TRAINING AND EMPLOYMENT NOTICE	NO. 27-23, Change 2
	DATE January 15, 2025

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: Change 2 – Implementation Update for the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, in Compliance with District Court Orders

1. **Purpose.** To update Training and Employment Notice (TEN) No. 27-23, Change 1 regarding states' implementation of the Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 FR 33898 (Apr. 29, 2024) (Farmworker Protection Rule), in light of recent Federal District Court Orders.

2. **Action Requested.** Please share this information with interested parties and review the regulations and information collections. State Workforce Agencies (SWA) for the 17 states identified in TEN No. 27-23, Change 1 must continue to comply with the Employment Service (ES) regulations at 20 CFR parts 651, 653, and 658 that were in effect on June 27, 2024, the calendar day *before* the effective date of the Farmworker Protection Rule. SWAs in all other states[1] must continue to comply with the current ES regulations, including the changes made to the ES regulations in the Farmworker Protection Rule, as of June 28, 2024, except as they relate to use of Forms ETA-790 and ETA-790B. Until further notice, all SWAs and employers (or employers' authorized attorneys or agents) are directed to prepare and submit **non-criteria** (not connected to H-2A applications) intrastate or interstate clearance orders using only the Forms ETA-790 and ETA-790B that were in effect on June 27, 2024, that is, not the forms associated with the new rule. See the Office of Foreign Labor Certification's announcements webpage for the latest guidance on the use of Forms ETA-790 and ETA-790A to submit **criteria** (connected to H-2A applications) clearance orders.

[1] As defined in sec. 2 of the Wagner-Peyser Act, 29 U.S.C. 49a, this includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

3. Summary and Background.

a. Summary –This TEN explains that the SWAs for the 17 states listed in section 3.b of Change 1 must continue to comply with the ES regulations that were in effect on June 27, 2024. The remainder of the states must comply with the ES regulations, as updated by the Farmworker Protection Rule that was effective June 28, 2024, except as they relate to use of Forms ETA-790 and ETA-790B.

b. Background – On April 29, 2024, the U.S. Department of Labor (DOL) published in the *Federal Register* the Farmworker Protection Rule, which revises Wagner-Peyser Act 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 Agricultural Recruitment System (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 DOL's H-2A regulations at 20 CFR part 655, subpart B and 29 CFR part 501. Also on April 29, 2024, the Employment and Training Administration (ETA) published TEN No. 27-23, describing the changes DOL made in the Final Rule to the ES regulations.

On August 26, 2024, the United States District Court for the Southern District of Georgia issued a preliminary injunction in the case of *Kansas, et al. vs. U.S. Department of Labor*, No. 2:24-cv-00076-LGW-BWC (S.D. Ga., Aug. 26, 2024), which specifically prohibited DOL from enforcing the Farmworker Protection Rule in the states of Georgia, Kansas, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia, and against Miles Berry Farm and members of the Georgia Fruit and Vegetable Growers Association as of August 26, 2024. DOL complied with the *Kansas* preliminary injunction and issued TEN No. 27-23, Change 1 to describe the effect of the *Kansas* injunction on states' implementation of the Farmworker Protection Rule.

On November 25, 2024, the United States District Court for the Eastern District of Kentucky issued a preliminary injunction in the case *Barton, et al. v. U.S. Department of Labor, et al.*, No. 5:24-cv-249-DCR (E.D. Ky., Nov. 25, 2024) ("*Barton*"), enjoining and restraining the Department from implementing, enacting, enforcing, or taking any action in any manner to enforce certain provisions of the Farmworker Protection Rule. Specifically, the *Barton* order applies to the following provisions:

- Seatbelt modifications to enhance safety requirements including but not limited to 20 C.F.R. § 655.122(h)(4);
- Any and all worker voice and empowerment provisions, and provisions allowing workers to invite and accept guests under 20 C.F.R. § 655.135 and any and all parallel provisions under §501.4, including but not limited to 20 C.F.R. § 655.135(h), § 655.135(m), and § 655.135(n);
- Updated information collection requirements including but not limited to 20 C.F.R. § 655.130(a); and

- New minimum pay requirements including but not limited to 20 C.F.R. § 655.120(a) and 655.122(l).

