State of Play: Update from the Nation's Capital

NCAE 2019 Labor Forum
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Today’s Task

• Delve into political environment that shapes our opportunities and threats

• Discuss substance and politics around H.R 5038, Farm Workforce Modernization Act
2020 Election - Senate

• 22 Republicans
• Most Vulnerable:
2020 Election - Senate

• 12 Democrats
• Most Vulnerable: 

[Images of two men]
U.S. House of Representatives

House and 2020 Election

- House Retirements as of now:
  - Republicans – 20
  - Democrats – 8

- House “Consensus” Forecast:

Image Credit: 270towin.com
The Race for Congress (Generic Ballot)
Credit: FiveThirtyEight.com

Democrats: 46.8%
Republicans: 41.0%
How (Un)Popular is Donald Trump?

Credit: FiveThirtyEight.com
Where from Here?
(On Ag Labor...)
H.R.5038: Key House Players...
116th Congress - Political Context

- House must move first. Democrats control House
- House leadership will not advance a bill that’s not (1) bipartisan, (2) supported by farm worker advocates
- Stakeholders:
  - Much common ground on “current workforce” solutions
  - Controversy on “more guest workers” and their treatment
- Flash points: wages, caps, enforcement rights
- Take-home messages:
  - Any compromise is, well, a compromise
  - No UFW “bottom line”
  - Unlike past agreements, we are not fully bound to “the deal”
  - Key areas for improvement as process advances
H.R.5038, Farm Worker Modernization Act

• 53 cosponsors
  • 28 Democrats, 25 Republicans

• Three-pronged approach
  • Current workforce stabilization, incentives
  • H-2A changes (mostly improvements)
  • E-Verify, phased in for Agriculture specifically

• Status
  • Cleared Judiciary Committee on 21st
  • House floor?
Title I – Three Options for Legal Status

- Option: Transition to H-2A

- Option: Become Certified Agricultural Worker (CAW), and renew that status

- Option: Certified Agricultural Worker (CAW), and earn/pursue eventual right to apply for legal permanent residency (green card)
Certified Agricultural Worker (CAW)

- Past Ag work, good behavior to qualify
- CAW status provides:
  - Agricultural work authorization for 5 ½ years
  - Protection of immediate family
  - Right to work, travel
  - “U.S. domestic worker” labor protections
- Renewable in 120 day period at end of 5 years
  - Must have worked 100+ days in Ag each year as CAW
  - Not otherwise ineligible
- **NOTE:** CAWs as domestic referrals? Bill has H-2A employers’ exception from having to hire CAW workers that would displace experienced, returning H-2A workers
Optional Adjustment of Status for Experienced Ag Workers

- Future work requirement
  - 4 years, for workers who demonstrated 10+ years prior work in Ag
  - 8 years, for workers who met minimum threshold to qualify but worked <10 years prior to enactment

- Background check

- Penalty - $1000
Title II – Modernizing H-2A

- Temporary/Seasonal H-2A remains uncapped
- Streamlined electronic platform
- Retains/codifies many elements of current program
- Several cost, flexibility improvements
  - Underlying 3 year visa – saves 2 years of visa petition costs
  - Job registry posting only. No advertising
  - Active recruitment ends when workers depart for job
  - 50% rule: longer of 30 days or 1/3 of contract
  - “Staggered entry” up to 120 days under single filing
Required Wage

• Employers must offer higher of four wages
• 2020 AEWR frozen one year at 2019 levels
• 2021-2029, AEWRs may not increase more than 3.25% (potentially 4.25% in high minimum wage states) or fall more than -1.5%.
• Once job posted, ”promised wage” is exactly that; does not need to be increased if AEWR goes up
• Disaggregation by occupational classification; worker must be paid highest applicable (borrowed from Trump admin regulatory proposal…point of concern for many of us)
• Post-2029, AEWR replaced by new wage rate based on joint USDA/DOL study and rulemaking
Housing

- Maintains requirement for employer to provide housing

- Provides funding/incentives for employer-provided housing and to encourage construction/rehabilitation of farm worker housing
Non-Seasonal/Temp. Needs (“Year-round Jobs”)

- Expands H-2A to year-round positions/3 year admission
- 20,000 visa cap/year for first 3 years (60,000 total)
  - Half are restricted to dairy industry
- For next 7 years, USDA and DOL jointly determine. Increase cannot exceed 12.5% over prior year, nor fall below 20,000
- After year 10, USDA and DOL (with DHS) jointly determine if a cap needed, and if so, methodology
- Emergency provisions
Portable Agricultural Visa Pilot Program

- 6-year pilot program authorizes portable H-2A visas for up to 10,000 workers
- Period of admission up to 3 years; 60 day grace period between jobs to secure new employment
- Employers must register with DHS, may employ these workers “at will”
Enforcement

- Strengthens oversight and enforcement of abuses in foreign labor recruitment undertaken by entities outside the United States
Primary Concerns with H-2A Provisions

• Disaggregation (too many classifications? Highest applicable wage…)

• Lack of clarity regarding primary vs. limited or ancillary tasks

• Application of Migrant & Seasonal Ag Worker Protection
  • Concern is expansion of “private right of action”
  • Mediation prior to right of action
  • Need to weigh degree of exposure to our employers

• Other?
Permanent Residency / Employer Sponsorship

• This is “legal immigration” option, distinct from the earned legalization and H-2A reforms

• Adds 40,000 new visas to employment-based category for “unskilled” labor. Agriculture has first preference

• Employer sponsorship; H-2A visa holders eligible to self-petition after working 10 years/100 days per year
Title III – Electronic Verification

• Makes various E-Verify improvements to address concerns, limitations such as fraud vulnerability

• Phases in E-Verify for agricultural employers, large to smaller, beginning 6 months after closing of CAW application period

• New hires only; no reverification requirement for current workforce
• 2020 H-2A AEWRs
  • National average increase ~ 5.6%
  • Setting aside the freeze, most states see increases greater than the H.R.5038 caps
  • IL/IN/OH take biggest hit, 9.5%
  • CO/UT/NV, which saw 22.8% increase last year, sees 8.6% for 2020

• Other uncertainties
  • Enforcement
  • House, Senate control after 2020
Political Education

Going local...