



Farmworker Protection Final Rule Briefing

Office of Foreign Labor Certification
Employment and Training Administration
United States Department of Labor

Wage and Hour Division
United States Department of Labor

Office of Workforce Investment
United States Department of Labor



PRESENTATION OUTLINE

- **OFFICE OF FOREIGN LABOR CERTIFICATION (OFLC)**
 - BACKGROUND AND SCOPE OF REGULATORY CHANGES
 - CLARIFICATIONS AND IMPROVEMENTS TO WORKER PROTECTIONS
 - FORM CHANGES
 - IMPLEMENTATION PLAN

- **WAGE AND HOUR DIVISION (WHD)**
 - NEW WORKER PROTECTIONS

- **OFFICE OF WORKFORCE INVESTMENT (OWI)**
 - NEW PROVISIONS
 - CLARIFICATIONS AND IMPROVEMENTS TO WORKER PROTECTIONS



Background & Scope of Changes

- Improves protections for workers in the event of a minor delay in the start of work
- Makes wages more predictable for workers in the H-2A program.
- Adds new protections for worker self-advocacy.
- Improves worker safety, including access to safe transportation.
- Clarifies when a termination is “for cause” to protect key rights for workers employed under the H-2A program.
- Enhances foreign labor recruitment transparency and related form changes.
- Collects information about owners, operators, managers, and supervisors.
- Codifies single employer test DOL already uses.



Protections in the Event of a Minor Delay in the Start of Work

- New § 655.175(b) permits minor delays to start dates without prior CO approval, if due to unforeseen circumstances and crops/commodities would be in jeopardy prior to additional, expedited recruitment:
 - Permits “minor delay” as 14 calendar days and requires the employer to refile if delay is longer.
 - Requires housing/subsistence for workers already traveling to the worksite when notice is sent, and Reimbursement on first date workers would have been paid had work begun on time and at the existing inbound-travel-related subsistence rate specified in § 655.122(h)(1).
 - Employer must provide notice of the delay to all workers and the SWA at least 10 business days prior to the start date.
 - If the employer fails to provide sufficient notice, it must compensate workers for each hour of work missed during the delay period on date workers expected to receive their first paycheck.
 - Employer may credit these payments toward its § 655.122(i) 3/4ths guarantee obligation.



Clarifications and Improvements to Worker Protections

- The Farmworker Protection Final Rule clarifies and strengthens enforcement provisions to address issues that have commonly been misinterpreted, including:
 - Updates ETA's regulations and job orders to expressly provide that employers must comply with WHD regulations (including those relating to investigations).
 - Clarifies the liability of successors in interest for debarment purposes and streamlines the procedures to deny labor certifications filed by or on behalf of successors in interest to debarred employers, agents, and attorneys.
 - Explicitly requires that employers raise any issues in administrative hearing requests that they wish to preserve on appeal.



Making wages more predictable for H-2A workers

- **§ 655.120(a)** requires employers to offer/advertise the highest applicable hourly wage, the applicable prevailing piece rate, and “any other wage rate the employer intends to pay.” Employers must pay the highest of all such wage rates.
- **§ 655.120(b)** requires that new Adverse Effect Wage Rates (AEWRs) become immediately effective upon publication of the **Federal Register** Notice announcing the AEWRs. Setting the effective date of updated AEWRs as the date of publication in the **Federal Register** is a return to longstanding prior practice.
 - OFLC will post an announcement prior to the FRN that links to the BLS Occupational and Employer Wage Statistics survey and USDA Farm Labor Survey data used to determine the AEWRs. This will allow employers to preview and plan for increased AEWRs and wage obligations.
 - The worker protection final rule clarifies enforcement action will not be taken against an employer that demonstrates it was impossible to update payroll before the next scheduled pay date and provides retroactive pay for the difference in the following pay period.



Additional Clarifications and Improvements to Worker Protections

§ 655.103(e) codifies the “single employer test” DOL already uses to determine if nominally separate entities are in fact one entity.

- Useful when determining whether an employer’s need is temporary or seasonal and for enforcement purposes. WHD also uses the test to determine liability for violations among nominally separate entities as appropriate.
- Test considers totality of the relationship; factors include:
 - Common management;
 - interrelation between operations;
 - centralized control of labor relations; and
 - degree of common ownership/financial control.



Additional Clarifications and Improvements to Worker Protections

New § **655.104** defines Successor-in-Interest and states a successor to a debarred entity is also debarred without need for separate debarment action.

