

FINAL SENT TO FRANK GASPERINI ON MARCH 3, 2010

Date: March 3, 2010

To: NCAE Members

From: Frank Gasperini, Executive Vice President

Subject: Summary of Final H-2A Regulations Issued by the Department of Labor on February 12, 2010 and Related Employer, Agent, and Association Compliance Alerts ¹

BACKGROUND

On February 12, 2010, the Department of Labor (DOL) issued its final H-2A regulatory reform package. The final regulations are effective on March 15, 2010. The final regulations can be found at 75 Federal Register 6884-6995 (February 12, 2010). In addition, DOL published in the Federal Register on February 18, 2010 the 2010 adverse effect wage rates (AEWR) that will be effective on March 15, 2010. 75 Federal Register 7293-94 (February 18, 2010). The final regulations return to the use of the AEWR that had been used since 1989, but were replaced in the Bush regulations.

The final regulations considered public comment on the proposed regulations issued by DOL on September 4, 2009. *See* 74 Federal Register 45906-45965 (Sept. 4, 2009). The final regulations amend both the Employment and Training Administration (ETA) rules under 20 CFR § 655 (hereafter referred to as § 655) and the Wage and Hour Division (WHD) enforcement rules under 29 CFR § 501 (hereafter § 501).² For ease of communication, we will refer to the newly finalized rules as the Obama or 2010 rules and will refer to the superseded rules as the Bush or

¹ This memorandum was prepared by Monte Lake of the law firm of Siff & Lake, LLP in Washington, DC. It describes the general requirements of the new H-2A regulations and identifies some of the important compliance issues. Because the regulations are new and have not been interpreted by the DOL or the courts, current and potential program users should seek clarification from the agency regarding regulatory ambiguities where possible. Program users should seek expert advice or legal counsel with regard to their own particular circumstances if they are uncertain regarding program requirements or their compliance responsibilities.

² The current H-2A regulatory proposal is the latest chapter in a regulatory pendulum that has swung between extreme regulatory positions on what the H-2A statute mandates in balancing protection of the U.S. worker and ensuring that agriculture has a viable temporary and seasonal foreign worker program. The Bush Administration finalized rules that represented a major reform of the H-2A program on December 18, 2008. The Bush H-2A rules revised the prior rules that had been in effect since 1987 that implemented the statutory H-2A changes enacted in the Immigration Reform and Control Act of 1986 (hereafter referred to the 1987 rules). On May 29, 2009, the Obama DOL finalized a rule suspending the 2008 rules, after a brief public comment period on whether the 2008 rules should be suspended. On June 29, 2009, the U.S. District Court for the Middle District of North Carolina issued a preliminary injunction stopping the suspension of the 2008 rules in a lawsuit filed by a number of grower groups, including many NCAE members. It is our understanding the DOL has withdrawn its appeal of the injunction of its suspended rule in view of the fact that it has issued the final rule that will be effective on March 15, 2010.

2008 rules. The H-2A regulations that governed the program between 1987 and 2009 will be referred to as the 1987 rules.

The regulatory chaos that has ensued during the past several years has made it exceedingly difficult for current and potential H-2A users to understand and comply with the complex rules that govern participation in the H-2A program. Unfortunately, the finalization of the Obama rules will not necessarily bring certainty. There has been discussion of a legal challenge to them, which, if undertaken, will leave current and potential program users in the same uncertain position that they have experienced recently. The present reality is that those who file applications to participate in the H-2A program with dates of need on or after June 1, 2010 must use the new rules.

PURPOSE OF MEMORANDUM

This memo is intended to be both a description of the final Obama regulations, as well as to provide helpful compliance comments to current and potential program users. The final regulations occupy 111 pages in the Federal Register. The memo generally follows the regulatory outline, which is organized around the key components of the new regulatory process—focusing on key definitions, filing of job orders, filing of applications, recruitment and the enforcement provisions of both ETA and WHD. While the primary focus is on the 2010 regulations, reference will be made to the Bush and 1987 regulations where they provide a helpful comparison and understanding of the changes in the new regulations.

OVERVIEW OF THE 2010 REGULATIONS

After consideration of nearly 7000 comments from the public, DOL made very few significant changes to its proposed regulations. NCAE submitted 45 pages of comments on the proposal on October 15, 2009, most of which were critical of the abrupt and poorly justified rejection of the Bush regulations. While a number of NCAE's suggestions were adopted,³ the final regulations retain almost all of those provisions that will make the program difficult and costly to use and which will subject agricultural businesses to substantial exposure from overly broad and punitive enforcement measures for violation of highly complex and technical program terms. The final rules:

- Fail to balance the interests of U.S. workers not to be adversely affected by foreign workers with the need of employers to have a readily accessible program that affords timely access to foreign workers at a reasonable cost. The singular focus of the regulations is protection of U.S. workers at all costs, without adequate justification;

³ DOL adopted in whole or part the following recommendations made in NCAE's comments: 1) that the Certifying Officer (CO) is given authority to resolve employer disputes with SWAs over the contents of job orders; 2) removed reforestation and pine straw activities as agricultural labor that qualifies for participation in the H-2A program; 3) reduced the period during which H-2A related records must be retained from 5 to 3 years; 4) expanded the option to define the area of intended employment in master applications from 1 state to 2 contiguous states; 5) employers may request a new determination from the CO on or after 30 days before the date of need if insufficient U.S. workers are available; 6) removed the requirement that employers obtain physical interview space in remote areas where U.S. workers are recruited for the purpose of interviews; and 7) allows employers to provide rebuttal evidence in response to a notice of revocation, prior to having to file a formal appeal.

- Establish a cumbersome, lengthy and costly labor certification application process and onerous enforcement provisions that were justified by the simplified attestation process in the Bush regulations but not the new certification process. The rule will have an especially negative effect on small businesses;
- Retain the 60-75 day recruitment and filing period in advance of the date of need that makes anticipation of labor needs difficult and which fails to provide a realistic picture of the availability of recruited domestic workers during that period;
- Eliminate the responsibility of the State Workforce Agencies (SWA) to verify the work authorization of their referrals, resulting in referral of unauthorized workers, leaving employers vulnerable if they are later audited by Immigration and Customs Enforcement;
- Eliminate the ability of H-2A workers to perform limited incidental agricultural work outside of the job description without violating program terms and subjecting employers to potential debarment if incidental work is performed;
- Establish an unprecedented and overly broad definition of corresponding employment, the literal terms of which will require that all U.S. workers in an employer's workforce be provided payment of the elevated wage rates of the H-2A program, as all H-2A program benefits, including free housing and in-bound and out-bound transportation;
- Reinstate the AEWL from the 1989 regulations with adverse modifications, including the unprecedented requirement to increase wages if the prevailing wage rate increases during the contract period;
- Replaces the longstanding definition of strike and lockout with an unprecedented definition that allows two persons declaring themselves on strike or locked to block access to any H-2A workers;
- Create ambiguity as to when H-2A workers must be given disclosure of the job order or contract in a foreign country;
- Imposes a new Fair Labor Standards Act requirement, never previously noticed to the public, that transportation, subsistence and visa and related border crossing fees paid by the employee coming to work for the employer cannot reduce the first week's wages below the minimum wage and which conflicts with DOL's longstanding rule requiring such reimbursement after 50% of the contract period is completed; and
- Retain virtually unchanged the punitive enforcement provisions, including concurrent debarment authority for WHD and ETA, and elevated civil money penalties.

EFFECTIVE DATE AND IMPLEMENTATION TIMEFRAMES

While the regulations do not provide any transition period guidance, DOL representatives have provided the following implementation timeframes at the three public briefings they have conducted at various locations in the U.S. during the past week. The implementation dates are expected to be posted in the near future at DOL's website, along with slides explaining the new regulatory requirements. The effective date and implementation timeframes have been explained as follows:

- Both the ETA and WHD regulations take effect on March 15, 2010;
- Employers who already filed with DOL will be processed in accordance with the 2008 Final Rule's transition procedures;
- Employers who file with DOL before March 15, 2010 with a date of need before June 1, 2010, must comply with the 2008 Final Rule's transition procedures;
- Employers who file with DOL on or after March 15, 2010, with a date of need before June 1, 2010 will be processed in accordance with the 2010 Final Rule's emergency procedures set forth at 20 C.F.R. § 655.134; and
- Employers with a date of need on or after June 1, 2010 will file under the 2010 Final Rule in accordance with normal procedures.

SUMMARY OF TIMEFRAMES FOR OBTAINING H-2A WORKERS UNDER FINAL 2010 REGULATIONS AFTER TRANSITION PERIOD⁴

60-75 days from date of need: Employer starts process by submitting job order for clearance.

60-75 days from date of need: SWA clears job order and employer begins accepting referrals.

45-75 days from date of need: Employer accepts referrals, conducts interviews and begins to compile recruitment report.

45 days from date of need: Employer files application for labor certification.

38 to 44 from date of need: Employer receives instructions from the Certifying Officer; SWA begins interstate recruitment; employer continues positive recruitment until H-2A

⁴ 74 Fed. Reg. 45909 (Sept. 4, 2009).

workers depart for employer's worksite for the first date of need; and employer continues to compile recruitment report.

50 percent of contract period (past date of need): Employer continues to accept referral U.S. worker applicants.

KEY H-2A PROGRAM DEFINITIONS § 655.103(b)

Following is a discussion of some of the key definitions that govern the H-2A program:

Agent. The term agent is defined the same as in the proposed regulations. An agent can be a legal entity or person, an association of agricultural employers or an attorney for an association that is authorized by an employer to assist with the labor certification. An agent is not an employer or joint employer. Agent status is discussed more fully below in the section on application filing procedures.

Agricultural Association. The definition is limited to associations that represent fixed-site agricultural employers that are incorporated or qualified under applicable state law and that solicit, hire, employ, furnish, house or transport workers subject to the H-2A program. The association can be an agent or sole or joint employer.

Area of Intended Employment. This term is defined as the geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance because of varying factual circumstances involved with different areas. This definition is important to the discussion of the term "corresponding employment" below.

Agricultural Labor or Services. This definition is critical in determining whether the work for which certification is sought qualifies as agricultural for purposes of the H-2A program. The final rule differs greatly from the 2008 Bush rule and failure to understand the differences can lead to serious compliance problems discussed more fully below.

The rule states that activities will qualify as agricultural labor under the H-2A program if they meet one of four definitions: 1) the Fair Labor Standards Act (FLSA); 2) the Internal Revenue Code (IRC); 3) the pressing of apples for cider on a farm; or 4) logging employment. If an activity meets one of these definitions, even though it is excluded from another, it qualifies as agriculture for purposes of the H-2A program. Following is a discussion of some of the critical parts of agricultural labor or services definition, including major changes made in the final rule that differ from the Bush rule.

Packing and processing work on a farm. The IRC definition allows the packing and processing of a crop by a farmer in a packing shed on a farm to qualify as agriculture, as long as the farmer grows more than 50 percent of the crop being packed or processed. By contrast, the FLSA removes agricultural status if a farmer's workers handle any commodity not produced by the farmer. Under the final rule, workers meeting the IRC definition would qualify for H-2A status even though they would be excluded under the FLSA. The final Obama rule

eliminates the provision in the Bush rule that would allow a farmer to use H-2A workers in a packing operation, regardless of whether the FLSA or IRC agricultural definitions were met, as long as no H-2B workers were used in the same operation. Under the final rule, H-2A workers cannot be used unless the work qualifies as agricultural. Thus, they could be used in a packing shed only where 50 percent or less of the crop packed was produced by other farmers.

Compliance Alert. While the packing of the crop of 50 percent or less of the crop of other farmers allows the workers to qualify for H-2A status under IRC, the packing work does not meet the FLSA definition of agriculture for purposes of the agricultural overtime exemption. Thus, those H-2A packing house workers would be entitled to overtime for all hours worked over 40 in a week.

Christmas tree production. Prior to the Bush rule, DOL classified Christmas tree production as non-agricultural work under the FLSA. The IRC definition treated such production as agriculture. Thus, there is no question that it qualifies for H-2A status. This is confirmed in the preamble of the final rule.⁵ What is less clear from the final rule is the status of Christmas tree production for purposes of the agricultural exemption from overtime under the FLSA. The Bush H-2A rule was accompanied by a simultaneous rule classifying Christmas tree status as agriculture for purposes of the FLSA.

