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Re: Public Comment – Improving Protections for Workers in Temporary Agricultural Employment in the United States – DOL Docket No. ETA-2023-0003

Dear Administrator Vitelli, Administrator Pasternak, and Director DeBisschop:

AmericanHort is the national trade organization representing the greenhouse and nursery horticulture industry in the United States. Our roughly 14,000 active members and advocacy partner affiliates encompass plant breeders, greenhouse and nursery growers, landscape and garden retail professionals, and others in the horticulture industry market chain. With a farmgate market value of roughly \$16 billion in annual sales, our horticultural crop growers represent a third of the value of specialty crop production and 10% of all crop agriculture in the U.S. Total industry economic output by all sectors of the so-called “green industry” is estimated at \$348 billion¹.

These comments are also endorsed by our advocacy partner, the National Christmas Tree Association, the national trade organization representing the farm-grown Christmas Tree industry. NCTA represents 38 state and regional associations, and more than 4,000 affiliated

¹ Hall, Charles R., Alan W. Hodges, Hayk Khachatryan, Marco A. Palma. *Economic Contributions of the Green Industries in the United States in 2018*. July, 2019.

farms that grow and sell Christmas Trees and businesses that provide related supplies and services.

Our industries are mainly comprised of small and family farms and businesses, many which are multi-generational. Most are seasonal by nature, with fluctuating workforce needs. Many industry businesses have found it necessary to supplement their base domestic workforce with legally-authorized temporary and seasonal workers sourced through the H-2A agricultural worker visa program.

In general, we find this proposed rule to be deeply problematic. We will delve into specifics, but at a high level, the Department's request for public comment has many employers in and beyond the horticulture sector of agriculture concerned that the Department views all employers who seek to use a legal, government sanctioned, workforce as somehow trying to exploit workers and attempting to evade the law. The Department says as much in the Notice of Proposed Rulemaking ("NPRM") "the Department is most interested in comments that cite evidence of the need to remedy through this rulemaking ongoing violations, worker abuse or exploitation, coercion, employer or agent subterfuge to avoid the law"² It is difficult for our employers using the program correctly to provide such evidence the Department is seeking, as they are following the law and are not committing worker abuse or exploitation, coercion, and are not participating in subterfuge to avoid the law.

The vast majority of our employers who use the H-2A temporary agricultural worker program do so with an eye towards compliance. Experts in migration policy at the University of California- Davis found that the top 5 percent of U.S. crop farms with labor violations accounted for 70 percent of labor violations detected by Wage and Hour Division ("WHD") and the top 5 percent of farm labor contractors with violations accounted for 65 percent of all violations found to be committed between 2005-2019.³ Therefore, violations of the H-2A temporary agricultural worker program are concentrated among a small number of employers, while the vast majority of employers are doing their level best to comply with the 209 H-2A rules the government has imposed on employers who are committed to hiring a legal, government sanctioned, workforce.⁴

The Department has two goals imposed upon it by the Immigration and Nationality Act ("INA"), ensuring U.S. agricultural employers have the necessary access to a workforce when there are not enough able, willing, and qualified U.S. workers available at the time and place needed, and that such employment will not adversely affect the wages and working conditions of U.S. workers.⁵ As discussed in detail below, some of the 209 current H-2A rules and the additional

² 88 Fed. Reg. 63753 (Sept. 15, 2023).

³ *The H-2A Program in 2022*, Rural Migration News, <https://migration.ucdavis.edu/rmn/blog/post/?id=2720> (last visited Oct. 31, 2023).

⁴ *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers*, David J. Bier, Table C, March 10, 2020, <https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire> (last visited October 31, 2023).

⁵ 8 U.S.C. § 1188(a).

rules being proposed in this NPRM are frustrating the purpose of the INA and not only adversely affecting the wages and working conditions of the current U.S. agricultural workforce, but also hindering the ability of U.S. agricultural employers to even use the program in a compliant manner. The INA requires the Department to balance the interests of U.S. agricultural employers and U.S. agricultural workers. This NPRM tips the balance far against the U.S. agricultural employers. The Department should focus its attention on the enforcement of current regulations, which are sufficiently protective of both U.S. agricultural workers and foreign visa-holding workers, as has been shown through currently publicized enforcement actions by the Department across the country.