The *Barton* preliminary injunction is effective within the Commonwealth of Kentucky and the States of Alabama, Ohio, and West Virginia. In addition, the Department is enjoined from enforcing those subject provisions of the Farmworker Protection Rule in connection with the activities of the following plaintiffs to the proceeding, including any members of any association or entity which is a plaintiff to the proceeding as of the effective date of the preliminary injunction (November 25, 2024): Richard Barton; Doug Langley; Benny Webb; Dale Seay; David DeMarcus, II; David De Marcus, Sr.; Steve Stakelin; Agriculture Workforce Management Association, Inc. (including its shareholders/members); North Carolina Growers' Association, Inc. (including members of that non-profit association); Workers and Farmer Labor Association, also known as "Wafla" (including members of that non-profit association); USA FARMERS, Inc. (including members of that non-profit association); National Council of Agricultural Employers (including members of that non-profit association).

On November 25, 2024, the United Stated District Court for the Southern District of Mississippi issued a Section 705 stay in *International Fresh Produce Association, et al. v. U.S. Department of Labor, et al.*, No. 1:24-cv-309-HSO-BWR (S.D. Miss., Nov. 25, 2024) ("IFPA"), staying the effective date of 20 C.F.R. § 655.135(h)(2) and (m) in the Farmworker Protection Rule nationwide until the conclusion of proceedings in the case, including any appellate proceeding.

4. **Final Rule Applicability.** 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 amended several portions of the ES regulations, as described in TEN No. 27-23.

   The SWAs serving the 17 states identified in TEN No 27-23, Change 1 and the following identified employers must continue to comply with the ES regulations that were in effect on June 27, 2024, the calendar day *before* the effective date of the Farmworker Protection Rule:

   - **States**: Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, and Virginia
   - **Employers**: Miles Berry Farm and members of the Georgia Fruit and Vegetable Growers Association as of August 26, 2024.

   These SWAs and employers may access the ES regulations that were effective on June 27, 2024, by navigating to title 20 on the Code of Federal Regulations eCFR website, selecting "Go to Date," then selecting June 27, 2024, from the calendar.

   SWAs in all other states must comply with all of the Final Rule ES changes, except as they relate to use of Forms ETA-790 and ETA-790B.

All SWAs and employers (or employers' authorized attorneys or agents) are directed to prepare and submit non-criteria (not connected to H-2A applications) intrastate or interstate clearance orders using the forms applicable under the version of 20 CFR part 653, subpart F in effect on June 27, 2024, which are available through the Office of Management and Budget (OMB) Approval Number 1206-0562. That is, all states will use the forms that were used before the 2024 Final Rule.

a. Agricultural Recruitment System for U.S. Workers (ARS) and Interstate Clearance of Job Orders.

i. **Clearance Order Forms:** All SWAs must continue to clear job orders through the ARS, including intrastate and interstate clearance. As of November 27, 2024, as noted on ETA's website and in emails to states, all employers (or employers' authorized attorneys or agents) are directed to prepare and submit non-criteria (not connected to H-2A applications) intrastate or interstate clearance orders using the forms applicable under the version of 20 CFR part 653, subpart F in effect on June 27, 2024, which are provided through OMB approval number 1205-0562.

- Employers submitting **non-criteria** (not connected to H-2A applications) intrastate or interstate clearance orders seeking workers to perform farmwork on a temporary, less than year-round basis through the ARS must complete:
  - Form ETA-790, see the Office of Foreign Labor Certification's (OFLC) forms page for Form ETA-790 and its instructions, and
  - Form ETA-790B Non-Criteria Agricultural Clearance Order, see the Monitor Advocate System resources webpage.
- Employers placing **criteria** clearance orders (connected to H-2A applications) must complete Forms ETA-790 and ETA-790A, in accordance with OFLC guidance. See OFLC's forms page for forms and guidance related to the H-2A program.

ii. **SWA Responsibilities**: The Final Rule revised 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 requiring ES staff to consult the Department's OFLC and Wage and Hour Division (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.

- The 17 SWAs in the above-named states are not required to check these lists prior to placing a job order into clearance. Each of these SWAs must continue to disapprove clearance orders submitted by employers whose ES services the SWA has discontinued.

iii. **Delayed Start Dates**: The Final Rule revised 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.

- In the 37 states not impacted by the *Kansas* injunction:
  - Employers must 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. The Final Rule also 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.
  - When employers fail to provide the required notice, they must provide housing for migrant workers, provide or pay 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 provide alternative work.
  - 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.

- The 17 SWAs must comply with the prior ES provisions shown on the pre-Final Rule versions of the clearance order forms, which made certain requirements for SWAs and employers. The prior ES regulations required that:
  - The employer provide to workers referred through the clearance system the number of hours of work cited in 20 CFR 653.501(c)(1)(iv)(D) for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 business days prior to the original date of need (pursuant to 20 CFR 653.501(c)(3)(iv)) by notifying the order-holding office in writing (email notification may be acceptable). The SWA must make a record of this notification and must attempt to inform referred workers of the change expeditiously. See 20 CFR 653.501(c)(3)(i) (June 27, 2024).
  - If there is a change to the anticipated date of need and the employer fails to notify the order-holding office at least 10 business days prior to the original date of need the employer must

pay eligible (pursuant to 20 CFR 653.501(d)(4)) workers referred through the clearance system the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need or provide alternative work if such alternative work is stated on the clearance order. If an employer fails to comply under this section the order holding office may notify the Department's WHD for possible enforcement.

b. Discontinuation of ES Services.