- Clarifies an entity can be a successor even if it has not “succeeded to all the rights and liabilities of the predecessor” entity.
- Considers factors like continuity of workforce and facilities. No one factor will be dispositive.
- Clarifies **DOL need not separately debar a successor-in-interest.**



Additional Clarifications and Improvements to Worker Protections

- Clarifies that, if the employer offers overtime pay voluntarily or pursuant to Federal, State, or local laws, the employer must specify any applicable overtime premium wage rates and the conditions for such overtime payment on the job order. Overtime pay must be disclosed on Form ETA-790A, Addendum C.
- Expressly prohibits employers from confiscating workers' travel documents (e.g., passport, visa, or other immigration or government identification documents), thus making workers less susceptible to labor exploitation and human trafficking.
- Enforced by DOL's Wage and Hour Division.



Changes to Forms and Instructions

- Currently **pending** at the Office of Management and Budget (OMB). Once OMB provides the *Notice of Approval*, final documents will be shared by DOL.
- Form ETA-790/790A, *Agricultural Clearance Order*, and Form ETA-9142A, *H-2A Application for Temporary Employment Certification*, now includes changes to comply with 2024 Protection Final Rule requirements.
- Changes in attestations to comply with regulatory changes.



MAJOR CHANGES: Form ETA-9142A

- Section B: New request of Doing Business As (DBA) for prior three years.
- New and modified attestations to conform to Farmworker Protection Final Rule provisions.
- A **new Appendix C** to the Form ETA-9142A, Owner, Operator, Manager, Supervisor, reflects the rule's requirement that an employer provide the identity and contact information (*e.g.*, name, contact address, phone, and email) for all owners and operators of employers and worksites, and for the managers and supervisors of all workers employed under the Form ETA-9142A. (New question E.4)
- A **new Appendix D** to the Form ETA-9142A, Foreign Labor Recruiter disclosures, collects basic information on the identities and locations of all persons and entities hired by, or working for, the associated foreign labor recruiter. (New questions 11, 11.a, and 11.b.)
- Amended instructions to correlate with changes on forms.



Enhanced Job Opportunity Transparency

- DOL will collect additional information about owners, operators, supervisors, and managers using a **new Appendix C** to the Form ETA 9142A to learn more about the nature of the employer's job opportunity.
- § 655.130(a)(1)-(3) requires employers to provide, at the time of filing:
 - The full name, date of birth, address, telephone number, and email address for the:
 - **Owner(s)** of each employer;
 - Any person or entity who is an **operator of the place(s) of employment** (including an H-2ALC's fixed-site agricultural business client(s)); and
 - Any **manager or supervisor** of H-2A workers and workers in corresponding employment under the H-2A Application.



Form ETA-9142A, New Appendix C

- ***Owner:** An owner legally owns or has a controlling operational role in the employer(s) business.
 - any owner with ownership of more than 50 percent of a business, and
 - any owner who exercises any decision-making responsibilities over the business.
 - The owner of the parent entity, if the employer is a branch, subsidiary, or affiliate of a corporate or joint venture.
- ***Operator of place of employment:** An operator runs the agricultural business, making day-to-day management decisions. An operator could be an owner, hired manager, cash tenant, share tenant, and/or a partner.
- ***Manager:** A person whose duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources.
- ***Supervisor:** A person who supervises and coordinates the activities of agricultural, range, aquacultural, and related workers.

***Definition for purposes of 20 CFR 655.130**



Foreign Labor Recruitment Transparency

- DOL will collect foreign labor recruitment chain information through a **new Appendix D** to the Form ETA 9142A. New § 655.137 in the final rule requires employers to:
 - Provide a copy of all agreements with any agent or recruiter the employer engages or plans to engage, whether in the U.S. or abroad in the recruitment of H-2A workers. § 655.137(a). Agreements must contain language prohibiting the imposition of fees on workers § 655.135(k).
 - Disclose the identity (including government registration/license #s) and location of any persons and entities who will be employed in the recruitment or solicitation of prospective H-2A workers. § 655.137(b).
 - Employer must update this information with any changes during the contract period (§ 655.137(c)) and must retain this information for a period of three years (§ 655.167(c)(8)).
 - OFLC will publish a foreign labor recruiter registry containing a recruiter's identifying information, as in H-2B. § 655.137(d).
 - Information about foreign labor recruiters **MUST** be submitted on Appendix D.