CHANGES TO THE EMPLOYMENT SERVICES SYSTEM

Review and Creation of Debarment Lists

To use the H-2A temporary agriculture worker program employers are first required to file a clearance order with the State Employment Services system, often referred to as the State Workforce Agency (“SWA”). If employers are unable to file clearance orders with the SWA or to receive referrals of U.S. workers through that system, they are effectively debarred from the H-2A program. One such concern many employers have is the proposed Office of Workforce Investment “discontinuation of services” list. The Department is proposing that the SWA must look to that list prior to placing any clearance order, and if an employer appears to be on the list the SWA will not place the order. As laudable of a goal it is to ensure that employers who have violated labor laws are not able to do so in other states, we want to encourage the Department to ensure that same or similar employer names do not inadvertently debar an employer that is not actually on this list.

Further, the NPRM is quite silent on how the Department is going to ensure that SWAs are not inadvertently debaring employers and what employers’ due process rights will be in getting an order placed if the SWA refuses to publish the order because an employer has the same or similar business name as another entity on the list. The NPRM does not discuss an appeal method if a SWA refuses to post a clearance order, and the Department should ensure there is a method for employers in this situation to ensure their order gets placed timely. Our employers have the same concern about requiring the SWA to consult the Office of Foreign Labor Certification (“OFLC”) and Wage and Hour Division (“WHD”) H-2A and H-2B debarment lists; if employers with the same or similar names appear on that list, there must be a method to prove that the employer seeking to have a clearance order filed is not in fact the employer appearing on these lists. The H-2A program is already a long and complex process for employers in planning for their season and even a few days delay can mean peril for time-sensitive activities with perishable crops.

Proposed Changes to the Discontinuation of Services Process

The Department in the NPRM is proposing to provide additional clarity and instruction to SWAs on when and how to discontinue services to an employer, citing the lack of discontinuation of

services from Program Year (PY) 2012 to PY 2019 and the “glaring disparity between the number of violations found by WHD and the actual discontinuation of services by the SWA during the same time period . . .”⁶ Allowing a SWA to effectively debar an employer when WHD notifies it of a violation makes little sense since when WHD also seeks to debar an employer, there is an investigation; however if WHD in their investigation decides that debarment is not necessary, the SWA should not then effectively debar an employer by discontinuing services. It seems that the principle of double jeopardy should apply; the Federal government conducted an investigation and issued a sentence that the employer ostensibly paid, now the State government is going to try the case and hand down what is practically speaking a death sentence. How is that fair or equitable?

Further, instructing a SWA to initiate a discontinuation of services in § 658.501(a)(1) because an employer refuses to “correct” terms and conditions the SWA believes to be contrary to employment-related laws is of great concern.⁷ As the Department describes on the previous page in the NPRM that “the Department identified that SWAs have made errors regarding citing applicable bases to discontinue services under § 658.501(a), describing necessary facts to justify the discontinuation, and notifying employers of their right to a hearing.”⁸ Unfortunately, many employers face issues where a SWA asserts that an employment related law means one thing, when it in fact means something different. In fact, the Department’s regulations surrounding the H-2A program contemplate these disputes and allow employers to file directly with the Department when the disputes cannot be resolved.⁹ How is the Department going to handle a SWA who attempts to discontinue services when an employer follows the regulations and files an emergency application directly with the Department? The Department is now instructing SWAs that when an employer refuses to “correct” a clearance order they **must** initiate discontinuation of services. Will every instance in which an employer files an emergency application under the regulations because of a dispute with the SWA now result in an initiation of a discontinuation of services?

If every time a SWA and employer disagree on employment related laws and the employer, under the H-2A regulations, files an emergency application with the Department and the SWA initiates a discontinuation of services, that yet again leads to another ground that the Department is instructing the SWA to discontinue services under § 658.501(a)(8). The instruction by the Department that the SWA must initiate a discontinuation of service for all of these provisions is going to dramatically increase the cost of participation in the H-2A program, as everyone involved is now going to have to administratively litigate with the SWA to ensure that they are not wrongfully discontinuing services to employers, agents, attorneys, agricultural associations, joint employers, farm labor contractors, and wrongfully declared successors in interest.