The Final Rule made revisions throughout 20 CFR 658, subpart F to clarify and streamline the discontinuation of ES services procedures. For a description of these changes, see TEN No. 27-23.

The requirement for SWAs to discontinue providing ES services in certain circumstances existed in the previous regulations; therefore, all SWAs are expected to discontinue ES services to employers where there is a basis to do so under the applicable regulations. However, SWAs in the 17 states subject to the *Kansas* injunction must apply the discontinuation bases and discontinuation procedures in effect on June 27, 2024, available at 20 CFR Part 658 Subpart F (June 27, 2024).

The Final Rule includes provisions whereby one state's discontinuation of services would require other states to also deny access to services to that employer. The *Kansas* preliminary injunction has altered the effect of these provisions. Specifically:

i. SWAs for the 17 states subject to the *Kansas* injunction must follow the discontinuation of services provisions that were in effect on June 27, 2024.

- When a SWA in one of the 17 states discontinues services pursuant to the ES regulations in effect on June 27, 2024, the other 37 states cannot disapprove clearance orders or terminate access to services for that employer on the basis of the discontinuation in one of the 17 states.
- SWAs in these 17 states cannot disapprove clearance orders submitted by an employer where such disapproval would be on the basis of a discontinuation action outside of their own state.

ii. SWAs for the 37 states not impacted by the *Kansas* injunction must continue to follow new discontinuation of services provisions in effect as of June 28, 2024. This includes notifying ETA's OWI of any final determination to discontinue, determination to immediately discontinue, or determination to reinstate ES services to an employer as detailed in 20 CFR 658.503 and 504. SWAs for the 37 states must notify OWI of these determinations by sending a copy of the determination letters through email to DOES@dol.gov. ETA will publish such discontinuations on the OWI discontinuation of services list, which will be available on the Discontinuation of Employment Services webpage.

- These states must disapprove an employer's clearance order if the employer is on the OWI discontinuation of services list.
- These states must also discontinue services for any of the bases in 20 CFR 658, subpart F in effect as of June 28, 2024. This may include discontinuing services to an employer that one of the 17 states discontinued, though not necessarily on the basis of that initial state's discontinuation.

It is possible that two SWAs (in states impacted and not impacted by the *Kansas* injunction) may discontinue services to an employer on different bases. For instance, one of the 17 states discontinues services because an employer refused to correct specifications contrary to employment-related laws on a job order or were found by a final determination of an enforcement agency to have violated an employment-related law. None of the 37 states can discontinue on the basis of that initial state's discontinuation because that initial state is not required to notify ETA or other states about the discontinuation. However, any of the 37 states can discontinue because that state also determines that the employer violated employment-related laws, and then must notify ETA which posts it on the OWI Discontinuation of Services list. At this point, two states have discontinued services on the same or a very similar basis, one state covered by the injunction and one not covered by the injunction. Others of the 37 states would not provide ES services to the employer because the employer is listed on the OWI Discontinuation of Services list. At this point, two or more states have discontinued services on different bases, some for the underlying violation of an employment-related law, and some because the employer is listed on the OWI Discontinuation of Services list.

Similarly, it is possible for one of the 37 states to discontinue services because of an underlying violation of an employment-related law, the state notifies ETA which posts it on the OWI Discontinuation of Services list, and others of the 37 states would not provide ES services to the employer. None of the 17 states would be required to discontinue services on the basis of the initial state's discontinuation. However, any of the 17 states could independently initiate discontinuation of ES services if they have sufficient evidence (other than basic knowledge of the initial state's discontinuation) to meet any of the bases described at 20 CFR 658.501, as effective prior to June 28, 2024.

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.
- Employment Service Regulations at 20 CFR parts 651, 653, and 658
- TEN No. 27-23, *Announcing the Publication of the Final Rule, Improving Protections for*
- *Workers in Temporary Agricultural Employment in the United States*
- TEN No. 27-23, Change 1, *Change 1 - Announcing Implementation of the Final Rule, Improving Protections for Workers in Temporary Agricultural Employment in the United States, in Compliance with District Court Order*

7. Attachment(s). N/A