Transition Procedures and Rule Implementation

UPCOMING H-2A Webinars

- August 7 – Farmwork Protection Final Rule H-2A Filing Tips
- August 21 – Farmworker Protection Final Rule FLAG Demonstration for Filers



Wage and Hour Division (WHD) Enforcement Authority

- Conduct investigations to determine compliance
- May enter and inspect any premises, land, property, housing, and vehicles
- May inspect and transcribe records
- May question any person
- May gather any other information as may be appropriate



WHD Enforcement Responsibilities

- Whether U.S. workers were offered employment
- Whether U.S. workers were laid off or displaced
- Payment of required wages and $\frac{3}{4}$ guarantee to all covered workers
- Provision of transportation, housing, and meals to all covered workers
- Anti-retaliation protections
- Other obligations under the work contract and H-2A regulations

Covered Workers

Workers covered under the H-2A regulations:

- H-2A visa holders
- Workers in corresponding employment
- U.S. workers improperly rejected, laid off, or displaced





Protection from Retaliation

May not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against a person who has engaged in a protected activity, including:

- Filing a complaint or instituting a proceeding about any matter involving the H-2A program
- Testifying or being about to testify in any such proceedings
- Consulting with an attorney or legal assistance program about any matter involving the H-2A program
- Consulting with a key service provider about any matter involving the H-2A program
- Exercising or asserting, on behalf of themselves or others, any H-2A right or protection
- Filing a complaint, instituting a proceeding, or testifying or assisting in an investigation, proceeding or hearing under any applicable Federal, State, or local law or regulation, including safety and health, employment, or labor laws



Protection from Retaliation

If working in agriculture as defined by the Fair Labor Standards Act, the rule also protects the following activities:

- Engaging in self-organizing, such as forming, joining, or assisting a labor organization, or refusing to do so
- Engaging in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions, or refusing to do so
- Refusing to attend a “captive audience” meeting, or listen to or view the employer’s opinion on protected activities



Guest Access to Worker Housing

Workers employed under the H-2A program may invite, or accept at their discretion, guests to their employer-furnished housing.

- Guests may enter and be present in workers' living quarters, common areas, and outdoor spaces near housing, if invited.
- Only reasonable restrictions may be implemented.
- Guests may include family members, friends, health care providers, translators, key service providers, representatives of labor organizations, or others.



Designation of a Representative

In many cases, workers engaged in FLSA agriculture must be permitted to invite a representative of their choosing to attend certain meetings where an employer seeks to gather information that the worker reasonably believes might result in disciplinary action.

- No particular words or form is required to request a representative
- Request can be made at any point before or during the meeting
- Anyone may act as a representative (coworker, interpreter, legal aid advocate, or others)
- Representative must be permitted to advise and assist the worker during the meeting
- If the representative is available in person, they must be permitted to attend in person
- If the representative is not available in person, the employer may allow either a reasonable delay to join in person or remote access via telephone or videoconference



Termination for Cause

A worker is not “terminated for cause” unless the worker is terminated for failure to comply with an employer’s policies or rules or for failure to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer.

Workers terminated **without** cause are owed:

- Three-fourths guarantee
- Housing and meals until departure
- Outbound transportation
- In the case of U.S. workers, contact for employment next year



Termination for Cause

Five conditions must be met to be justified and reasonable:

1. The worker has been informed of the policy, rule, or performance expectation;
2. Compliance with the policy, rule, or performance expectation is within the worker's control;
3. The policy, rule, or performance expectation is reasonable and applied consistently;
4. The employer undertakes a fair and objective investigation into the job performance or misconduct;
5. The employer corrects the worker's performance or behavior using progressive discipline, unless the worker has engaged in egregious misconduct.



Termination for Cause

Condition 1: the worker has been informed, in a language understood by the worker, of the policy, rule, or performance expectation

- Criteria for performance expectations disclosed in the job offer
- Policies and rules must be clearly communicated to and understood by the workers
- Productivity standards must be disclosed in the job offer



Termination for Cause

Condition 2: compliance with the policy, rule, or performance expectation was within the worker's control

Compliance is not within the worker's control when, for example:

- Appropriate tools or equipment are broken, faulty, or not provided
- Crop is immature and not ready to harvest, but the worker is held to a productivity standard for a fully mature crop
- Worker is unable to meet productivity standards due to waiting time
- Performance is evaluated on a per-crew basis instead of on a per-worker basis
- All residents of a housing unit are held responsible for a housing policy violation by one worker



Termination for Cause

Condition 3: the policy, rule, or performance expectation is reasonable and applied consistently to H-2A workers and workers in corresponding employment