⁶ 88 Fed. Reg. 63761.

⁷ *Id.* at 63762.

⁸ *Id.* at 63761.

⁹ 20 C.F.R. § 655.121(e)(3).

Since employers, agents, attorneys, agricultural associations, joint employers, farm labor contractors, and wrongfully declared successors in interest are going to be receiving many more notices of intent to discontinue services, it is prudent that the Department is providing instruction to the SWAs of what must be in these notices. However, the removal of the ability to request a pre-discontinuation hearing is concerning. The ability to present facts and information to refute the “evidence” the SWA is relying on to an impartial hearing officer is integral to an efficient ES system. In fact, removing the pre-discontinuation hearing is likely to draw out the process for discontinuation of services for many more months as each successive stage allows the SWA and the employer 20 working days to respond. If an employer was immediately able to request a hearing the decision from the hearing officer would happen much quicker and would be provided by an impartial trier of the facts. The Department should also provide more clarity on what repeatedly causes the initiation of discontinuation of services under § 658.501(a)(8). Is repeatedly after 2 or 3 initiations? More? It is unclear what the Department intends here and since SWAs have not been utilizing this provision, unclear how it will be implemented. Further, as stated before, employers are concerned that simple disagreements on terms and conditions and relevant labor laws are going to lead to many more initiations of discontinuation and thus this provision is going to be used more frequently.

The Department also requested input on the redesignation of § 658.501(c) to § 658.501(b) and “whether it would be appropriate to limit the scope of previous labor certifications or potential violations of a labor certification to a particular time period.”¹⁰ Given that employers in the H-2A and H-2B program are only required to maintain records under the programs for 3 years, it would be appropriate to limit the scope to the time period that is 3 years from the date of certification. Any longer period would frustrate the purpose of the investigation as employers may not have records. Also, WHD limits its H-2 investigations to 3 years as well, ostensibly because of the records requirement, but also because the Fair Labor Standards Act (“FLSA”) has an ultimate limit of 3 years for willful violations and 2 years for all other violations.

CHANGES SPECIFIC TO THE DEPARTMENT’S H-2A REGULATIONS

The Single Employer Test is Flawed and Not the Long-Standing Approach of the Department

The Department’s proposal to define the term “single employer” is not a codification of “its long-standing approach to determining if multiple nominally separate employers are operating as one employer for the purposes of the H-2A program.”¹¹ The Department has attempted to make this their approach but has been rebuffed by the Board of Alien Labor Certification Appeals (“BALCA”) on a regular basis as the terms “employer” and “joint employer” are defined in the regulations and those tests are used to determine who has an employment relationship, under the common law of agency, with an employee. *What the Department is proposing is a*

¹⁰ 88 Fed. Reg. 63763.

¹¹ 88 Fed. Reg. 63768. *See Id.* at 63769 (citing that the Department only started attempting to apply the single employer analysis in 2015.) *See also Id.* at 63774 (citing that starting in January 2018, it was not a long-standing practice to provide a 14-day grace period for paying updated wages published in the Federal Register.).

significant change from the long-standing practice of using the common law of agency to determine when two employers jointly employ an employee.

For the purposes of determining when two entities are in fact a single entity, the Department should continue to determine who in fact has the employment relationship with the employee. The fact that two entities share office space or even addresses, does not make them a single entity for the purposes of the H-2A program or employment law in general. The fact that two entities are both horticultural producers, again does not make them a single entity for the purposes of the H-2A program or employment law in general. The key factor is who controls the wages and working conditions of the employee, that entity is the employer. The Department's use and proposed use of the single-employer test is flawed and the Department has not sufficiently explained its reversal of its long-standing use of the common law of agency to determine if two employers are joint employers. The Department's finding that some employers' use of creative corporate structure means that all employers do this is unfounded and should be narrowed to target the abuse the Department has highlighted, not burden the whole industry for a few bad apples.

