

TRAINING AND EMPLOYMENT NOTICE	NO. 27-23
	DATE April 29, 2024

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE MONITOR ADVOCATES
EMPLOYMENT SERVICE OFFICE MANAGERS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARDS
LABOR COMMISSIONERS
AMERICAN JOB CENTERS

FROM: JOSÉ JAVIER RODRÍGUEZ /s/
Assistant Secretary

SUBJECT: Announcing the Publication of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*

1. **Purpose.** To announce the publication of the final rule on *Improving Protections for Workers in Temporary Agricultural Employment in the United States* (Farmworker Protection Rule), which makes changes to the regulations regarding the Wagner-Peyser Act Employment Service (ES), in addition to changes to the regulations governing the H-2A temporary nonimmigrant agricultural worker visa program at 20 CFR 655, subpart B, and 29 CFR 501. This Training and Employment Notice (TEN) describes revisions to the ES regulations at 20 CFR parts 651, 653, and 658, which relate to the Agricultural Recruitment System (ARS) and the situations where State Workforce Agencies (SWA) discontinue providing ES services to employers.
2. **Action Requested.** Please share this information with interested stakeholders and review the regulations and information collections. States must comply with the ES-related changes in the final rule on the effective date, which is June 28, 2024. For information on the H-2A related changes, please see the Office of Foreign Labor Certification (OFLC) and Wage and Hour Division (WHD) information as described in the Inquiries section.
3. **Summary and Background.**
 - a. **Summary** – On April 29, 2024, the U.S. Department of Labor published in the *Federal Register* the Farmworker Protection Rule ([89 FR 33898](#)), which revises Wagner-Peyser ES regulations at 20 CFR parts 651, 653, and 658. The final rule strengthens protections for workers who are placed on clearance orders through the ARS as well as clarifies and streamlines procedures for instances where SWAs discontinue ES services to employers, both agricultural and non-agricultural. The

final rule also revises the Department’s H-2A regulations at 20 CFR part 655, subpart B and 29 CFR 501, which are further described through the resources identified in the Inquiries section.

- b. **Background** – The Wagner-Peyser Act of 1933, 29 U.S.C. 49 et seq., established the ES program, a nationwide system of public employment offices that provide public labor-exchange services delivered through the American Job Center network. The ES program, as part of the public workforce system, seeks to improve the functioning of the nation’s labor markets by matching job seekers with employers that are seeking workers. The Department’s regulations for the ES program are at 20 CFR parts 651, 652, 653, 654, and 658. In addition to describing overall requirements for ES services, the ES regulations describe benefits and protections SWAs must provide to migrant and seasonal farmworkers (MSFWs) through the ARS as well as the procedures for discontinuation of ES services to specific employers when needed. The ES regulations about ARS at 20 CFR part 653, subpart F describe requirements for acceptance of intrastate and interstate clearance orders through which employers seek U.S. workers to perform farmwork on a temporary, less than year-round basis. Part 658, subpart F describes procedures for when SWAs must discontinue providing ES services to employers that have failed to meet their ES requirements.

On September 15, 2023, the Department published a Notice of Proposed Rulemaking (NPRM) that proposed to strengthen protections for temporary agricultural workers and to enhance the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators. 88 FR 63750 (Sept. 15, 2023). The Department received many comments from the public and nonprofit sectors, as well as private citizens, employers, and employer groups, in response to the NPRM. The Department considered these comments, and the final rule reflects changes made in response to the public comments.

- 4. **Final Rule Changes**. The Department published the Farmworker Protection Rule in the *Federal Register* on April 29, 2024, available at <https://www.federalregister.gov/documents/2024/04/29/2024-08333/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states>. The final rule amends several portions of the ES regulations, including the following changes related to the ARS and SWA requirements for discontinuation of ES services to employers. Please see the final rule for a complete list of all changes.