Reasonable policy, rule, or performance expectations:

- Clearly represents an employer's permissible interests with clear relationship to legitimate business needs
- Housing rules are related to safety, health, legal, or employer's other legitimate interests
- Policies or rules do not violate the law

Consistent application

- Holding all workers to a standard or rule



Termination for Cause

Condition 4: the employer undertakes a fair and objective investigation into the job performance or misconduct

- Evaluate the job performance or misconduct impartially and without favoritism
- Do not assume misconduct or failure to meet expectations before reviewing the relevant facts
- Generally includes an investigatory interview



Termination for Cause

Condition 5: the employer corrects the worker's performance or behavior using progressive discipline

Progressive Discipline

- Graduated and reasonable responses to an employee's failure or noncompliance
- Discipline is proportional to the severity of failure or misconduct
- Procedural steps under the "for cause" standard are taken
- Egregious misconduct may result in immediate termination



Termination for Cause

Recordkeeping and other obligations

- Notify OFLC, and DHS in the case of an H-2A worker, in writing, within 2 working days of termination for cause
 - Failure to properly notify may result in $\frac{3}{4}$ guarantee, outbound transportation, and recruitment obligations
- Maintain records for at least 3 years from the date of TEC approval
 - Records of notification to OFLC and DHS of termination or abandonment
 - Disciplinary records
 - Records indicating reason(s) for termination of any worker



Seat Belts

- Employer-provided transportation must have seat belts if the vehicle was originally manufactured with seat belts
- Vehicle cannot be driven, or allowed to be driven, unless all occupants, including the driver, are wearing seat belts
- Seat belts must be maintained in good working order
- Employers do not need to retrofit vehicles that were not required at the time of manufacture to have seat belts



Rate of Pay

Employers must offer and pay the adverse effect wage rate (AEWR), the minimum hourly wage rate under the H-2A program, effective immediately upon publication in the Federal Register Notice updating the AEWR.

- Non-range occupations must offer and pay at least the hourly AEWR, prevailing wage, including any prevailing piece rate, Federal minimum wage, State minimum wage, collective bargaining rate, or any other wage rate an employer intends to pay, whichever is highest.
- Range occupations must offer and pay at least the monthly AEWR, a collective bargaining wage rate, any applicable minimum wage imposed by Federal or state law, or any other wage rate an employer intends to pay, whichever is highest.
- Any applicable piece rate or overtime pay must also be disclosed.



Passport Withholding

Employers are prohibited from holding or confiscating a worker's passport, visa, or other immigration or government identification documents.

- Documents may be held for safekeeping provided the following conditions are met:
 - The worker voluntarily requests the employer keep the document(s) safe;
 - Worker is not directed to submit a request for safekeeping;
 - Documents are returned immediately upon request.
 - Worker must state in writing that the three conditions above will be met
 - Worker has ready access without meaningfully restricting access



Delayed Start

Employers that need to delay the start of work under a certified H-2A application by up to 14 calendar days in certain circumstances must notify, in writing, the state workforce agency and each worker at least 10 business days before the original start date.

- Employer must provide daily subsistence to workers who are already traveling to the place of employment.
- If timely notice is not provided, workers must be compensated the required rate for each hour offered in the job order for up to 14 calendar days
- Retain records of notifications
- Continue to comply with all H-2A requirements, including housing free of cost



Side Agreements

Employers may not ask workers employed under the H-2A program to sign any side agreements relating to their rights under the program, including:

- Arbitration agreements that were not disclosed in the job order
- Forms that purport to add or waive terms and conditions of employment
 - Examples include $\frac{3}{4}$ guarantee or outbound transportation



Transition Procedures and Rule Implementation

The Farmworker Protection Rule will go into effect on June 28, 2024. However, as described below:

New worker protections that must be incorporated into job orders filed in connection with H-2A Applications (criteria clearance orders) will apply to workers employed under any criteria clearance orders and associated H-2A applications submitted on or after 12:00AM Eastern Daylight Time on August 29, 2024. These new worker protections supplement and enhance existing protections and include the following employer obligations and assurances:

- disclosure of all applicable wage rates, including prevailing piece rates, as well as any other wage rate the employer intends to pay;
- requirement to permit workers to invite or accept guests to their employer-furnished housing;
- prohibition on operating vehicles that were required to be manufactured with seat belts unless all occupants and the driver are wearing such seat belts;
- disclosure of any productivity standards as a condition of job retention;



Transition Procedures and Rule Implementation

- clarification on the criteria necessary to terminate a worker for cause;
- agreement that workers may designate a representative in certain circumstances;
- disclosure of the owner of each employer, operator of each place of employment, and the managers and supervisors of workers; and
- disclosure of foreign worker recruitment.