Offered Wage Rate

Long-standing practice when the Department publishes updated wages in the H-2A program has been to allow a 14-day grace period from publication of those wages in the Federal Register to when the updated wage is due. The Department has cited that this would allow employers mid-season to update their payroll systems to allow for the new wages to be paid at the beginning of the next pay period. The proposed change to require employers to update the wage immediately upon publication in the Federal Register is a departure from this long-standing practice as such the Department has failed to explain why it is departing from this position, which the Department has held at least as recently as June 16, 2023.¹² The change would be particularly burdensome for many of our greenhouse growers, whose production season often begins prior to the typical publication of the new years' AEWs.

Requirement to Offer, Advertise, and Pay the Highest Applicable Wage Rate

The Department's current language on offering, advertising, and paying the highest applicable wage is sufficient to test the labor market and apprise workers of the wages they should expect to receive. However, the Department's proposal will make this simple requirement extremely convoluted and will lead to confusion by both employers and potential employees. The confusion that this proposal creates is how to calculate the appropriate wage when multiple piece-rate wages are involved, and hourly wages are involved. Is the Department suggesting if on an 8-hour shift working the highest piece rate task an employee could make more than the Adverse Effect Wage Rate ("AEWR"), then the employer must always pay that higher rate even if the employee did not perform that higher rate task? From the proposal it is unclear as § 655.122(l)(2) states "the employer must calculate each worker's wages . . . using the highest

¹² See 88 Fed. Reg. 39482 (June 16, 2023) (making the wage rates published on June 16th effective on July 1.).

wage rate for each unit of pay, and pay the worker the highest of these wages for that pay period. The wage actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job offer.” The first sentence in conjunction with the second sentence seems to say that if the job offer was for 8-hour days, and the job offer included prevailing piece rates, that if an employee working in that task for all 8 hours would make more than the AEW, even on days that the employee did not work on piece rate tasks, an employer would be required to pay as if the employee had for all hours worked.

If the situation as described above is the Department’s intention, it will further incentivize employers to not pay piece rates where they do not have to, and only offer the AEW. Further, in areas where there is a prevailing piece rate that has been certified by the Department, it will drive employers away from planting crops that have a prevailing piece rate, further harming the domestic workforce. Employers need more clarity as to what the Department’s intention is surround offering, advertising, and paying the highest wage as this seems to be a substantial change from the Department’s previous practice.

Employer Provided Transportation

The Department should not require employers to enforce whether employees wear seatbelts. Aside from a requirement to ensure they have seatbelts for each employee in a vehicle and instruct employees to wear those seatbelts, an employer has no effective way to ensure every employee continues to wear a seatbelt through the entirety of a trip in a vehicle. Keeping the seatbelt on is a matter of personal discretion and each employee’s own free choice, and an employer should not be penalized if an employee, through their own free choice decides to take the seatbelt off.

Termination for Cause or Abandonment of Employment

The Department in the proposed rule seems to believe that employers, large and small, have a large dedicated Human Resources team. This is hardly the case for small and family-operated nurseries and greenhouses. While some large farms may be able to easily comply with the progressive discipline system the Department is proposing to require, in reality for agricultural operations the type of system and the documentation expected to be retained is not feasible in smaller farming operations. It may not even be feasible in bigger farming operations, as corrections and instructions can happen in the field on the fly. Is instructing someone how to better do their job now a disciplinary action that must be recorded under this proposed progressive disciplinary system? Should that not be considered training instead? Is that instruction now a violation because the employee was not notified in advance of the instruction that the employee was performing the task incorrectly? Will an employer have to wait to make that instruction until an employee’s authorized representative arrives? What does the employee do until then, since the employer is going to want to protect their crop from damage?