Compliance Alert. The Obama DOL tried to rescind the Bush FLSA Christmas tree rule, but it was enjoined by the federal court in North Carolina. Thus, the current position of DOL on Christmas tree status under the FLSA is unclear based on the final H-2A rule. The preamble comments on the final rule when discussing Christmas tree production acknowledge the FLSA changes in the Bush rule and do not repudiate them. A DOL spokesman at the San Diego briefing stated that the Bush FLSA rule applies and that Christmas tree production on farms or plantations, as distinct from trees cut in the wild, is agriculture under the FLSA. This means that it is exempt from the payment of overtime.

Incidental Work. The final rule eliminates the Bush rule that allowed incidental work outside of the H-2A job opportunity.⁶ Incidental agricultural work was defined as that which is not more than 20 percent of the work activities approved in the application. The 2009 Obama preamble comments regarding the elimination of the incidental work provision were confusing and contradictory. They argued that the rule was superfluous because incidental work is inherent in the secondary definition of agriculture under the FLSA. It implied that employers may employ H-2A workers and U.S. workers in corresponding employment in incidental work even if it is not described in the job order.⁷ Notwithstanding the implication in the proposed rule that incidental employment was permitted, the proposed enforcement provisions were clear that an employer could be debarred under the 2009 proposal if the H-2A worker was employed “in an activity/activities not listed in the job order.”⁸ Thus, the proposed regulation was internally inconsistent and employers would have relied on it to great detriment.

⁵ 75 Fed. Reg. 6888 (Feb. 12, 2012).

⁶ § 655.100(d)(1)(vi) (Dec. 18, 2008).

⁷ 74 Fed. Reg. 45910 (Sept. 4, 2009).

⁸ § 655.182(d)(vii) (Sept. 4, 2009).

The preamble to the final rule eliminates much of the ambiguity. It affirms that work within the secondary definition of agriculture meets the definitional requirements to qualify for agricultural status under the H-2A program. Thus, for example, loading trucks on a farm to ship crops grown on a farm, as well as maintenance of farm equipment and buildings, would qualify within the secondary definition of agriculture. But it makes a clear distinction between secondary agricultural activities and incidental work that is outside of the H-2A occupation as defined in the job order and labor certification application. The preamble comments are clear that work that is outside of the H-2A job opportunity and was not subject to advertising and recruitment is impermissible and subjects the employer to possible debarment. NCAE commented that the proposed enforcement provision that would have allowed the performance of any incidental work outside of the H-2A job opportunity to subject the employer to debarment was extreme. DOL responded by stating:

However, the Department does not intend to debar an employer whose H-2A workers perform an insubstantial amount of agricultural work not listed in the Application. In exercising our enforcement discretion when an employer has worked an H-2A worker outside the scope of the activities listed on the job order due to unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting, the Department will consider the employer's explanation, so long as the activities are within the scope of H-2A agriculture, have been occasional or sporadic, and the time spent in total is not substantial.⁹

Compliance Alert. While DOL has provided above a very narrow exception to its strict enforcement posture with respect to incidental work, work in incidental employment is extremely risky, given the fact that by doing so the employer exposes U.S. workers employed in incidental employment to potential H-2A wages and benefits under the concept of “corresponding employment” discussed below.

Reforestation and Pine Straw Activities. The final rule removes reforestation and pine straw activities from the definition of agricultural labor or services as was proposed. NCAE commented that there is no legal justification for including these activities and apparently, after the public comment period, DOL agreed.

Corresponding Employment. The final rule eliminates the 2008 Bush definition of corresponding employment and broadens the longstanding 1987 definition¹⁰ that preceded it.¹¹ It adopts an extremely expansive definition that, if literally interpreted, could routinely entitle an entire agricultural workforce to H-2A wages and benefits. The definition reads as follows:

⁹ 75 Fed. Reg. 6889 (Feb. 12, 2010).

¹⁰ § 655.103(b) (June 1, 1987).

¹¹ The repealed Bush regulations revised the definition of corresponding employment to clarify that it included only U.S. workers who are newly hired by employers participating in the H-2A program. Under the Bush rule, workers who were employed in the occupation prior to H-2A workers being employed in the same occupation would not be entitled to the wages, housing and transportation benefits afforded to the H-2A workers. Only those workers hired on or after the beginning of the contract period would be afforded such wages and benefits. § 501.0; 73 Fed. Reg. 77194-95 (Dec 18, 2008).

The employment of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification **in any work included in the job order, or in any agricultural work performed by the H-2A workers.** To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof. (Emphasis added).

DOL claims that the above definition is a return to the 1987 definition of corresponding employment.¹² It is not. The final rule is much broader. By comparison, the 1987 rule reads:

These regulations are applicable to the employment of other workers hired by employers of H-2A workers **in the occupations** and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification, including any extension thereof.¹³ (Emphasis added).

It is clear that the 1987 rule limits corresponding work to that which is included in the occupations defined in the job order. Thus, for example, if a job order is accepted that defines the H-2A occupation as one that includes supervisory work involving harvesting and packing activities and that the supervisor will perform some harvesting and packing as a part of the job, corresponding employment would be limited to that job description. By contrast, the final 2010 rule would place in corresponding employment “any work” in the job order or “any agricultural work performed by the H-2A workers.” Thus, in this example under the 2010 final rule, any U.S. worker performing any harvesting or packing would be considered to be in corresponding employment, regardless of the fact that the accepted job order narrowed the position to supervisory work that included harvesting and shipping. The 1987 regulation distinguishes between the occupations set forth in the job order, and any work included in the job order or performed by H-2A workers.

In its preamble comments, DOL suggests that its rule does not require every worker on the farm be paid the H-2A required wage, yet its explanation does not eliminate the literal reading of the regulatory language that suggests otherwise.¹⁴ The only example provided in the preamble suggests that the addition of the language “any agricultural work performed by H-2A workers” was intended to address the problem of incidental employment, where H-2A workers perform work outside of the job order or the area of intended employment. This is a very different problem than the one described above where any work performed by U.S. workers that also is performed by H-2A workers, in addition to unique H-2A functions set forth in the job order, qualifies as corresponding employment. The DOL example confers corresponding employment on U.S. workers whose jobs H-2A workers perform outside of the job order, which is not unreasonable if such work is substantial.

When asked how the broad definition of the term “corresponding employment” would apply to the above supervisory example, a DOL spokesperson at the San Diego briefing did not

¹² 75 Fed. Reg. 6885 (Feb.12, 2010).

¹³ 29 C.F.R. § 501.0 (June 1, 1987).

¹⁴ 75 Fed. Reg. 6885 (Feb. 12, 2010).

address it and simply stated that the purpose of the revised rule was to address the problem of incidental employment outside of the job order or area of intended employment.

The final rule eliminates the limitation to newly hired U.S. workers in the 2008 rule and applies to any non-H-2A worker working in any work specified in the job order or any other work performed by the H-2A worker, as long as the work was performed during the validity of the job order. Any non-H-2A workers hired during the recruitment period as part of the H-2A certification process, and non-H-2A workers already working for the employer, would be included within the definition.¹⁵

Compliance Alert. This definition is extremely problematic. If applied as literally written, DOL could seek to impose corresponding employment upon most farm jobs in an agricultural workforce. The resulting costs would be prohibitive, especially if not anticipated by the employer. DOL has been extremely aggressive in seeking astronomical back wage payments from employers during the past year based on broad interpretations of the concept of corresponding employment. There are reports that some investigators are trying to apply the new definition retroactively, even though it does not take effect until March 15, 2010.

Employers must be extremely careful in writing job descriptions in the ETA-790 and labor certification application so that the job as described appears distinct from the performance of basic farm labor tasks. While this may not overcome a literal reading of the new definition of “corresponding employment” and an aggressive enforcement posture, hopefully it will enable the employer to argue the unique nature of the job as defined in the job order is based on the narrower definition in the 1987 rule that DOL claims that it is reinstating. Meanwhile, employer representatives should pursue further written clarification and limitations from DOL of this onerous rule that could cripple H-2A program usage.

Also, as noted above with respect to incidental employment, aside from any debarment risks, employers should avoid at all costs employing workers outside of the job description and area of employment, especially if they employ a sizeable number of U.S. workers performing the incidental work in question. DOL has made it clear in the preamble and in its recent briefings that it will aggressively seek H-2A wages and benefits for U.S. workers in these circumstances.

Finally, the preamble discussion of “corresponding employment” clarifies that DOL will seek joint employment liability for workers in corresponding employment from each employer meeting the definition of joint employment under the regulations. It refused to extend joint employment liability for fixed-site agricultural employers using an H-2ALC labor contractor in all instances, rather, it stated that it would rely upon its joint employment definition in the regulations to make such a determination.¹⁶

Employee. This term is defined in the final rule the same as in the 2008 rule. The definition relies upon the common law of agency and looks at such factors as the hiring party’s right to control the manner and means by which the work is done, skill required, source of tools,

¹⁵ 74 Fed. Reg. 45911 (Sept. 4, 2009).

¹⁶ 75 Fed. Reg. 6886 (Feb. 12, 2010).

location of the work, and the hiring party's discretion over when and how long to work and whether it is part of the regular work of the hiring party.

Employer. The final definition is the same as that proposed. An employer is any entity that has a place of business in the U.S. and a means by which it may be contacted, and has an employer relationship with respect to an H-2A worker or a worker in corresponding employment, such as the ability to hire, pay, fire, supervise or otherwise control the work of the employee.

Joint Employment. The final definition does not adopt the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) definition of joint employment. It is defined as where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker. Each employer in a joint employment relationship to a worker is considered to be the joint employer of that worker. The definition of the term necessarily requires consideration of the terms "employer" and "employee" defined above.

Compliance Alert. As discussed in this memo with regard to corresponding employment and H-2ALC labor contractors, it will be important for fixed-site employers using H-2ALCs to ensure that they maintain sufficient separation from the H-2ALC so as to avoid a finding of a joint employment relationship. A finding of joint employment could result in substantial unanticipated liability if the H-2ALC were subject to back wage or civil money penalty demands as a result of providing H-2A workers to a fixed-site employer. Careful attention should be paid to the definitions above of the terms of "employee" and "employer" that help define whether a joint employment relationship exists. Factors such as the right to control the work, ability to hire, fire and control over how long the work is performed and who provides the tools should be taken into consideration.

Temporary or Seasonal in Nature. The final rule removes the MSPA definition of temporary and seasonal and replaces it with the definition issued by the Department of Homeland Security (DHS) as part of its 2008 rules on the H-2A program.¹⁷ The 1987 and 2008 rules incorporated the MSPA definition of temporary or seasonal work, for purposes of determining whether a particular occupation qualified for the H-2A program. While the MSPA definition is very broad, there is a body of court precedent that provides guidance to its scope.

The final definition of "seasonal nature" includes work tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing activities. As with any proposed new definition, there is a legitimate concern as to how it would be interpreted and applied. For example, how will DOL define the term "far above" for purposes of determining whether the labor levels would qualify as seasonal? An employer may only need to hire one or two extra workers for the season. Would that number qualify as "far above"? The preamble comments on the final definition do not address this issue.

¹⁷ See, 8 C.F.R. §214.2(h)(5)(iv)(A).

The final definition of “temporary nature” is stated as where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year. Again, this is taken from the DHS regulations finalized in December 2008.

The final rule does not include the dairy industry in the definition of “temporary.” DOL concluded, after receiving extensive comments favoring the inclusion of dairy in the definition that the dairy industry and milk production are year-round activities and, as such, there is no legal authority or legislative precedent to classify them as temporary. Shepherders, included within the definition, were distinguished because their legislative inclusion was implicitly ratified in the Immigration Reform and Control Act.¹⁸

JOB ORDERS §655.121

An employer must initiate the process of certification 60 to 75 days in advance of the date of need by filing an Agricultural and Food Processing Clearance Order (Form ETA-790) with the SWA in the area of intended employment.¹⁹ If the job opportunity is located in more than one state within the same area of intended employment, the employer can submit the job order to any one of the SWAs with jurisdiction over the job sites.²⁰ A new provision was added to the final rule that states that when a job order references an area of intended employment which falls within the jurisdiction of more than one SWA, the originating SWA must forward a copy of the approved job order to the SWAs serving the area of intended employment.²¹

Compliance Alert. WHD investigators are concerned about employers employing H-2A workers outside of the area of intended employment set forth in the job order. Based on comments by a DOL representative at the San Diego briefing session conducted after the issuance of the final regulations, DOL will scrutinize whether employers employed workers outside of the area of intended employment and, if they determine that they have, they will consider all workers employed outside the area of intended employment to be in corresponding employment and demand that they be afforded the same wages and benefits afforded to H-2A workers. This also could be a potential basis for debarment.

