for appeal requests for debarment matters and submittal of rebuttal evidence; enhancements to the DOL's ability to apply orders of debarment against successors-in-interest; and defining a single employer test for assessing temporary need, or for enforcement of contractual obligations.

These rules would prohibit termination for exercising or asserting any of the rights under the H-2A Program, including the new rights and protections set forth in the new rule, such as those relating to

self-organization and concerted activity, even those workers are exempt from similar protections under the NLRA.

The new rules would require employers to permit workers to designate a representative of their choosing to attend any meeting between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline. Employers would be prohibited in engaging in coercive speech, intended to oppose workers' protected activity unless the employer: (a) explains the purpose of the meeting or communications; (b) informs employees that attendance or participation is voluntary, and that they are free to leave at any time; (c) assures employees that non-attendance or non-participation will not result in reprisals; and (d) assures employees that attendance or participation will not result in rewards or benefits. The new rule would require employers to attest either that they will bargain in good faith over the terms of a proposed labor neutrality agreement with the requesting labor organization, and that they will not do so and provide an explanation for why they have declined. The rules would provide that workers residing in employer-furnished housing must be permitted to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of workers' workday and subject only to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas.

In contrast to the Administration's approach to guest workers' programs, Congress appears to have general bipartisan support for a guest worker program that would allow the states to determine the extent of guest workers permitted in the state based upon a bona fide labor shortage. This program would require that the affected guest worker must be located in his or her country of origin and not enter this country illegally. This should encourage a better respect for our borders that is currently occurring. This approach would more successfully help workers who wish to follow the immigration laws and those employers who wish to employ hardworking individuals with the desired result to properly administrate our immigration program and the need for certain labor forces in specific industries in the U.S.

Questions? Please contact James W. Wimberly, Jr. or Larry Stine at 404-365-0900, jww@wimlaw.com or jls@wimlaw.com.

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