Furthermore, these regulations will likely chill an employer from terminating an employee, which clearly appears to be the intent. However, consider an employee who is suggesting to other employees to abscond, through no fault of the employer, and word gets back to the employer. Should that employer have to follow multiple rounds of this occurring before being able to terminate that employee? Obviously, the Department believes that absconding and leaving a bad work environment is okay, and perhaps that is understandable in egregious situations. But what about an employee pressuring other employees to violate the terms of their visa and leave, for instance, to make more money working (illegally) in another field such as construction? Is that not a violation of the law and thus egregious enough to terminate immediately? How offensive does the conduct need to be so that an employer can rightfully terminate an employee? The Department mentions assault, but is that just physical, or can it be verbal? These types of questions are what will chill employers' ability to terminate otherwise toxic employees that then open employers up to hostile workplace claims, which then may open employers up to constructive termination as the Department describes.

Disclosure of Employers, Owners, Operators, Managers, and Supervisor Information

Although it is understandable that the Department would want to collect information of owners of the employer to ensure employer is not a restructured company of someone who has been debarred, the vast majority of employers and those who work within the H-2A program are not debarred employers or individuals. In fact, there are only 32 employers and individuals in the entire country that are debarred from the H-2A program, when by rough estimates using 2023 USCIS H-2A Data Hub results there are over 11,000 unique employers in the H-2A program, that means debarred employers make up 0.00029% of the H-2A users.¹³

This information collection is onerous and unnecessary to catch the 32 employers debarred from the H-2A program from reconstituting as another employer. What makes this even more onerous and unnecessary is that not only does the Department want to collect all owner information, even of silent partners and minority shareholders, but the Department is now proposing to obtain the information of all managers and supervisors of any location employees under the job order will work, regardless of if they are employees of the employer filing the job order. This information is unnecessary at the application stage of the H-2A program and is easily and regularly attainable at the enforcement stage of the H-2A program. If an employer refuses to cooperate with a WHD enforcement official seeking information, that is a violation of the program that should be cited, but requiring such an onerous amount of information to be provided just to file an application is unnecessary and starkly against the requirements of the Paperwork Reduction Act and the Small Business Regulatory Enforcement Fairness Act.

The Department's analysis under both of those acts of impact and burden is drastically low. This is evidenced by the Department's claim that small businesses will be faced with a mere one-

¹³ See U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Program Debarments, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf (last visited October 31, 2023). See also U.S. Citizenship and Immigration Service, H-2A Employer Data Hub, <https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub> (last visited October 31, 2023).

time cost of \$54.00 to familiarize themselves with this rulemaking only \$108.00 to complete the new application with all owner, manager, and supervisor information.¹⁴ This proposed regulation spans some 83 pages of the Federal Register in tri-column fashion; the final rule is likely to be similar. The Department's assumption that this proposed regulation and whatever form the final regulation takes will consume only an hour to read is a gross underestimation. If the onerous nature of the information collection were not enough, many employers have concerns over Personally Identifiable Information ("PII") being requested from such a large number of individuals. Since the Department posts disclosure data on its website, will this information be included? How will this information be protected from unlawful disclosure under the Freedom of Information Act?

THE DEPARTMENT IS ATTEMPTING TO CIRCUMVENT NATIONAL LABOR RELATIONS ACT ("NLRA") PREEMPTION

The Department's proposal to provide NLRA-like protections to agricultural employees under the H-2A program is in fact preempted by the NLRA. "It seems clear from the legislative history . . . that Congress meant to exclude agricultural laborers from the provisions of the Act. The Senate Report on the bill which became the original National Labor Relations Act, says that . . . 'the committee deemed it wise not to include under the bill agricultural laborers . . .'"¹⁵ Congress explicitly meant to exempt agricultural employees from the protections and penalties of the NLRA. It strikes us that what the Department now proposes goes against Congress' legislative intent. Congress spoke as to what the Executive could do when it comes to agricultural workers, and they are exempt from the provisions of the NLRA.

Activities Related to Self-Organization and Concerted Activity

The Department, in proposing § 655.135(h)(2), is both preempted and exceeding its statutory authority under the INA. The Department is preempted as discussed *supra*. Further, as the Department has stated, the INA requires it to protect the working conditions of those U.S. workers similarly employed.¹⁶ However, similarly employed U.S. workers do not have this protection the Department is purporting to bestow upon H-2A workers.¹⁷ The Department is trying to make job contracts under the H-2A program more attractive to U.S. farmworkers, which is not what the INA allows the Secretary to do.¹⁸ Interestingly, proposing to allow concerted activity and secondary boycotts by agricultural workers, the Department cites a case that says agricultural workers are exempt from the provisions of the NLRA that protect employers from concerted activity, but workers who also joined in secondary boycotts that were not agricultural workers committed an unfair labor practice under the NLRA.¹⁹ The

¹⁴ 88 Fed. Reg. 63816.