Resolution of Disputes with the SWA. DOL responded to the concerns expressed by NCAE regarding inconsistent standards being imposed by different SWAs with regard to the contents of job orders. The final rule sets forth clear timeframes for the resolution of deficiencies in the job order.²² The SWA must notify the employer of any deficiencies within 7 calendar days after submission. The employer must respond within 5 calendar days and the SWA in turn must reply to the employer’s response within 3 calendar days. If after these responses a dispute still remains, the employer may file an Application for Temporary employment Certification pursuant to the emergency filing procedures set forth in § 655.134

¹⁸ 75 Fed. Reg. 6890-91 (Feb. 12, 2010).

¹⁹ § 655.121 (Feb. 12, 2010).

²⁰ § 655.135(d) (Feb. 12, 2010).

²¹ § 655.121(c) (Feb. 12, 2010).

²² § 655.121(b) (Feb. 12, 2010).

The employer must file a statement describing the nature of the dispute with the SWA and demonstrate its compliance with the requirements under this section. It also may use the emergency procedures if the SWA doesn't respond in a timely manner to the employer's response to any deficiencies. The certifying officer (CO) may direct the SWA to place the job order into the intrastate clearance system and otherwise process the application or issue a notice of deficiency and direct the employer to modify the job order.

50 Percent Rule. The order is placed in the intrastate clearance system and retained on file with the SWA until 50 percent of the work contract period is completed, as contrasted to the 2008 rule which would have limited the order until 30 days after the date of need.

DOL responded to criticism of the long recruitment period as unrealistic given the unpredictability of labor needs 60 to 75 days in advance of the date of need. It responded by retaining the long recruitment period and stating that it provides employers an opportunity to amend their applications to request additional workers prior to the issuance of a final labor certification.²³

Housing Inspection. A request for inspection of housing must be filed at the same time as the job order and the inspection must be completed prior to the issuance of a labor certification.²⁴ Under the 2008 regulations, if the SWA did not make an inspection prior to the certifying officer issuing certification, certification still could be issued, as long as an inspection was made prior to or during occupancy.²⁵ The 2008 provision has been eliminated.

THE WAGE RATE OFFERED IN THE JOB ORDER § 655.120²⁶

The required wage rate must be placed in the job order that provides the basis for an employer's pre-filing recruitment efforts.²⁷ The final rule restores the adverse effect wage rate (AEWR) implemented in 1989 with some modifications, which are discussed more fully in the following section on the contents of job offers. The OES wage rates and the four wage levels which accompanied them are repealed in the final rule. DOL published new AEWRs on February 18, 2010 that take effect on March 15, 2010. To the extent that an employer is paying an hourly wage, the one benefit of the restoration of the AEWR is that it makes the employer's job of finding the correct wage for the job order simpler because it does not have to worry about the proper wage level and the county to county variations in the hourly wage rate.

²³ §655.121(e)(2); 75 Fed. Reg. 6902 (Feb. 12, 2010).

²⁴ 74 Fed. Reg. 45908 (Sept. 4, 2009).

²⁵ § 655.104(b)(4) (Dec. 18, 2008).

²⁶ A major component of the 2008 regulation was the redefinition of the term "adverse effect wage" (AEWR) that been in effect since 1989. The 2008 rule abandoned the use of the traditional U.S. Department of Agriculture (USDA) Farm Labor Survey data that annually had been used by DOL to average all nonsupervisory field and livestock worker wages, generally on a multi-state basis. This wage calculation had been highly criticized by agricultural employers as non-market based because it did not accurately reflect the wage for the specific occupation in the area of intended employment and often resulted in inflated wages rates that employers could not afford to pay and make a profit. The 2008 rule replaced the USDA survey data with Bureau of Labor Statistic OES agricultural data that provided wage information on a more localized basis. It also included four experience levels that were factored into the wage rate for the occupation in the area of employment.

²⁷ § 655.120 (Feb. 12, 2010).

CONTENTS OF JOB ORDERS § 655.122

The employer's job offer must address each of the following issues:

Prohibition Against Preferential Treatment of Aliens. This provision requires that U.S. workers be offered the same benefits, wages and working conditions as H-2A workers. This standard provision, intended to protect U.S. workers from adverse effects, was expanded in the 2008 proposal to also state that H-2A workers must receive at least the same minimum level of benefits, wages and working conditions that are being offered to U.S. workers.²⁸ This language was retained in the final rule. The language of the rule can be read to mean that if an employer pays some U.S. workers in corresponding employment a higher wage rate than the AEWR because of experience or other factors, the H-2A workers could not be paid less than the U.S. workers, even though the mandated AEWR was less.

Compliance Alert. DOL addresses the concern expressed during public comment period that the rule can be read to either force employers to reduce wages paid to U.S. workers in corresponding employment that are higher than the AEWR to the level paid to H-2A workers, or alternatively, increase all H-2A workers and U.S. workers in corresponding employment to the level of the higher paid U.S. worker. Both the preamble comments to the final rule and comments made by DOL officials at the DOL briefing session clarify that the rule does not preclude an employer from providing additional wages and benefits to U.S. workers that are not being provided to H-2A workers and other workers in corresponding employer, nor does it require that all H-2A workers and corresponding U.S. workers be elevated to the level of the higher paid U.S. worker.²⁹

Job Qualifications and Requirements. Under the final rule, the CO or SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.³⁰ DOL will compare the qualifications in the job order to the normal and accepted job qualifications of non-H-2A employers in the same and comparable occupations and crops.³¹

Minimum Benefits, Wages, and Working Conditions. The job offer must offer all of the wages, benefits and working conditions that follow:³²

Housing. The final regulations on housing are generally similar to the Bush regulations, except for the timing of the inspection. Employers must request housing inspections at the time they file their job orders and must obtain a certificate of approval before they can obtain a labor certification. They are allowed conditional access to the interstate clearance system pending their inspection or while they correct any deficiencies noted during the inspection.

²⁸ § 655.122(a) (Feb. 12, 2010).

²⁹ 75 Fed. Reg. 6907 (Feb.12, 2010).

³⁰ §655.122(b) (Feb. 12, 2010).

³¹ 75 Fed. Reg. 6907 (Feb. 12, 2010).

³² § 655.122(c) (Feb. 12, 2010).

Employers are allowed to substitute housing if it becomes available for reasons beyond the employer's control. Public accommodation or rental housing may be substituted, as long as the employer provides evidence that the housing meets applicable local, state or federal standards and the SWA is given written notice of the substitution. DOL makes clear that it cannot impose the strictest housing standard on public accommodation housing. Such housing need only meet local standards if they exist, if not then state standards, and federal standards only if there are no others.³³ If upon inspection by the SWA deficiencies in such housing are found, the employer must be given notice and must cure them, otherwise it will have its application denied or revoked.³⁴ DOL indicates that it will continue to exercise discretion with respect to allowing employers a reasonable opportunity to correct housing safety and health violations before imposing sanctions.³⁵

The final regulations will continue to provide standards for housing provided to sheepherders and the range production of livestock.³⁶ At the DOL San Diego briefing session on the new regulations, it was indicated the sheepherder guidelines are being updated and expected to be released in March 2010.

Compliance Alert. Housing must be provided free of cost to both H-2A employees and U.S. workers in corresponding employment. Often, U.S. workers are local workers who do not need housing. This is common in border crossing areas. On occasion, H-2A workers do not want to reside in employer-provided housing and want to obtain housing on their own. Employers should consider having U.S. workers in corresponding employment and H-2A workers declining housing to sign a form in the language the worker understands that indicates that free housing was offered and the worker declined it. If DOL concludes that corresponding workers were not offered free housing, it can seek back pay for the reasonable value of housing. Documentation is helpful in these circumstances.

Workers' Compensation. Employers must provide workers' compensation insurance coverage in compliance with state law.³⁷ The additional requirement set forth in the proposed rule was adopted that requires employers to provide the CO with proof of coverage, including the name of the carrier, the insurance policy number and proof that the coverage is in effect as of the date of need.³⁸ At the San Diego briefing session, a DOL official suggested that if a worker's compensation policy (as well as a FLC registration certificate) is going to expire during the contract period, it is helpful to include with the job order and application a letter indicating that renewal of the policy and/or FLC registration will be obtained prior to expiration.

Transportation and Daily Subsistence to the Place of Employment. The final rule retains the long-standing requirement that the employer reimburse the in-bound transportation and housing costs to the H-2A employee once he/she completes 50 percent of the contract work period.³⁹ The final rule adds two significant changes. First, it eliminates the language in the

³³ 75 Fed. Reg. 6909 (Feb. 12, 2010).

³⁴ § 655.122(d)(6) (Feb. 12, 2010).

³⁵ 75 Fed. Reg. 6910 (Feb. 12, 2010).

³⁶ § 655.122(d)(2) (Feb. 12, 2010).

³⁷ § 655.122(e) (Feb. 12, 2010).

³⁸ 75 Fed. Reg. 6910 (Feb. 12, 2010).

³⁹ § 655.121(h)(1) (Feb. 12, 2010).

Bush rule that stated the employer need only reimburse inbound transportation costs from the U.S. consulate to the employer's worksite. Instead, the employer must reimburse transportation from the place from which the worker has come to work for the employer whether in the U.S. or abroad to the place of employment. The preamble comments clarify that the place from which the work has come is not necessarily his/her home but rather the place from where the worker was recruited.⁴⁰

The final rule also adds ambiguous language stating the FLSA requirements regarding the payment of wages apply independently of the H-2A reimbursement requirements. DOL does not directly state in any of its final 2010 H-2A rules that the principle of the *Arriaga* decision applies to inbound transportation of H-2A workers.⁴¹ One has to read the preamble comments related to permissible deductions (§ 655.122(p)) carefully to understand that DOL's position is as follows:

“Therefore, an H-2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to the employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage.”⁴²

Thus, DOL, through preamble comments to H-2A regulations, seeks to impose a newly pronounced requirement related to *de facto* transportation and subsistence cost deductions under the FLSA, rather than directly doing so through a new FLSA regulation that was subject to public notice and comment pursuant to Administrative Procedure Act requirements.

The final rule does not address specifically whether the application of the *Arriaga* holding to transportation, subsistence and visa and related costs means these items cannot result in deductions below the federal minimum wage or the minimum wage set forth for participants in the H-2A program, which is the higher of the AEW, prevailing wage or piece rate, federal or state minimum wage or applicable collective bargaining wage. A DOL representative at the San Diego briefing session indicates that *Arriaga* only will apply to the federal minimum wage. The preamble comments also make this clarification.⁴³

Compliance Alert. Neither the final rule nor the related preamble comments provide any guidance as to when the new transportation reimbursement obligation is effective. Because the FLSA has not been amended, it is unclear whether it is DOL's position that *Arriaga* has always been the law and that employers which have had labor certifications approved under

⁴⁰ 75 Fed. Reg. 6912 (Feb. 12, 2010).

⁴¹ The *Arriaga* decision treated the inbound transportation costs of H-2A workers from their country to the U.S. worksite as a *de facto* deduction from the first week's wages, which constituted a minimum wage violation if the deduction brought the first week's wages below the minimum wage. The preamble to the Bush regulations repudiated the *Arriaga* decision and stated that such costs were not deductions for the benefit of the employer. Secretary of Labor Solis, in her attempt to suspend the 2008 regulations, also withdrew the accompanying preamble language rejecting *Arriaga*. The U.S. District Court in North Carolina that enjoined the suspension of the 2008 rules was asked by the Secretary whether its injunction also applies to the *Arriaga* issue but the court has not addressed the issue. See *Arriaga v. Florida Pac. Farms*, 305 F.3d 1228 (11th Cir. 2002); but see *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274 (2009).

⁴² 75 Fed. Reg. 6915 (Feb. 12, 2010).