These new provisions are reflected in the Form [ETA-790A, “H-2A Agricultural Clearance Order,”](#) and Form ETA-9142A “[H-2A Application for Temporary Employment Certification,](#)” which are pending OMB approval.

- In addition, through August 28, 2024, the Department will continue to enforce the anti-retaliation provisions in effect as of June 27, 2024. The Department will begin to enforce the anti-retaliation provisions as revised by the Farmworker Protection Rule only with respect to conduct or actions occurring on or after August 29, 2024. The revised anti-retaliation provisions explicitly prohibit retaliation because a person has:
 - Consulted with a key service provider on a matter related to the H-2A program; or
 - Filed a complaint, instituted or caused to be instituted any proceeding, or testified, assisted, or participated (or is about to testify, assist or participate) in an investigation, proceeding, or hearing under any applicable Federal, State, or local law.



Transition Procedures and Rule Implementation

- Additionally, for any person engaged in agriculture as defined by the Fair Labor Standards Act, the revised anti-retaliation provisions prohibit retaliation because a person has:
 - Engaged in self-organization and/or other concerted activities for the purpose of mutual aid or protection related to wages or working conditions, or refused to engage in these activities; or
 - Refused to attend a “captive audience” meeting, or listen to or view communications that have the primary purpose of communicating the employer’s opinion on protected activity.

H-2A Program Worker Protection Flyers

Protections for Workers Employed Under the H-2A Program

H-2A



This document summarizes legal protections and requirements for workers employed under the H-2A Program. For more information, call 1-866-4US-WAGE (1-866-487-9243) or visit dol.gov/agencies/whd/agriculture/h2a

WORKERS EMPLOYED UNDER THE H-2A TEMPORARY AGRICULTURAL EMPLOYMENT PROGRAM HAVE THESE RIGHTS:

DISCLOSURE:

You must be given a copy of your work contract in a language you understand. The contract must include all terms and conditions of the job, including productivity standards, wage rates, and any overtime pay. You must be notified in writing of all deductions that are not already required by law.

WAGES:

You must be paid at least twice per month at the rate stated in your work contract, and each payday you must be given a pay stub. If your employer has delayed work at the beginning of the contract without giving you at least 10 business days' notice, you have the right to be paid for each day the work is delayed, up to a maximum of 14 calendar days. You must be guaranteed at least 3/4 of the total hours of work stated in your work contract unless you abandon the job or are terminated for cause.

INBOUND AND OUTBOUND TRANSPORTATION:

Your employer must pay you for any inbound transportation and daily meals to the place of employment once you complete half of the work contract. Once you complete the work contract, your employer must provide or pay for your return transportation and daily meals.

Protections for U.S. Workers Under the H-2A Program

H-2A

for U.S. Workers



This document summarizes protections afforded to U.S. workers when recruited or employed in agricultural employment by employers using the H-2A nonimmigrant visa program. For more information, call 1-866-4US-WAGE (1-866-487-9243) or visit dol.gov/agencies/whd/agriculture/h2a

RECRUITMENT

- Before employing H-2A workers, an employer **MUST** first advertise available jobs through the local State Workforce Agency and at seasonaljobs.dol.gov
- The State Workforce Agency **MUST** refer all eligible U.S. workers who apply for the advertised job to the H-2A employer.
- The employer **MUST** hire you if you are a qualified, eligible U.S. worker who applies for the job up through the 50% point of the season listed on the employer's job advertisement.
- You may **ONLY** be rejected for lawful, job-related reasons.
- The employer **MUST** contact you and solicit your return to the job if you were employed in the previous year in the occupation and place of employment for which the employer is requesting H-2A workers, unless you abandoned the job or were terminated for cause. Any termination for cause must be fair and reasonable.

BENEFITS, WAGES, AND WORKING CONDITIONS

- The H-2A employer **MUST** offer you benefits, wages, and working conditions that are at least as favorable as those offered to H-2A workers.
- The employer **MUST NOT** impose any restrictions or obligations on you that are not also imposed on H-2A workers.