¹⁵ *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 646 (1951).

¹⁶ 88 Fed. Reg. 63793.

¹⁷ See 29 U.S.C. § 152(3)

¹⁸ *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir. 1976) ("Clearly, his authority to insure against a lowering of wages is hardly synonymous with the affirmative power to *raise wages* which Williams here proposes. Attractiveness is the wrong test for measuring the Secretary's determination.") (internal quotations omitted emphasis in the original).

¹⁹ *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 643 (D.C. Cir. 1951).

Department cannot have its proverbial cake and eat it too; this proposed section as drafted ignores the other obligation of the Secretary under the INA, enabling access to the availability of a workforce to the U.S. farmer when U.S. workers are not available. This provision exceeds the statutory authority given to the Department and should be removed from any final rule.

WORKER VOICE AND EMPOWERMENT

The Department has not sufficiently explained how being a member of a union provides any additional protection to H-2A workers, except through hyperbole and anecdotal examples of the few H-2A employers that commit egregious violations of the program.²⁰ Further, the Department has failed to explain how there is an adverse effect on U.S. workers, who themselves have no right to organize, that giving the right to organize to H-2A employees will alleviate said adverse effect. Finally, if this proposed regulation does anything it exceeds the authority of the Department under longstanding precedent by trying to make H-2A jobs more attractive to U.S. workers by providing them NLRA type protections they are statutorily exempt from receiving unless they join an H-2A contract.²¹

Employee Contact Information

Our employers are very concerned by the proposal that employers be required to provide employee contact information to a non-recognized union or even a union supported by cards signed by less than a majority of represented unit. The Department's proposal that this list also include each "worker's full name, date of hire, job title, work location address and ZIP code, and (if available to the employer) personal email, personal cellular number and/or profile name for a messaging application, home country address with postal code, and home country telephone number" is excessive over and above the NLRB requirements for voter lists.²² At least under the NLRB rules a majority of the employee unit must sign union cards to seek representation. Under the Department's proposal any group claiming to be a labor organization, which is also broadly defined in the proposal to potentially include labor organizations that would not be eligible labor organizations under the NLRB rules, may request an employer provide such PII. Additionally, the employer may be asked to update the information, likely in the midst of the peak of their season. Employers are worried this is a method to harass employers during their busiest times, something that would likely be considered an unfair labor practice under the NLRA, which the Department decided not to include in this proposal.

The Department claims that the need to organize earlier in the process than the normal NLRB process, ostensibly because of the limited duration of H-2A contracts, outweighs the privacy concerns of employees. Has the Department queried H-2A workers if they think this concern outweighs their privacy rights? The Department asks if there should be an opt-out ability for workers to decline their information to be provided. We believe this provision should be

²⁰ See *Supra* re discussion on the 32 employers debarred compared to the over 11,000 unique H-2A employers.

²¹ See *Williams*, 531 F.2d at 307.

²² 88 Fed. Reg. 63798.

stricken, but if it the Department insists on retaining it, then yes, there must be an opt-out opportunity. Workers' private information should not be shared without their permission to anyone not entitled to that information without their consent. The Department next asks if the already-expansive definition of labor organization should be further expanded to include key service providers? It should absolutely not. Though worker advocates lovingly claim they are only trying to protect the rights of workers, their other goal has long been to harass employers. This proposal would allow unscrupulous groups to continually ask employers for updated lists. Also, problematically, this proposal does not limit the number of groups that can ask for the employee list.