⁴³ 75 Fed. Reg. 6516 (Feb. 12, 2010).

the Bush rule and will have workers departing from abroad prior to the March 15 effective date of the new rule are required to reimburse transportation to avoid minimum wage violations. It is similarly unclear whether the new requirement only takes effect on or after March 15. At a recent DOL briefing session, a clear answer to these questions was not provided. A DOL representative simply stated that a bulletin was being prepared that will explain the FLSA obligations of those bringing in H-2A workers. The bulletin apparently will be similar to that DOL prepared last summer (WH Field Assistance Bulletin 2009-2 (August 21, 2009))to explain the application of the transportation reimbursement requirement under the FLSA for purposes of the H-2B program.

Employers have several options. They can take their chances that DOL will not enforce the requirement with respect to certifications approved under the Bush rule and only will apply it to those subject to the new rule. Even if DOL does not take enforcement steps against such employers, private attorneys may file lawsuits seeking back wages, as they have in *Arriaga* and similar cases. Employers can avoid the concerns related to any potential effective date and simply advance transportation and subsistence costs. The downside of this new policy is that workers may feel less inclined to complete the job contract if they do not have to wait until completion of 50 percent of the work contract before being reimbursed.

Employers may also consider advancing transportation and subsistence costs and then deducting the advance from payroll in amounts that do not reduce the first week's wage below the minimum wage. If an employer decides to take deductions from paychecks after advancing the transportation and subsistence it should provide workers clear written notice of that fact in the job order and job contracts given to workers. DOL takes the position that deductions that are not disclosed are not permissible.⁴⁴ Some H-2A employers address this issue by ensuring that workers work sufficient hours in the first week of work to ensure that the federal minimum wage is paid after transportation and subsistence costs borne by the worker are deducted from the first week's earnings.

The regulation also provides that when it is the prevailing practice of employers in the occupation and area of employment to provide advance transportation and subsistence, then employers must do so. One should anticipate that with the imposition of the so-called *Arriaga* rule, many employers will advance transportation costs, thus establishing a prevailing practice so that alternatives, such as expanded hours in the first pay period to cover *de facto* deductions from worker borne transportation and subsistence costs, may be effectively eliminated.

Transportation from the Place of Employment.⁴⁵ The final rule retains the requirement that if workers complete the H-2A contract, or are terminated without cause, and have no immediate subsequent employment, employers must provide or pay for the workers' transportation and subsistence costs from the employer's worksite to the place from which the worker departed to work for the employer, disregarding any intervening employment. The same applies if an H-2A worker is displaced by a U.S. worker pursuant to the 50 percent rule. The rule also requires the employer to pay the transportation and subsistence costs of the work to

⁴⁴ 75 Fed. Reg. 6916 (Feb. 12, 2010).

⁴⁵ § 655.122(h)(2) (Feb. 12, 2010).

work for a subsequent employer, unless the subsequent employer has agreed in its work contract to pay for such expenses.

Transportation Between Living Quarters and Worksite.⁴⁶ The final regulations retain the requirement that employers provide free transportation to H-2A workers and U.S. workers in corresponding employment between the housing provided or secured by the employer, including public accommodation housing, and the worksite.

Compliance Alert. As noted above regarding housing, an employer's obligation to provide housing is limited to workers who are not reasonably able to return to their permanent residence within the same day. The free transportation requirement ties into this housing obligation. If a worker refuses free employer provided housing, then the employer has no obligation to provide such worker transportation from wherever he/she resides locally to the worksite. Thus, the recommendation above that workers refusing employer provided housing sign a waiver is equally important to establish that the employer had no obligation to provide transportation to the worksite.

Safety Standards for Employer Provided Transportation.⁴⁷ The final regulations require that employers comply with all local, state and federal laws, including MSPA, that govern vehicle safety, licensure and insurance requirements for all employer transportation. It expands the requirement from that of the Bush rule which was only applicable to employer provided transportation between the living quarters and the worksite. DOL rejected arguments that it was improperly extending MSPA requirements to H-2A workers, contending that it had the independent authority to do so under its H-2A regulatory authority. As a practical matter, if an employer transports U.S. workers it is subject to MSPA vehicle safety requirements and such vehicles likely also would be used to transport H-2A workers. It would have to meet such standards in any event.

Three-fourths Guarantee.⁴⁸ The obligation of the employer to guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the work days of the total period of the contract is essentially the same as the Bush and 1987 rules. The primary change from the proposed rule to the final is that the final rule clarifies that if a worker is paid on a piece rate basis, the three quarters guarantee is based on the higher of the average hourly piece rate or the required hourly wage.

Compliance Alert. Accurate recordkeeping is critical for purposes of proving satisfaction of the guarantee. Employers may count toward satisfaction of the guarantee any hours that a worker fails to work up to a maximum number of hours specified in the work contract for a day, as well as all hours that a worker voluntarily works over eight hours in a day or on the Sabbath or a holiday.⁴⁹ Employers are required to keep such records as part of their earnings records obligations.⁵⁰ A lesser known fact is that employers are required to include on

⁴⁶ § 655.122(h)(3) (Feb. 12, 2010).

⁴⁷ § 655.122(h)(4) (Feb. 12, 2010).

⁴⁸ § 655.122(i) (Feb. 12, 2010).

⁴⁹ § 655.122(i)(2) (Feb. 12, 2010).

⁵⁰ § 655.122(j)(1) (Feb. 12, 2010).

the hours and earnings payroll statements they provide employees information that shows the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee), separate from any hours offered over and above the guarantee.⁵¹ Some employers have indicated that standard computer payroll software does not afford the ability to print out such information on paystubs, making this a practical compliance challenge.

Earnings Records.⁵² The final rule is the same as the Bush rule. The major positive change in the final rule from the proposed rule is that DOL adopted NCAE's recommendation that the record retention requirement be 3 years, rather than the 5 years, as was proposed. This makes employer recordkeeping practices consistent, as now the H-2A record retention requirements are the same as the FLSA and MSPA.

Hours and Earnings Statements.⁵³ The final rule is similar to the Bush rule, except that employee pay stubs must also provide the beginning and ending date of the pay period and the employer's name, address and Federal Employment Identification Number. These additions impose the more extensive MSPA requirements that are not required under the FLSA.

Rates of Pay.⁵⁴ As discussed extensively above regarding the Contents of Job Orders, the final rule requires an employer to offer the AEWWR similar to that set forth in 1989 regulations. The rule requires the payment of the highest of the hourly AEWWR, the prevailing hourly wage, the prevailing piece rate wage, the agreed upon collective bargaining rate, or the federal or state minimum wage in effect at the time the work is performed for every hour or portion thereof worked during the pay period. As in the past, the appropriate hourly rate sets the payment floor if workers are being paid on a piece rate basis. Piece rates must be no less than the piece rate prevailing for the activity in the area of intended employment.

The primary new addition in the final regulations is the inclusion of a collective bargaining rate, which was not proposed. There is no explanation as to whether it is a collective bargaining rate for the employer's own workers in the H-2A occupation or a prevailing collective bargaining rate for the occupation and area of employment. At the San Diego DOL briefing on the new regulations, a DOL spokesperson clarified that the collective bargaining rate is limited to that provided by the employer in the occupation. DOL rejected recommendations in the public comments that any collective bargaining rate should be acceptable as the wage rate even if it were lower than the AEWWR or other rates, stating that the collective bargaining wage rate would be required only if it were the highest wage.⁵⁵

The final rule also adds a new requirement absent in the 1989 regulations that requires an employer to increase the wage rate offered in the job order if DOL announces during the work contract period that the prevailing hourly or piece rate increased and is higher than the AEWWR, the collective bargaining rate or federal or state minimum wage.⁵⁶ A DOL representative at the

⁵¹ § 655.11(k)(3) (Feb. 12, 2010).

⁵² § 655.122(j) (Feb. 12, 2020).

⁵³ § 655.122(k) (Feb. 12, 2010).

⁵⁴ § 655.122(l) (Feb. 12, 2010).

⁵⁵ 75 Fed. Reg. 6901 (Feb. 12, 2010).

⁵⁶ § 655.120(b); 74 Fed. Reg. 45913 (Sept. 4, 2009).

San Diego briefing indicated that DOL will issue employers notices of any increases during the contract period. In these instances, DOL states that it will allow employers time to comply with newly announced wage rate increases. A DOL representative at the San Diego briefing on the regulations indicated that this provision would not be applicable to current H-2A job orders accepted under the Bush regulations.

The final rule also allows an employer to set a productivity standard correlated to piece rate pay as long as it is noticed in the job offer; however, it must be approved by the Administrator of the Office of Foreign Labor Certification (OFLC) if the standard is higher than that required by the employer in 1977 or when the employer first filed an application. The rationale for this rule is that DOL wants to prohibit employers facing rising piece rate guarantees from increasing production standards unless employers can demonstrate that technological developments justify a higher production standard.⁵⁷

Frequency of Pay.⁵⁸ The final rule adds a concept from MSPA that employers must pay wages when due. Employers must pay at least twice monthly or according the prevailing practice in the area of employment, whichever is more frequent.

Abandonment of Employment or Termination for Cause.⁵⁹ The final rule requires employers to report in writing to DHS and DOL within 2 days of a worker's abandonment of employment or termination for cause. Abandonment is defined to mean a worker who fails to report to previously scheduled work for 5 consecutive days. The employer must report to DHS only if an H-2A worker abandons or is terminated from the job. The employer must report to DOL the abandonment or termination for cause of H-2A workers, as well as U.S. workers in corresponding employment. The rule states that an employer that provides the required notice will not be required to provide or pay for transportation and subsistence reimbursement or the three-fourths guarantee. While the 1987 rule had a similar notice provision, it did not define when abandonment occurred or the timeframe within which notice needed to be provided.⁶⁰

Compliance Alert. Some employers are confused with regard to this requirement, believing that it only applies to H-2A workers or only to U.S. workers referred by the SWA or who are hired as a result of the employer's positive recruitment efforts. The rule is somewhat unclear in this regard; however, DOL intends the rule to apply to all U.S. workers in corresponding employment, as well as H-2A workers.⁶¹ Employers should make sure that they give the required notice to all workers in corresponding employment, regardless of whether they were referred, responded to recruitment efforts or were gate hires, and regardless of how long they worked before they abandoned the job or were terminated.

Both the rule itself and the explanatory preamble comments are not clear as to whether DOL will seek transportation and three fourths guarantee reimbursement payments for failure to comply with the notice requirements in all instances or whether it will exercise discretion,

⁵⁷ § 655.122(l)(2)(iii) (Feb. 12, 2010).

⁵⁸ § 655.122(m) (Feb. 12, 2010).

⁵⁹ § 655.122(n) (Feb. 12, 2010).

⁶⁰ § 655.102(b)(11) (June 1, 1987).

⁶¹ 75 Fed. Reg. 6914 (Feb. 12, 2010).

depending on the circumstances. Because of the potential astronomical liability that DOL might seek for failure to provide notice to a substantial number of workers, it is prudent to establish a policy and practice of providing the required notice in a timely manner and keeping records to establish such notice if audited by DOL.

Contract Impossibility.⁶² If the services of the worker are no longer required before the end of the contract period due to fire, weather or an Act of God beyond the control of the employer, the CO, in his/her discretion, may terminate the contract. In such case the employer must fulfill the three-fourths guarantee for the time that has elapsed from the start of the contract to the time of the termination. In such a case, the employer must try to find comparable employment for the workers, consistent with immigration law. The employer also must pay for the transportation of the workers to the next employer or the place from which they were recruited, whichever the workers prefer, and reimburse any inbound transportation and subsistence costs incurred by the workers or any deductions the employer made for such purposes.

Deductions.⁶³ The final rule states that the employer's job offer must specify all deductions that will be taken from the worker's paycheck and that all deductions must be reasonable. An employer may deduct the inbound transportation and subsistence costs that it advances to a worker, as long as they are noticed in the job order, along with the fact that they will be reimbursed upon completion of 50 percent of the contract period. The final rule makes implicit reference to the *de facto* deduction issue under the FLSA that was raised in the *Arriaga* decision discussed above regarding inbound transportation. In other words, an employer may deduct its advanced transportation and subsistence costs (and also any advanced visa or border crossing and related fees), as long as the deductions do not bring the weekly wages below the federal minimum wage.⁶⁴

New language is added in the final rule that was not proposed that defines reasonable deductions.⁶⁵ Unreasonable deductions would be those that are primarily for the benefit of the employer (*Arriaga*) and reduce the week's wages below the minimum wage; undisclosed or unauthorized deductions; deductions providing a profit to the employer or affiliated persons; and kickbacks of wages to employers or affiliated persons.