<https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule>



Where to Obtain Additional Information

Information and resources related to the H-2A visa program including fact sheets, posters, checklists, worker rights cards, and more:

- <https://www.dol.gov/agencies/whd/agriculture/h2a>

Information and resources related specifically to the Farmworker Protection Rule:

- <https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule>



Where to Obtain Additional Information

WHD protects all workers regardless of immigration status. WHD keeps all complaints and requests for compliance assistance confidential.

- Call WHD toll free to obtain confidential compliance information and helpline: **1-866-4US-WAGE** (1-866-487-9243)
- If you would like to file a complaint, call or visit the nearest WHD office: <https://www.dol.gov/agencies/whd/contact/local-offices>



Overview of the Wagner-Peyser Employment Service

Wagner-Peyser Act (June 6, 1933):

- Established a nationwide system of public employment offices, now known as the Employment Service (ES).
- ES seeks to improve the functioning of the nation's labor markets by bringing together individuals seeking employment with employers seeking workers.
- State Workforce Agencies (SWAs) must use ES funding to provide ES to migrant and seasonal farmworkers (MSFW), as described in Federal regulations at 20 CFR parts [653](#) and [658](#), including [outreach to MSFWs](#), [State Monitor Advocate \(SMA\) responsibilities](#), clearance of job orders through the [Agricultural Recruitment System \(ARS\)](#), and operation of the [ES and Employment-Related Law Complaint System](#).

Workforce Innovation and Opportunity Act (WIOA):

- Amended the Wagner-Peyser Act to integrate services into the [American Job Center \(AJC\) Network](#) by requiring that ES offices collocate with the approximately 2,300 + AJCs nationwide.
- The AJC network provides access to an integrated array of labor exchange services so that workers, job seekers, and employers can find the services they need.

To find the nearest American Job Center: Call 1-877-US2-JOBS or 1-877-889-5627 (TTY) or visit [Local Help](#) | [CareerOneStop](#).



Changes to the Wagner-Peyser Employment Service Regulations at 20 CFR parts 651, 653, and 658

See [Training and Employment Notice 27-23](#) for a summary of changes to ES regulations.

Definition of Terms Used in Wagner-Peyser Employment Service Regulations

(20 CFR Parts 651, 653, 654, and 658)

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.*

Revises the definition of:

- *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



Agricultural Recruitment System Changes (Clearance Order Processing)

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:

The image shows the top portion of Form ETA-790, 'Agricultural Clearance Order'. It includes sections for 'Clearance Order Information' (with fields for Clearance Order Number, Issue Date, and Expiration Date), 'SWA Order Holding Office Contact Information' (with fields for contact name, address, and phone), and 'Employer Contact Information' (with fields for employer name, contact name, address, and phone). The form also includes a section for 'Type of Clearance Order' with checkboxes for '790A (H-2A clearance order)' and '790B (regular clearance order)'.

The final rule impacts Forms ETA-790 and 790A, OMB approval number 1205-0466 (criteria clearance order), and Form ETA-790B, OMB approval number 1205-0134 (non-criteria clearance order).

- 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.



Delayed Start Date

(Involving Workers Placed through the ES on Both Criteria and Non-Criteria Clearance Orders)

Revises clearance order **assurances and protections** for workers **placed through the ES on criteria** (filed in connection with H-2A) **and non-criteria** (not filed in connection with H-2A) clearance orders when employers fail to provide timely notice of delayed start dates.

- 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 describes how notice must be provided to workers, including compliance with the **language access requirements** of 29 CFR 38.9, **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 to all migrant workers placed** on the clearance order who are already traveling to the place of employment, without cost to the workers, **until work commences**, and must **pay all placed workers the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or state minimum wage, or an applicable prevailing wage, or for criteria orders the rate of pay required under 20 CFR 655, subpart B**, and must **provide or pay 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 such alternative work is stated on the approved clearance order.
- 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.

Discontinuation of Employment Services

Revisions throughout 20 CFR 658, subpart F to clarify and streamline 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. New 20 CFR 658.503 (e) and (f):
 - e) If the SWA discontinues services to an employer, **the employer cannot participate in or receive Wagner-Peyser Act ES Services provided by the ES, including by any SWA, to employers pursuant to parts 652 and 653 of this chapter. From the date of discontinuance, the SWA that issued the determination must remove the employer's active job orders from the clearance system. No SWA may process any future job orders from the employer or provide any other services pursuant to parts 652 and 653 of this chapter to the employer unless services have been reinstated under § 658.504.**
 - f) **SWAs must continue to provide** the full range of ES and other appropriate services **to workers whose employers experience discontinuation of services** under this subpart.