Right to Designate a Representative

First and foremost, the Department's proposal to allow a non-employee third-party representative to enter employers' private property is a taking under the fifth amendment. As proposed, this NPRM would allow a government-authorized physical invasion of a person or entity's property. Such actions have recently been described as a *per se* taking requiring just compensation.²³ "[T]he right to exclude falls within the category of interests that the Government cannot take without compensation."²⁴ "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking."²⁵ It is clear under the *Cedar Point* analysis that as proposed this NPRM would amount to an uncompensated taking when restricting a property owner's right to exclude third-party individuals from their property.

Prohibition on Coercive Speech

Employers have long recognized that H-2A employees have free choice for many things, including the right to not listen to an employer's opinion on the merits or lack thereof of unionization. It is interesting that the Department here recognizes that H-2A employees have free choice as well.²⁶ We say this since the Department has proposed multiple times throughout the NPRM to not allow H-2A employees have free choice, such as making the free choice to refuse meals on a given day and not have a deduction taken from their check, making the free choice to not want to wear a seatbelt, and making the free choice not to have their PII shared with representatives of labor organizations. The Department should return to the other sections of this NPRM when looking to go final and ask a simple question. Are we, the Department, taking away an H-2A employee's free choice?

Access to Worker Housing

The Department's proposal to require access to H-2A worker housing by invited guests of the H-2A workers while allowing reasonable restrictions to protect the health and safety of other

²³ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021)

²⁴ *Id.* (cleaned up and internal quotations omitted).

²⁵ *Id.* at 2075.

²⁶ 88 Fed. Reg. 63798.

workers in shared housing is reasonable. The Department should provide additional examples of what they deem reasonable, as it is difficult for employers to meaningfully comment on this provision with the limited discussion in the NPRM. However, it strikes us as unreasonable that yet again the Department effectuating another taking under the fifth amendment.²⁷ § 655.135(n)(2) goes a step too far, and the Court in *Cedar Point* articulated that very clearly. Under § 655.135(n)(1) an H-2A worker could invite a union representative to the employer's property, and as an invited guest made by the free choice of the H-2A worker it would not be a taking under the fifth amendment. But allowing 10 hours a month for a labor organization representative to access an employer's property, at the labor organization's discretion, is clearly a taking under the fifth amendment.

Even if the provision in § 655.135(n)(2) were implemented and survived litigation, which it likely will not under *Cedar Point*, how will the Department implement and police the 10 hour provision? Further, to the Department's question of whether this access should be expanded to other key service providers, the answer is the same: that would be a taking under the fifth amendment and it should not retained or expanded in a final rule.

INTEGRITY MEASURES

The Department is proposing to shorten the period for an employer to submit rebuttal evidence or appeal a Notice of Intent to Debar from 30 calendar days to just 14 calendar days. In order to ensure employers have the time to secure counsel and gather any rebuttal evidence, the Department should not move forward with this proposal. First, the Department is proposing to cut in half the time to gather all evidence an employer would need to submit rebuttal evidence. Second, this extremely shortened timeframe impinges on an employer's ability to obtain counsel if they do not already have counsel representing them. Although filing for a notice of hearing is a relatively simple process, employers still need time to find counsel. As a secondary proposal, the Department could implement a staggered approach, allowing employers a period to notify the Department of their intention to seek a hearing or their intention to file rebuttal evidence. For instance, employers within 14 days could request a hearing or within 14 days notify the Department they are going to file rebuttal evidence. At that point, employers would then have 30 days from the initial notice to file such rebuttal evidence. Employers should still be able to request a hearing after the final determination by the Administrator and that could be required within 14 days. This would be a reasonable compromise to allow employers sufficient time to obtain counsel and to compile such evidence that needs to be submitted or request a hearing.

CONCLUSION

We thank you for the opportunity to review and comment on this proposed regulation and to share perspectives and concerns of horticultural crop producers. We have profound concerns with many if not most of the proposed changes and new burdens that would affect an already-

²⁷ See *supra*.

complicated and highly regulated program. We hope the Department takes meaningful and due consideration of our comments.

Sincerely,

A handwritten signature in black ink, reading "Matthew D. Mika". The signature is written in a cursive style with a large, stylized initial "M".

Matthew D. Mika
Vice President for Advocacy and Government Affairs