Compliance Alert. It is important to notice any deductions in the job order. Failure to do so, even if the deduction is reasonable and otherwise permissible, will result in the employer having to reimburse the deduction to the employee.⁶⁶

Disclosure of the Work Contract.⁶⁷ The final rule requires that H-2A workers and U.S. workers in corresponding employment receive either a copy of the job order and approved labor certification in the language the workers understand, or a written contract that contains all the

⁶² § 655.122(o) (Feb. 12, 2010).

⁶³ § 655.122(p) (Feb. 12, 2010).

⁶⁴ 75 Fed. Reg. 6915 (Feb. 12, 2010).

⁶⁵ § 655.122(p)(2) (Feb. 12, 2010).

⁶⁶ 75 Fed. Reg. 6916 (Feb. 12, 2010).

⁶⁷ § 655.122(q) (Feb. 12, 2010).

terms in the job order and labor certification. The language requirement applies to major languages but does not require specific dialects of a language, such as Spanish. The final rule, as distinct from the Bush and 1987 rules, makes a distinction between H-2A and U.S. workers in corresponding employment with regard to when a copy of the job order or a separate written work contract must be disclosed.

H-2A workers must be given a copy of the work contract no later than the time a worker applies for a visa. While the final rule states that disclosure is required no later than the time an application for a visa is made, the preamble explanation of this rule is somewhat contradictory, indicating that the disclosure requirement, while not required during the solicitation or recruitment process, is triggered by the offer of employment.⁶⁸ The application for a visa could be made later than an offer of employment. The final rule states that U.S. workers in corresponding employment must be given a copy of the work contract or job order and labor certification no later than on the date work commences.

Compliance Alert. While the final rule is silent on the issue of an employer's obligation with regard to a modified job order, the preamble explanation of the rule states that if the original job order is later modified, then the employer must provide a copy of the modified job order to H-2A workers and U.S. workers in corresponding employment as soon as practicable.⁶⁹ Once a modified job order is accepted, the employer should take steps to ensure that the SWA distributes it. The employer also must provide the modified copy to those recruiting H-2A workers on its behalf so that it can be disclosed as required by the rule. U.S. workers in corresponding employment must receive the modified order no later than the date work begins under the contract.

The disclosure obligation assumes greater significance under the new definition of corresponding employment contained in the final rule. As discussed above, the concept of corresponding employment has been radically expanded, and could in many instances encompass all, if not most of an employer's U.S. workers. In such case, all workers in the workforce would have to be given the job order or contract, which typically are lengthy, multiple page documents. Thus, employers would have to disclose the job order to all incumbent employees, as well as those U.S. workers referred by the SWA or who seek employment in response to positive recruitment efforts. The administrative costs and burdens of this obligation are significant. Failure to do so, can result in significant civil money penalties imposed for each worker who did not receive the disclosure.

While this rule imposes disclosure obligations under the H-2A program, employers still have an independent written disclosure obligation under MSPA for migrant workers who are recruited.⁷⁰ Typically, DOL's Form WH-516 is used for this purpose and is a one page summary form that is not nearly as comprehensive as a job order. As long as the job over covers all of the terms and conditions required by MSPA as set forth on the Form WH 516, it provides adequate MSPA notice. If, however, the employer engages in positive recruitment activities outside of the SWA and interstate clearance system, such as using a farm labor contractor to find workers for

⁶⁸ 75 Fed. Reg. 6516 (Feb. 12, 2010).

⁶⁹ 75 Fed. Reg. 6916 (Feb. 12, 2010).

⁷⁰ 75 Fed. Reg. 6916 (Feb. 12, 2010).

the H-2A occupation that would not otherwise obtain a copy of the job order, the employer must ensure that MSPA compliant written disclosure of the terms and conditions of employment are provided at the time of recruitment.

APPLICATION FILING PROCEDURES FOR TEMPORARY EMPLOYMENT CERTIFICATIONS

Filing Requirements.⁷¹ All agricultural employers must file for a certification from DOL by submitting an Application for Temporary Employment Certification with the National Processing Center (NPC). An employer must file the application along with a copy of the Form ETA-790 (job order) filed with the SWA in the area of intended employment. The application must be filed no less than 45 calendar days before the employer's date of need.

Signatures.⁷² Applications must bear the original signature of the employer, and if applicable, the employer's authorized attorney or agent. Associations filing master applications as joint employers may sign on behalf of its employer members. An association filing as an agent may not sign on behalf of its members but must obtain each member's signature on each application.

Compliance Alert. Signatures on the labor certification application, Form 9141, are legally significant. Employers and H-2ALCs certify under penalty of perjury as to the conditions of employment. It is important that employers take this obligation seriously and review all of the conditions set forth in Form 9142, Appendix A-2, before signing the document. Similarly, agents and attorneys must certify under penalty of perjury that the information contained in the application is true and correct to the best of their knowledge.⁷³

Association Filing Requirements.⁷⁴ Associations may file applications as a sole employer, joint employer or agent. The association must retain documentation proving the employer or agency status of the association and be prepared to submit such documentation in response to a notice of deficiency from the CO.

Master Applications.⁷⁵

Significant limitations are placed on master applications. While both the Bush and 2010 rules allow master applications and require identification of each employer by name and address and are limited to a single date of need for all workers, the final 2010 rule limits the use of master applications to joint employer associations that are seeking workers for the same occupations and comparable work for a number of members in multiple areas of intended employment with the same date of need.⁷⁶ An improvement in the final rule is that the area of intended employment is expanded to include two contiguous states, rather than one, as was

⁷¹ § 655.130 (Feb. 12, 2010).

⁷² § 655.130(d) (Feb. 12, 2010).

⁷³ Form 9142 and Appendix A-2 can be seen at 75 Fed. Reg. 6987-95 (Feb. 12, 2010).

⁷⁴ § 655.131 (Feb. 12, 2010).

⁷⁵ § 655.131(b) (Feb. 12, 2010).

⁷⁶ § 655.131(b) (Feb. 12, 2010).

proposed. In addition, the final rule expands somewhat the scope of work permitted from that proposed by clarifying that a master application may cover the same occupations or comparable agriculture employment.⁷⁷

While the final rule and related preamble comments do not address this issue, a DOL representative at the Dallas DOL briefing indicated that while the master application must have a single date of need, that not all jobs must have the same ending date. There is implicit support in the final rule for this conclusion because the section relating to H-2A labor contractors (H-2ALC) states that H-2ALCs must provide in their applications the expected beginning and ending dates, while the master application provision only requires the beginning date.⁷⁸ It would be wise to confirm this issue before varying the ending dates of employment.

Agents.⁷⁹ An agent is a legal entity, including associations of agricultural employers or attorneys that is authorized to act on behalf of employers for labor certification purposes. Agents are not employers or joint employers. Agents are required to provide copies of their agency agreement or contract with employers or other proof of their relationship when they file applications. Moreover, if the agent is a farm labor contractor, it will be required to provide proof its registration as such under MSPA.⁸⁰

Compliance Alert. Under MSPA, a farm labor contractor (FLC) is an entity that performs farm labor contracting activities for a fee. This can include solicitation, recruitment and furnishing of migrant and seasonal U.S. workers, as well as providing housing and transportation.⁸¹ Some states require independent farm labor contractor registrations. Agents should review their activities to determine whether they fall under the MSPA definition. Distinctions should be made between simply completing job orders and labor certification applications and performing more extensive recruitment related activities. For example, if an agent files newspaper advertisements for employers, and is paid for these services, in addition to filing applications, the question arises as to whether it is performing an FLC activity.⁸² The mere filing of a job order alone that is sent to a SWA may not constitute a farm labor contracting activity. DOL recently has been seeking MSPA registrations by agents. The preamble comments by DOL provide no guidance on this issue.

As noted above, the final rule requires agents to obtain the original signatures of each employer whose application they file. In the past, agents could sign on behalf of their employer clients in a master application. The final rule prohibits this practice, except for joint employer associations. This necessarily will require agents that have traditionally filed master applications to prepare individual applications for each employer and obtain original signatures from each. This is a substantial additional administrative burden. In addition, agents must file individual advertisements for each of its members and the advertisements would have to be run by each

⁷⁷ 75. Fed. Reg. 6917 (Feb. 12, 2010).

⁷⁸ § 655.132(b) (Feb. 12, 2010).

⁷⁹ § 655.103(a) (Feb. 12, 2010).

⁸⁰ § 655.133 (Feb. 12, 2010).

⁸¹ 29 U.S.C. § 1802 (6) and (7).

⁸² The filing of a job order with a state employment service agency does not constitute recruitment for farm labor contracting purposes so as to trigger MSPA's FLC requirements. *Flores, et al. v. Rios and Gibsonburg Canning Co.*, 36 F.3d 507, 513 (6th Cir. 1994).

individual member of an agent association.⁸³ Some traditional agents are considering changing their status to joint employer associations in order to avoid this burden. This requires careful consideration of the additional risks that accompany joint employer association status, such as potential joint employer liability.

NCAE and others expressed concern during the comment period that the proposed rule would require agents and associations to divulge proprietary business information regarding their agreements with employer clients. DOL addressed these concerns in its preamble comments, indicating that agents and associations need only provide proof of status if asked by the CO. DOL suggests that if such information is provided it be marked confidential and DOL will attempt to protect it, consistent with its regulations.⁸⁴ The preamble comments states that agents and employers are not required to disclose fees charged or trade secrets or other proprietary information.⁸⁵ At the San Diego DOL briefing, a DOL spokesperson confirmed this point, indicating that while the CO may seek proof of agency or association status, it will not require information regarding fee and financial arrangements between agents and their clients and associations and their employer members. Consideration should be given to separating fee arrangements from the basic contractual agreements provided to clients and employers to avoid providing public disclosure of proprietary business information.

Farm Labor Contractors (H-2ALC).⁸⁶ H-2ALCs must be prepared to meet all the obligations of an employer, as well as the additional requirements imposed upon a labor contractor. The final regulations build upon the additional obligations imposed in the Bush regulations, and in some instances impose greater limitations. Unlike the 2008 regulations, that allowed job orders to be filed for multiple areas of intended employment,⁸⁷ the final 2010 rule limits applications filed by contractors to a single area of intended employment.

H-2ALCs, like agents and associations, must include with their application copies of the fully-executed work contracts with each fixed-site employer to which it will be providing workers. As with the case of agents and associations, the preamble comments clarify that such contracts need not provide confidential proprietary information and can be marked confidential upon submission.⁸⁸ As suggested above in the compliance alert related to agents, consideration should be given to separating contracting fees and other proprietary information from the basic work contract that the H-2ALC provides its fixed-site agricultural employer clients.

The final regulations require that the H-2ALC provide the names and location of all of the growers to whom it will be providing workers, as well as information regarding the expected beginning and ending dates of employment and the nature of the crop activities. A surety bond must be provided to ensure that the H-2ALC has the financial ability to satisfy its contract obligations under the job order. The final rule requires that the original surety bond be provided to DOL with the application, as compared to the proposed rule that only required a copy of the

⁸³ 75 Fed. Reg. 6928 (Feb. 12, 2010).

⁸⁴ 75 Fed. Reg. 6917 (Feb. 12, 2010).

⁸⁵ 75 Fed. Reg. 6920 (Feb. 12, 2010).

⁸⁶ § 655.132 (Feb. 12, 2010).

⁸⁷ § 655.106(a)(1) (Dec. 18, 2008).

⁸⁸ 75 Fed. Reg. 6919 (Feb. 12, 2010).

surety bond. DOL contends that it needs the actual bond to ensure that it has legal recourse to make a claim to the surety against the bond following a final order finding violations.⁸⁹

The final rule increases the security bond amounts required above the amounts required in the 2008 rule. Under the final rule, employers of 24 or less workers must obtain a \$5,000 bond; employers of between 25 and 49 employees must obtain a \$10,000 bond; employers of between 50 and 74 workers must obtain a bond of \$20,000; employers of between 75 and 99 workers must obtain a bond for \$50,000; and employers of 100 or more workers must obtain a bond for \$75,000. The bond is required to remain in effect for two years.⁹⁰

In addition, the final rule requires the H-2ALC to provide with its application a copy of its MSPA Farm Labor Contractor Certificate of Registration identifying all contracting activities that it will be providing. Unlike, the 2008 rule, the final rule requires that the H-2ALC provide copies of all fully executed agreements with fixed-site agricultural employers.