- a. **Definition of Terms Used in 20 CFR Parts 651, 653, 654, and 658.**

- i. Adds new definitions of: *agent*, *criteria clearance order*, *discontinuation of services*, *farm labor contractor*, *joint employer*, *non-criteria clearance order*, *successor in interest*, and *week*.
- ii. Revises the definition for *employment-related laws* to mean those laws and implementing rules, regulations, and standards that relate to the employment

relationship, such as those enforced by the Department's WHD, Occupational Safety and Health Administration, or by other federal, state, or local agencies.

b. Agricultural Recruitment System (ARS) for U.S. Workers.

- i. Revises the responsibilities of ES offices and SWAs when they review clearance orders submitted by employers and the process by which they place approved clearance orders into intrastate and interstate clearance, by creating the following new requirements:
 - ES staff must consult the Department's OFLC and WHD H-2A and H-2B debarment lists, and a new prospective ETA Office of Workforce Investment (OWI) discontinuation of services list, before placing a job order into intrastate or interstate clearance.
 - If an employer is on one of the debarment lists, the SWA must initiate discontinuation of ES services to such employer.
 - If the employer is on the OWI discontinuation of ES services list, or the SWA has already discontinued ES services, the SWA must not approve the clearance order.
 - Employers may submit written requests to the OWI Administrator to determine whether they are on the OWI discontinuation of ES services list. If the OWI Administrator indicates that the employer is not on the discontinuation of ES services list, then the SWA must approve the clearance order if all other requirements have been met.
 - SWAs must ensure intrastate and interstate clearance orders include the hourly wage rate, if applicable, and any non-hourly wage rate offered, including a piece rate or base rate and bonuses and, for any non-hourly wage rate, an estimate of its hourly wage rate equivalent for each activity and unit size.
- ii. Revises clearance order assurances and employer requirements regarding protections for workers placed through the ES on criteria and non-criteria clearance orders when employers fail to provide timely notice of delayed start dates.
 - Requires employers to notify workers the SWA placed, in addition to notifying the SWA, of a delayed start date at least 10 business days before the original start date and describes how notice must be provided to workers, including compliance with the language access requirements of 29 CFR 38.9 for workers with limited English proficiency, standards for non-written telephonic notice as well as written notice through email or postal mail, and record retention requirements.
 - Describes requirements for employers that fail to provide the required notice, including providing housing for migrant workers, provision or payment of wages and all other benefits and expenses described on the clearance order for each day work is delayed up to 14 calendar days, starting with the originally anticipated date of need, or provision of alternative work.

- Requires that if an employer fails to comply with these requirements, the order-holding office must process the information as an apparent violation and may refer the apparent violation to the Department's WHD.

c. Discontinuation of ES Services.

- i. Makes revisions throughout 20 CFR 658, subpart F to clarify and streamline the discontinuation procedures, including changes to:
 - Which entities may be subject to discontinuation, including employers, agents, farm labor contractors, joint employers, and successors in interest to any employer, agent, farm labor contractor, or joint employer, as defined at § 651.10.
 - The reasons for which SWAs must initiate discontinuation of ES services,
 - Notice requirements for SWAs,
 - Evidentiary requirements for employers,
 - Organization of the subpart to more accurately group subjects and more logically arrange procedural steps, including when and how employers may request a hearing, and
 - The description of which ES services are unavailable after discontinuation occurs.

The final rule also impacts associated information collections, notably for Forms ETA-790 and 790A through Office of Management and Budget (OMB) approval number 1205-0466, which are used for criteria clearance orders placed in connection with H-2A applications, and Form ETA-790B through OMB approval number 1205-0134, which is used for non-criteria clearance orders.

5. **Inquiries.** Please direct inquiries to the appropriate ETA regional office. Additional information about changes to the regulations governing the H-2A program is available on the Department's OFLC and WHD websites at <https://www.dol.gov/agencies/eta/foreign-labor/farmworker-protection-final-rule> and <https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule>, respectively.

6. References.

- *Improving Protections for Workers in Temporary Agricultural Employment in the United States* Final Rule (89 FR 33898, April 29, 2024)
- The Wagner-Peyser Act of 1933, 29 U.S.C. 49 et seq
- WIOA Regulations at 20 CFR parts 651, 653, and 658

7. Attachment(s). N/A