The final rule requires H-2ALCs to provide proof that the housing owned, controlled or secured by the fixed-site agricultural operations to which they are providing workers comply with the applicable housing standards. Similar proof must be provided with regard to the transportation safety and insurance of vehicles used to transport workers from living quarters to the worksite.

Emergency Applications.⁹¹ The final rule retains the discretion of the CO to accept an application filed less than 45 days before the date of need. An employer filing an emergency application has the burden of showing that it did not participate in the H-2A program during the prior year or other good and substantial cause, such as the substantial loss of workers due to weather-related activities or other unforeseen events. As noted above, the emergency provisions apply during the transition period of the new regulations for applications filed on or after March 15, 2010 for a date of need before June 1, 2010, which period would not otherwise permit a full 60 to 75 recruitment period prior to the June 1.

ASSURANCES AND OBLIGATIONS OF H-2A EMPLOYERS

In addition to compliance with the terms and conditions set forth in the job order, an employer filing a labor certification must promise that it will abide by the following assurances:

Non-discriminatory Hiring Practices.⁹² Employers must promise that the H-2A job opportunity will be open to any qualified U.S. workers, regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. U.S. workers who apply for the job may be rejected only for lawful, job-related reasons and that those not rejected must be hired. To demonstrate compliance with this requirement, the employer has and will continue to retain records of all hires and rejections.

⁸⁹ § 655.132(b)(3); and 75 Fed. Reg. 6919 (Feb. 12, 2010).

⁹⁰ § 20 C.F.R. § 501.9 (Feb. 12, 2010).

⁹¹ § 655.134 (Feb. 12, 2010).

⁹² § 655.135(a) (Feb. 12, 2010).

Compliance Alert. This is a critical assurance because of the focus of the regulations on the protection of U.S. workers from adverse effects from the employment of H-2A workers and the potentially severe penalties applicable for violations of this assurance. It ties in directly with the related umbrella concept of corresponding employment which defines which U.S. workers are entitled to H-2A wages and benefits and protected from exclusion from such jobs at the time or hire or by termination. It also is related to prohibition against the displacement of U.S. workers.⁹³

The recordkeeping obligations imposed by this assurance are especially critical and employers are advised to consistently document all refusals to hire and termination decisions related to all U.S. workers seeking or employed in H-2A occupations. Good recordkeeping will be critical to employers, who have the independent obligation to report to DOL any workers who abandon the job or are terminated for cause, as discussed above with regard to those provisions of the job order.

No Strike or Lockout. The final 2010 rule rejects DOL's longstanding position set forth in both the provisions of the 1987 and 2008 regulations that limited the admission of H-2A workers where the specific job opportunity for which the employer is requesting H-2A certification is vacant because the former occupant is on strike or being locked out in the course of a labor dispute.⁹⁴ Instead, it imposes a very problematical definition that states that the employer seeking certification cannot have workers currently on strike or being locked out in the course of a labor dispute.⁹⁵ The effect of this change through an extremely broad definition of the term "strike" would be to allow two or more workers who declare themselves on strike or locked out to preclude the employer from obtaining any H-2A workers.⁹⁶ Prior rules would only prohibit the admission of the number of H-2A workers that corresponded with the number of workers actually on strike or being locked out. DOL's preamble comments related to this provision fail to acknowledge that it is rejecting its longstanding rules and offer no justification for this significant change that could cripple program usage by an employer.⁹⁷

Recruitment Requirements.⁹⁸ This requirement requires the employer to accept U.S. worker referrals until 50 percent of the contract period is completed, as well as to conduct whatever positive recruitment is required by the CO. New language is added to the final rule that clarifies that unless the employer has informed the SWA in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

The 50 Percent Rule.⁹⁹ The final rule reinstates the so-called 50 percent rule that was included in the 1987 regulations but removed by the 2008 rule. Under the rule, employers have

⁹³ § 655.135(g); § 501.20(d)(iv) (Feb. 12, 2010).

⁹⁴ § 655.105(c) (Feb. 12, 2010).

⁹⁵ § 655.135(b) (Feb. 12, 2010).

⁹⁶ The definitional section of the regulations defines a "strike" as "a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement.)" § 655.103(b) (Feb. 12, 2010).

⁹⁷ 75 Fed. Reg. 6920-21 (Feb. 12, 2010).

⁹⁸ § 655.135(c) (Feb. 12, 2010).

⁹⁹ § 655.135(d) (Feb. 12, 2010).

to continue to employ U.S. workers through completion of 50 percent of the contract work period as compared to only 30 days after the date of need in the 2008 rule. The small employer exemption from the rule is retained, which only excludes those employers that did not use more than 500 man-days of labor during any calendar quarter during the preceding calendar year and that is not a member of an association that has petitioned for H-2A workers and has not associated with others seeking H-2A workers.

Comply with Applicable Laws.¹⁰⁰ The final rule requires employers to comply with all federal, state and local laws and regulations, including health and safety laws. It specifically incorporates the provisions of a new law, the Wilberforce Trafficking Victims Protection Reauthorization Act that, among other things, prohibits employers from holding or holding workers' passports, visas, or other immigration documents.¹⁰¹

This assurance makes the third reference in the regulations (in addition to inbound transportation reimbursement and deductions) to the FLSA and emphasizes, consistent with the *Arriaga* decision, that the FLSA stands independent of the H-2A regulations. The effect of this provision is to enable DOL to argue that the FLSA limitation on deductions (inbound transportation and subsistence costs of the H-2A workers) for the benefit of the employer are not superseded by the H-2A regulations and represent independent legal obligation of employers. It also allows DOL to find employers in violation of H-2A program requirements whose *de facto* deductions bring the first week's wages below the minimum wage.

Job Opportunity is Full-Time.¹⁰² The final rule expands the definition of full-time job opportunity from 30 to 35 hours a week. This increases the obligation of the employer to meet the minimum hour requirement and has the effect of increasing the number of hours for purposes of the three-fourths guarantee.

No Recent or Future Layoffs.¹⁰³ Employers may not lay off U.S. workers in H-2A occupations, except for lawful job related reasons within 60 days of the date of need, or if the employer has laid-off such workers, it has offered the job opportunity to those laid-off U.S. workers and they refused the job opportunity, were rejected for lawful job-related reasons or were hired. A new provision is added in the final rule that clarifies that a layoff for lack of work or the end of the growing season is permissible if all H-2A workers are laid off before any U.S. worker in corresponding employment.

Compliance Alert. Employers with a 10 month contract period were concerned that the 60 day layoff rule exposed them to displacement allegations because they would be seeking H-2A workers again in 60 days. While DOL attempts to address those concerns with new language stating you can lay off workers at the end of the season, as long as H-2A workers

¹⁰⁰ § 655.135(e) (Feb. 12, 2010).

¹⁰¹ Worker advocates often have complained that unscrupulous employers confiscate immigration documents to hold workers in indentured servitude. The Wilberforce law requires that H visa holders, including H-2A workers, be given a pamphlet upon admission to the U.S. that informs them upon admission to the U.S. that they may be subject to abuse by employers, advises them of their employment rights and informs them that they have the right to sue employers in the U.S. courts and to reach out to immigrant rights groups and labor organizations.

¹⁰² §655.135(f) (Feb. 12, 2010).

¹⁰³ § 655.135(g) (Feb. 12, 2010).

are laid off first, this imposes a new and important documentation obligation on employers to show during a seasonal wind down of operations that H-2A workers were let go prior to U.S. workers. In addition, the preamble comments on this section emphasize that if the employer reapplies to use the H-2A program two months later, that other parts of the regulations require that it contact the U.S. workers that it employed in the prior season.¹⁰⁴ This dovetails with this regulation, making it important during the next season that the employer recruits workers laid off in the prior season, otherwise the employer faces a potential displacement allegation.

The preamble language also provides helpful clarification regarding layoffs by a fixed-site agricultural organization that uses an H-2ALC. The preamble states that this rule does not extend the concept of joint employment to H-2ALCs and fixed-site employers at the same location for purposes of the no layoff provision, where the fixed site employer does not qualify as a joint employer. It explains that only an employer may layoff its own employees and therefore each employer is individually responsible for ensuring that it does so only for lawful job-related reasons.¹⁰⁵ The important fact here is whether or not the H-2ALC and fixed-site entity are joint employers under the definition of that term which is discussed in another section of this memorandum.

No Unfair Treatment.¹⁰⁶ This standard labor protection prohibits an employer from intimidating, threatening, restraining, coercing, blacklisting or in any manner discriminating against U.S. and H-2A workers who file a complaint, institute a legal proceeding, testify, consult with a legal services representative, or assert any right under the H-2A regulations on behalf of himself/herself and others.

Notify Workers of the Duty to Leave the U.S.¹⁰⁷ Employers are required to provide notice to H-2A workers that they must leave the U.S. at the end of the period certified by DOL or their separation from the employer, whichever is earlier, unless the H-2A workers are being supported by another employer.

Compliance Alert. As with the other notice obligations in these regulations, employers should provide a standard form informing H-2A workers in writing in the language they understand of the duty to depart, provide it to such workers at the time of departure, and place a copy in the workers' files to demonstrate compliance if the employer is audited.

Prohibition on Employees Paying Fees.¹⁰⁸ Other than requiring that workers pay for their own passports, the final rule prohibits employers and their agents from requiring workers to pay for any kind of fees, including recruitment costs, attorney fees, application fees, visa fees, border inspection fees, and other government-mandated fees. Moreover, employers are prohibited from receiving kickbacks to reimburse such costs.

¹⁰⁴ § 655.153; 75 Fed. Reg. 6923-24 (Feb. 12, 2010).

¹⁰⁵ 75 Fed. Reg. 6924 (Feb. 12, 2010).

¹⁰⁶ § 655.135(h) (Feb. 12, 2010).

¹⁰⁷ § 655.135(i) (Feb. 12, 2010).

¹⁰⁸ § 655.135(j) (Feb. 12, 2010).

Contracts with Third Parties¹⁰⁹ The final rule is very similar to the Bush rule requiring that employers contractually forbid recruiters and agents, such as foreign labor contractors, from directly or indirectly seeking compensation of any kind from a prospective H-2A worker in a foreign country. Employers must maintain copies of such written contracts, which may be sought by DOL, DHS and other federal parties.

Compliance Alert. Employers are justifiably concerned that workers in a foreign country may allege that they were charged recruiter fees, making it difficult for the employer to rebut such allegations under circumstances over which the employer has little control. The preamble to the regulations states that beyond the contract, DOL will respond to such accusations and attempt to determine whether the employer knows or has reason to know that the worker has paid or agreed to pay fees to a recruiter as a condition of getting access to the H-2A program.¹¹⁰ The preamble to the related WHD enforcement regulations affords helpful guidance on this point, stating that if “the employer can show that it had a bona fide contractual provision preventing or barring the violative action by its agent, the employer has not violated the regulation.”¹¹¹

Notice of Worker Rights.¹¹² As if providing a written job contract or a copy of the job order specifying all the terms and conditions of the contract to each U.S. and H-2A workers in English and any other of the language of the worker did not provide sufficient notice of workers’ rights, the final rule requires the employer to post at a conspicuous place at the place of employment a copy of all of the rights provided under the statutory provisions of the H-2A program in English and any other language spoken by a significant number of workers. One of the justifications of this rule is that it is necessary to help workers in corresponding employment understand their rights.¹¹³ This is a new requirement that did not exist in prior regulations. At the San Diego DOL briefing session, a DOL spokesperson indicated that DOL has prepared the new notice of worker rights in English and is working on translating it into Spanish and other languages that hopefully the notice will be available by the March 15, 2010 effective date of the new regulations.

PROCESSING OF APPLICATIONS

Review of Applications and Notice of Deficiency.¹¹⁴ The CO at the NPC reviews the application and job order for compliance with program requirements. If the application and job order are incomplete, contain errors or inaccuracies or do not meet program requirements, the CO will notify the employer within 7 days of the receipt of the application. A copy of the notice will be sent to the SWA in the area of intended employment. The notice will state the reasons for the deficiencies and offer the employer an opportunity to submit a modified job order or application within 5 days of the receipt of the notice. Employers also are notified of their right to an expedited administrative review or *de novo* administrative hearing.

¹⁰⁹ § 655.135.(k) (Feb. 12, 2010).

¹¹⁰ 75 Fed Reg. 6026 (Feb. 12, 2010).

¹¹¹ 75 Fed. Reg. 6943 (Feb. 12, 2010).

¹¹² § 655.135(l) (Feb. 12, 2010).

¹¹³ 75 Fed. Reg. 6926 (Feb. 12, 2010).

¹¹⁴ § 655.140 and 141 (Feb. 12, 2010).

Submission of Modified Applications.¹¹⁵ If the employer chooses to submit a modified application, the CO's final determination will be delayed 1 calendar day for each day that passes beyond the 5 business-day period allowed to submit a modified application. An application will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the notice of deficiency is issued. If the employer's modification is not accepted by the CO, the application will be denied. In such case, an administrative appeal or review is available.

Notice of Acceptance.¹¹⁶ If the CO accepts the application and job order as complete and in compliance with program requirements, he/she will notify the employer within 7 calendar days, with a copy sent to the SWA in the area of intended employment. Thereafter, the NPC will direct the SWA to place the job order in the interstate clearance system and to circulate to states that may be potential sources of such workers. The employer will be directed to engage in positive recruitment and submit a recruitment report on its positive recruitment efforts. Positive recruitment will end when the H-2A workers depart for the place of work, or 3 calendar days before the date of need, whichever occurs first. The CO must make a determination whether to certify the application no later than 30 calendar days before the date of need.

Electronic Job Registry.¹¹⁷ The final rule for the first time requires the CO to place the job order on the *Electronic Job Registry* for the duration of 50 percent of the work contract. This will result in the public placement of job orders nationwide and impose upon employers the obligation to respond to and document inquiries from interested parties at remote locations. At the San Diego DOL briefing, a DOL representative indicated that the job registry is not yet operational but is expected to be in operation by June 2010. It was indicated that the ETA 790 will be placed on the registry but the Form 9142 labor certification application will not.

Compliance Alert. Comments on the proposed electronic job registry drew praise from legal services organizations because it will allow them to determine almost immediately upon the filing of job orders which employers are seeking to use the H-2A program. While such organizations routinely monitor filings, they often have to wait for considerable time for responses to their Freedom of Information Act (FOIA) requests for such information. This simply means that employer compliance will be under the microscope by worker advocates earlier in the process. It also can be anticipated that worker advocates will use such real time information to direct U.S. workers to such job opportunities. On the other hand, to the extent that DOL concludes that the registry is a more effective means of positive recruitment than newspaper advertising, it may be beneficial to H-2A employers who incur great costs for such advertising with minimal results.

Amendments to Applications for Certification.¹¹⁸ Employers may request in writing at any time prior to the CO's labor certification determination an increase in the number of workers of up to 20 percent (50 percent for employers requesting more than 10 workers) without

¹¹⁵ § 655.142 (Feb. 12, 2010).

¹¹⁶ § 655.143 (Feb. 12, 2010).

¹¹⁷ § 655.144 (Feb. 12, 2010).

¹¹⁸ § 655.145 (Feb. 12, 2010).

requiring an additional recruitment period. The CO may approve larger increases without a longer recruitment period only where the employer demonstrates that the need for a larger number could not have been foreseen or that an extended period would jeopardize crops prior to the end of an extended period.

An employer may seek in writing minor changes in the total period of employment without an expanded recruitment period. The CO will consider whether the need for the delay in the start date of the employment period could have not have been foreseen or whether crops will be in jeopardy without the delay. If the request for the delay in the start date is made after workers have departed for work, the CO may approve the changes if the employer includes in its request an assurance to provide all workers traveling to the job free housing and subsistence until work begins.

POST APPLICATION ACCEPTANCE REQUIREMENTS—RECRUITMENT

The 2008 Bush regulation extended the pre-filing recruitment period beyond that required in the 1987 regulations, as well as generally broadening recruitment obligations.¹¹⁹ The 2010 final rule expands employer recruitment obligations even further and requires most recruitment after the filing of the application. Under the final rule DOL reasserts control over recruitment process by giving the CO broad authority to determine the labor market is adequately tested prior to issuing a labor certification. The final rule requires the following positive recruitment steps be taken:

Filing the Job Order in the Interstate Clearance System.¹²⁰ The SWA posts the job order in the interstate clearance system directed to all states designated by the CO. At a minimum, the SWA will direct the job order to all states listed on the order as anticipated worksites covering the area of intended employment.

Newspaper Advertisement Requirements.¹²¹ The final rule requires employers to place print advertisements on two different days, one of which must be a Sunday in a newspaper of general circulation servicing the area of intended employment. If a newspaper with a Sunday edition is not located in the area of intended employment, then the employer may be directed to advertise in a daily edition in the area with the widest circulation.

The advertising must list the name of the employer, the geographic area of intended employment with specificity, the wage offer, the three-fourths guarantee, a statement that work tools will be provided at no cost to the worker, that housing will be available at no cost to H-2A and U.S. workers in corresponding employment, that transportation and subsistence expenses to the worksite will be provided or paid for upon completion of 50 percent of the contract period, that the position is temporary, the number of job openings the employer hopes to fill and a statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the state in which the advertisement appeared, including contact information for the SWA and the job order number if available.

¹¹⁹ § 655.102 (Dec. 18, 2008).

¹²⁰ §655.150 (Feb. 12, 2010).

¹²¹ § 655.152 (Feb. 12, 2010).

The preamble comments clarify that joint employer associations filing master applications need only run one advertisement on behalf of itself and its members. The advertisement does not need to list the names and addresses of all the members and needs only to include a statement indicating that the names and locations of its members can be obtained from the local SWA in the state where the advertisement appeared. This is in contrast to agent associations which must place an advertisement for each of its members.¹²²

The final rule eliminated a potentially costly and unworkable requirement in the proposed rule that would have required employers with “remote workplaces” to provide physical space or other assistance for the interviewing of U.S. workers in a place other than the worksite that is readily accessible to the population most likely to apply for the job opportunity. Given that a substantial number of agricultural worksites are remotely located, this obligation would have had a broad burdensome application.

The final rule adds new language that states employers that wish to conduct interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the work is being recruited at little or no cost to the worker. Employers cannot provide H-2A workers more favorable treatment than U.S. workers with respect to the requirement and conduct of interviews. The preamble comments indicated that most interviews, if conducted, are by phone.¹²³

Contact with Former Workers.¹²⁴ This final rule is essentially the same as the 2008 regulations. Employers must document efforts to contact workers from the previous season by letter or otherwise. Exception is made for those workers who abandoned the job or were dismissed for cause. This contact must occur during the period of time that the job order is being circulated by the SWA for interstate clearance. Documentation of employer efforts to contact workers may be shown through letters signed and dated by the employer, dated logs demonstrating that each worker was contacted, including the phone number, email address, or other means used to make contact. In addition, an employer could print out a list of former employees and attach a telephone bill that shows calls placed to all of the employees.¹²⁵

Additional Positive Recruitment.¹²⁶ The final rule gives the CO discretion to direct additional recruitment that must be no less than the normal recruitment efforts of non-H-2A employers of comparable size in the area of intended employment. The final regulations states that the CO will direct recruitment in no more than 3 traditional or expected labor supply states for each area of intended employment listed on the application.¹²⁷ The CO will specify the documentation required to prove positive recruitment efforts were made by the employer.

¹²² 75 Fed. Reg. 6928 (Feb. 12, 2010).

¹²³ 75 Fed. Reg. 6929 (Feb. 12, 2010).

¹²⁴ § 655.153 (Feb. 12, 2010).

¹²⁵ 75 Fed. Reg. 6929 (Feb. 12, 2010).

¹²⁶ § 655.154 (Feb. 12, 2010).

¹²⁷ § 655.154(c) (Feb. 12, 2010).

Referral of U.S. Workers.¹²⁸ SWAs may only refer workers who have been informed of the material terms and conditions of the employment and have indicated by accepting the job opportunity that are qualified, able, willing and available for employment. The final rule eliminates the requirement in the 2008 Bush regulations that required SWAs to verify that the U.S. workers that they refer to employers seeking H-2A workers are authorized to work as determined through compliance with the I-9 verification process required by the Immigration and Nationality Act.¹²⁹ This requirement is eliminated in the 2010 rule based on the alleged administrative burdens it imposed upon SWAs and the argument that determination of work eligibility properly belongs with the employer and not the government.¹³⁰ Elimination of the verification requirement returns H-2A employers to the problems associated with being referred undocumented workers who take positions away from H-2A workers and subject the employer to audits or raids during which they will lose workers referred by the SWA and suffer worker shortages.

Recruitment Report.¹³¹ Under the final rule, employers are required to complete, sign and date recruitment reports and submit them on a date specified by the CO. The reports must identify the name of each recruitment source, the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the report and disposition of each worker, confirm that former workers were contacted and by what means, and documentation of the lawful job-related reasons for not hiring any U.S. workers. A DOL representative at the San Diego briefing indicated that the report typically will be required to be filed 31 or 32 days before the date of need. Employers have an obligation to update the recruitment report through the recruitment period, including the 50 percent period. The updated report need only be provided to the CO if asked for in a post-certification audit or investigation.

Withholding of U.S. Workers Prohibited.¹³² The final rule retains the long-standing rule set forth in the 1987 regulations that prohibits an entity from willfully and knowingly withholding U.S. workers prior to the arrival at the worksite of H-2A workers during the recruitment period.

Duration of Positive Recruitment.¹³³ As noted above, a new provision is included in the final rule that states that unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business. This date suspends positive recruitment.

LABOR CERTIFICATION DETERMINATIONS

Determinations.¹³⁴ The CO will make a determination either to grant or deny an application based on the criteria in the final regulations and other related regulations¹³⁵ no later

¹²⁸ § 655.155 (Feb. 12, 2010).

¹²⁹ § 655.102.(j) (Dec. 8, 2008).

¹³⁰ 74 Fed. Reg. 45913-14 (Sept. 4, 2009).

¹³¹ § 655.156 (Feb. 12, 2010).

¹³² § 655.157 (Feb. 12, 2010).

¹³³ § 655.158 (Feb. 12, 2010).

¹³⁴ § 655.160 (Feb. 12, 2010).

than 30 calendar days before the date of need identified in the application. The employer will be notified by means ensuring next day delivery.¹³⁶ Applications that are modified or do not meet the requirements are not subject to this date.

Certification Fee.¹³⁷ A certification will include a bill assessing each employer certified \$100 plus \$10 for each H-2A worker certified; however, there is a \$1,000 cap on the fee. Joint employer associations will not be assessed a fee in addition to that assessed their members. Fees must be received by the CO no later than 30 days after the date of certification. Non-payment of the fees in a timely manner is a substantial violation of the regulations.

Denied Certification.¹³⁸ If an application is denied, the employer will receive notice by next day delivery. The notice will state the reasons for the denial and inform the employer of its administrative appeal rights.

Partial Certification.¹³⁹ The CO may issue a partial certification, reducing either the number of H-2A workers being required or the period of need or both, based on information received by the CO. This notice will inform the employer of its administrative appeal rights.

Requests for Determinations Based on Nonavailability of U.S. Workers.¹⁴⁰ The final rule adds a new provision that allows employers to request a new determination on or after 30 days before the date of need if insufficient U.S. workers are able, willing, eligible, qualified or available. Before deciding, the CO will check with the SWA to determine if additional U.S. workers will be available within 72 hours of the request. The CO must decide within 72 hours of the employer's request. The employer can appeal a denial of its request for a redetermination.

The employer's request for a new determination must be made directly to the CO by telephone or email and must be confirmed by the employer in writing. The employer must submit a written request to the CO confirming the asserted lack of U.S. workers within 72 hours of its request.

Document Retention Requirements.¹⁴¹ The CO may conduct audits of employers participating in the H-2A program and WHD has broad authority to conduct investigations regarding compliance with H-2A program requirements, and other laws under its jurisdiction. The final regulations require employers to maintain specific information so that program compliance can be determined during an audit or investigation. All employers filing an application must retain: proof of recruitment efforts; the job order placement; advertising, such as tear sheets; additional positive recruitment efforts; substantiation of information contained in recruitment reports; proof of workers' compensation coverage; a copy of the work contract and

¹³⁵ § 655.161(Feb. 12, 2010).

¹³⁶ § 655.162 (Feb. 12, 2010).

¹³⁷ § 655.163 (Feb. 12, 2010).

¹³⁸ § 655.164 (Feb. 12, 2010).

¹³⁹ § 655.165 (Feb. 12, 2010).

¹⁴⁰ § 655.166 (Feb. 12, 2010).

¹⁴¹ § 655.167 (Feb. 12, 2010)

labor certification application; records of each worker's earnings; and evidence of association and agent status.

One positive change in the final regulation is the reduction in the period of record retention from 5 to 3 years from the date of the certification. This was a recommendation of NCAE.

POST CERTIFICATION

Extensions.¹⁴² An employer may seek an extension of the employment period in a certification under the following circumstances. A request for an extension of 2 weeks or less must be made directly to DHS. If approved, DOL will consider the certification extended for such period approved by DHS. For extensions longer than 2 weeks, the employer must support in writing to the CO that the request is related to weather conditions or other factors beyond the control of the employer and could not have been reasonably foreseen. The CO may grant an extension, but in no case to a period of greater than 12 months. If an extension is approved, the employer would have to provide a copy of the extension to workers.

Withdrawal of Job Order and Application.¹⁴³ Employers may withdraw both applications and job orders; however, in both cases they remain obligated to comply with the terms and conditions of employment contained in the job order and application with respect to those workers recruited in connection with the job order and application.

Public Disclosure.¹⁴⁴ DOL will maintain an electronic file accessible to the public with information on all employers applying for labor certifications. The database will include the number of workers requested, the date filed, the date decided and the final disposition.

MISCELLANEOUS PROVISIONS

Retention of Authority to Provide Special Procedures¹⁴⁵

The final rule retains language from the 2008 rule that allows DOL to continue, revise or revoke special procedures that it has permitted in the past. This has been especially critical with respect to shepherders in the western U.S. and for the range production of livestock and custom combine harvesting crews.¹⁴⁶ Shepherders, as noted above, have been found to qualify under the H-2A program, notwithstanding the fact that the work is not temporary, because the legislative history of the western range production of livestock supports such treatment and its legislative inclusion was implicitly ratified in the Immigration Reform and Control Act.¹⁴⁷ At the San Diego DOL briefing, DOL representatives indicated that new guidelines for occupations treated under special procedures will be released in the near future.

¹⁴² § 655.170 (Feb. 12, 2010).

¹⁴³ § 655.172 (Feb. 12, 2010).

¹⁴⁴ § 655.174 (Feb. 12, 2010).

¹⁴⁵ § 655.102 (Feb. 12, 2010).

¹⁴⁶ § 655.102; 74 Fed. Reg. 45909 (Sept. 4, 2009).

¹⁴⁷ 75 Fed. Reg. 6890-91 (Feb. 12, 2010).

KEY ENFORCEMENT PROVISIONS

The final Obama rules, except for a few changes noted below, increase the range of penalties faced by an employer if violations occurred and expand the range of circumstances in which DOL could seek those penalties. Fines are increased, as are the situations in which DOL could seek revocation or debarment.¹⁴⁸

Office of Foreign Labor Certification

Audit Procedures¹⁴⁹ As noted above with respect to the document retention requirements, DOL requires employers to maintain detailed records of program compliance. This in part is to facilitate DOL audits with program requirements. The final rule changes the proposal to clarify that not all program participants will be audited and that DOL will exercise discretion to determine those that will be.¹⁵⁰ The final rule sets 30 days as the minimum time for a response to a DOL audit request. This allows for more time than the 2008 rule which permitted DOL to demand a response in as few as 14 days.¹⁵¹ The final rule also leaves in place DOL's broad discretion to share audit findings with the DHS and the Office of Special Counsel in the Department of Justice. The proposed rule also permits sharing with these agencies or "another appropriate enforcement agency."

Revocation.¹⁵² The final rule expands the grounds upon which DOL can seek revocation of an already granted certification. A revocation applies when a labor certification is still active, while debarment is appropriate when the certification has expired.¹⁵³ The OFLC may revoke a certification if it determines that certification should not have been granted in the first place due to fraud or misrepresentation in the application process, a finding of a substantial violation, or any failure to cooperate in an investigation. The final rule provides DOL more procedural flexibility.

The OFLC is required to give the employer a notice of revocation which will contain a detailed statement of the grounds for revocation. The employer has 14 days within which to provide rebuttal evidence upon receipt of notice. If the rebuttal evidence is rejected, the employer has the right to appeal.

¹⁴⁸ The enforcement provisions of the regulations emphasize DOL's rejection of the 2008 Bush rule's decision to replace the certification process with streamlined attestation procedures and impose stiffer penalties in the event of proven violations. The final rule substitutes a more intensive certification process for the 2008 rule's attestation process, but does not balance the burden placed on employers by the more onerous front end for less onerous enforcement procedures.

¹⁴⁹ § 655.180 (Feb. 12, 2010).

¹⁵⁰ 75 Fed. Reg. 6932 (Feb. 12, 2010).

¹⁵¹ § 655.112(b)(2) (Dec. 18, 2008).

¹⁵² § 655.181 (Feb. 12, 2010).

¹⁵³ 75 Fed. Reg. 6935 (Feb. 12, 2010).

Debarment¹⁵⁴ The final rule significantly expands the circumstances in which DOL can seek debarment of an employer, attorney, or agent for a program violation. It emphasizes that one violation could justify debarment. It also creates independent debarment authority in the Wage and Hour Division of DOL, in addition to that which has traditionally been limited to ETA.

An employer may be disbarred for materially violating a term or condition of a labor certification with respect to H-2A workers, U.S. workers in corresponding employment, or U.S. workers improperly rejected for employment, laid off or displaced. Because of the breadth of the concepts of “displacement” and “corresponding employment,” the final rule represents a significant expansion of debarment authority.

Another new ground for debarment is employing a worker outside of the area of intended employment, in an activity or activities not listed in the job order, or outside the job order period. NCAE commented on the problem of potential for debarment when an H-2A worker engages in activity or activities not listed in the job order, given the ambiguity in the proposed rule related to incidental employment. As discussed above in the definition section of this memorandum, DOL has clarified that incidental employment is impermissible. It stresses in its preamble comments on debarment that it does not intend to debar well-intentioned employers that commit inadvertent or minor mistakes related to incidental employment.¹⁵⁵ The final rule also states that violations of the anti-fee shifting regulations and anti-discrimination provisions support debarment.¹⁵⁶

DOL proposed to alter the debarment procedure by eliminating an employer’s opportunity to submit evidence to the certifying officer when it receives a Notice of Debarment. Under the proposed rules, the employer’s remedy is to file an administrative appeal from the certifying officer’s decision.¹⁵⁷ The final rule restores the employer’s ability to submit rebuttal evidence to the grounds set forth in the notice of debarment. A similar right to submit rebuttal evidence is not provided in WHD’s concurrent debarment procedure. If, after submitting rebuttal evidence, the employer’s request is denied, the employer is afforded a right to appeal.

The proposed rule broadens the grounds for debarment of a member of a joint employer association if the member participated in or had reason to know of the association’s debarable violation.

Debarment of Agents, Attorneys and Associations and Joint Employer Associations.¹⁵⁸ The preamble comments accompanying the debarment section indicate that DOL does not intend to debar agents and attorneys unless they commit substantial violations in collusion with their employer clients. DOL will not seek to debar a joint association if one of its employer members committed a substantial violation unless it is determined that the association or another association member participated in the violation. By the same token, DOL will not seek to debar an individual member of a joint association unless it knew or had reason to know of the violation

¹⁵⁴ § 655.182 (Feb. 12, 2010).

¹⁵⁵ 75 Fed. Reg. 6035 (Feb. 12, 2010).

¹⁵⁶ § 655.182(d)(1)(viii and ix) (Feb. 12, 2010).

¹⁵⁷ 74 Fed. Reg. 45955 (Sept. 4, 2009).

¹⁵⁸ 75 Fed. Reg. 6937 (Feb. 12, 2010).

by the association.¹⁵⁹

Statute of Limitations on Debarment.¹⁶⁰ The OFLC must issue a notice of debarment no later than 2 years after the occurrence of the violation. An employer, agent or attorney may not be debarred for more than 3 years.

Enforcement Proceedings by DOL's Wage and Hour Division

Corresponding Employment.¹⁶¹ The final rule affirms the authority of WHD to enforce all H-2A program contractual obligations, including seeking wages and benefits owed to workers in corresponding employment.

Effective Date of WHD Regulations.¹⁶² The enforcement provisions in the final rule will apply only to those labor certification applications filed on or after the effective date of the regulations discussed above at 20 C.F.R. Part 655, which is March 15, 2010. This is a departure from the prior regulations which were applicable to applications filed on or after June 1, 1987. This is an important limitation, to the extent WHD decides to apply the final Obama regulations retroactively.

Definitions.¹⁶³ Most of the definitions discussed above are repeated verbatim in this enforcement section of the regulations.

Scope of Potential Remedies.¹⁶⁴ The proposed rule includes a provision allowing DOL to seek make whole relief.¹⁶⁵ The 2008 rule limited DOL to seeking unpaid wages which implicitly included back wages and reinstatement. NCAE commented that the unprecedented use of the term “make whole” expanded potential relief beyond that normally provided in an administrative proceeding—lost wages and possible reinstatement to the job. DOL clarified in its preamble comments that it does not intend make whole relief to include compensatory damages for non-economic injuries, such as pain and suffering or other types of damages available in state or federal courts.¹⁶⁶

Civil Money Penalty (CMP) Assessment.¹⁶⁷ The final rule adopts the proposed rule with respect to the assessment of CMPs. The final rule states that every violation of the work order permits imposition of a separate CMP. DOL increases the ceiling amount of potential CMPs for certain violations and alters the substantive grounds upon which they can be sought. Under the 2008 regulations, the maximum CMP for a violation of the work order was \$1,000; the final rule

¹⁵⁹ § 655.182(g) and (h) (Feb. 12, 2010).

¹⁶⁰ § 655.182(c) (Feb. 12, 2010).

¹⁶¹ § 501.0 (Feb. 12, 2010).

¹⁶² § 501.1(c) (Dec. 18, 2008). Prior WHD enforcement regulations were applicable to the employment of any H-2A workers and U.S. workers in corresponding employment with regard to labor certification applications filed on or after June 1, 1987.

¹⁶³ § 501.3 (Feb. 12, 2010).

¹⁶⁴ § 501.16(a) (Feb. 12, 2010).

¹⁶⁵ § 501.16; 74 Fed. Reg. 45925 (Sept. 4, 2009).

¹⁶⁶ 75 Fed. Reg. 6942 (Feb. 12, 2010).

¹⁶⁷ § 501.19 (Feb. 12, 2010).

increases the ceiling to \$1,500 for non-willful violations.¹⁶⁸ Under the final rule, any violation of 20 C.F.R. part 655, subpart B would permit DOL to impose a CMP.

Under the final rule, a willful violation of the work contract is subject to up to a \$5,000 penalty; failure to cooperate in an investigation results in a CMP up to \$5,000; violations for laying off or displacing U.S. workers in corresponding employment results in CMPs up to \$15,000 per violation; violations of housing, transportation, or any other obligation under 20 C.F.R. part 655, subpart B that proximately causes death or a permanent injury subjects the employer to a CMP of up to \$50,000 per worker; and for a repeat violation of the same provision resulting in death or injury, the CMP is up to \$100,000 per worker.

Debarment Procedures.¹⁶⁹ The proposed rules significantly reduce the thresholds for the finding of a debarable offense.¹⁷⁰ Under the 2008 rule, DOL had to show that a violation was “significant” and part of a pattern or practice before debarment could occur. The final rule eliminates these threshold showings.¹⁷¹ Instead, a single “substantial” violation could serve as the basis for debarment. The final rules conform WHD’s debarment authority to the rules that concurrently apply under the ETA regulations at 20 C.F.R. Part 655.

¹⁶⁸ § 501.19(c) (Feb. 12, 2010).

¹⁶⁹ § 501.20 (Feb. 12, 2010)

¹⁷⁰ § 501.20; 74 Fed. Reg. 45926 (Sept. 4, 2009).

¹⁷¹ *Id.*