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Protecting H-2A Workers' Rights and Welfare

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JEL Classifications: J15, J43, J83, J08, J30

Keywords: Adverse effect wage rate, Farm labor contractors, H-2A workers, Wage violations

The H-2A Fair Wages Principle

Traditionally, the agricultural sector has depended on nonresident, foreign-born workers for farm job positions usually avoided by domestic workers. These positions require taxing manual labor performed under harsh work environments that pose significant risks to workers' health (Luo and Escalante, 2017a). Nonresident foreign-born workers not only provide relief to employers' job sourcing difficulties but also allow their farm business employers to realize cost savings, as some of them (usually undocumented immigrants) are paid at relatively lower (below fair market) wage rates. Additionally, such foreign workers are given few to no benefits, including health insurance coverage crucial to their risk-laden work situations (Luo and Escalante, 2017b). Analytical evidence indicates that the cheaper cost of certain foreign labor inputs could distort market wage determinations (Rutledge, Richards, and Martin, 2023), an anomaly rectified by the H-2A program, the farm sector's legitimate alternative for employing contractual foreign workers.

Under the program, the adverse effect wage rate (AEWR) principle was conceived to revert possible farm labor market anomalies when foreign workers are hired. AEWR ensures that market wages paid to H-2A workers are economically acceptable. Each year, the Department of Labor (DOL) sets the adverse effect wage rate (AEWR) using the previous year's Farm Labor Survey results, collected by the USDA from crop and livestock workers. For nonrange occupations (which historically account for a majority of H-2A employment), AEWRs are set at the state level and apply to all workers regardless of nationality. Because of this, the AEWR serves as a legally binding lower bound on the wage that H-2A workers must be paid.

Beyond the market argument, AEWR can be seen as one of the H-2A program's social equalizing mechanisms. By setting a minimum hiring wage threshold, AEWR protects workers' welfare and ensures fair treatment of workers, regardless of ethnicity (Whittaker, 2008). This minimum wage regulation is supplemented by additional fringe benefit requirements that include, among others, decent housing accommodation for workers (CFR §655.122).

AEWR's Alignment to Livable Standards

In 2023 and 2024, state-level AEWRs posted annual increments averaging 7.49% and 5.26%, respectively, that exceed the wage rate's historical growth trends. The average 2022 rate of \$15.03 abruptly jumped to \$16.13 in 2023. In 2024, the rate further increased to \$16.98. Table 1 summarizes average annual AEWR changes for the country's five production regions.¹ Since 2022, the South, which usually has the lowest average AEWR, posted the highest annual increase at 8.26%, apparently to make up for its sluggish growth of 3.64% from 2019 to 2022. Interestingly, Midwestern states had the second highest average annual rate of increase since 2022 at 7.74%, even after posting the second highest AEWR growth rate from 2019 to 2022.

The trends reported in Table 2 validate AEWR's role as a social-equalizing tool that upholds workers' rights to receive adequate, fair, and just compensation. In establishing this goal, AEWR upgrades are analyzed relative to prevailing livable wage rates obtained from the Massachusetts Institute of Technology (MIT)'s Living Wage Calculator (MIT, 2024). MIT compiles annual average state livable (living) wages, which are estimates of incomes needed to cover basic needs (i.e., food, housing, transportation, taxes, and inflation). Livable wages are set as incomes that allow workers to be self-

¹ These five production regions are (i) South (Arkansas, Florida, Georgia, Louisiana, Mississippi, Alabama, Tennessee, South Carolina, Kentucky); (ii) West (California, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Alaska, Hawaii); (iii) Plains (Nebraska, Kansas, Texas, North Dakota, South Dakota, Oklahoma); (iv) Midwest (Minnesota, Iowa, Wisconsin, Illinois, Missouri, Indiana, Ohio, Pennsylvania, Michigan); and (v) Atlantic (North Carolina, Virginia, West Virginia, Maryland, Connecticut, Massachusetts, New York, Vermont, New Hampshire, Maine, New Jersey, Rhode Island, Delaware).

Table 1. Regional Summary of Annual Adverse Effect Wage Rate (AEWR) Changes, 2019–2024

Region	Regional Average AEWR			Change in AEWR (%)			
	2022	2023	2024	2022-2023	2023-2024	Average, 2022-2024	Average, 2019-2022
Atlantic	15.27	16.34	17.15	6.96	5.01	5.98	5.66
Midwest	15.74	17.24	18.09	9.53	4.94	7.24	5.65
Plains	15.61	16.51	17.40	5.86	5.33	5.60	4.53
South	12.61	13.87	14.74	10.25	6.27	8.26	3.64
West	15.77	16.60	17.43	5.29	4.96	5.13	5.24
All States	15.03	16.13	16.98	7.49	5.26	6.37	5.05

Notes: The five production regions are defined as follows: South (Arkansas, Florida, Georgia, Louisiana, Mississippi, Alabama, Tennessee, South Carolina, Kentucky); West (California, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Alaska, Hawaii); Plains (Nebraska, Kansas, Texas, North Dakota, South Dakota, Oklahoma); Midwest (Minnesota, Iowa, Wisconsin, Illinois, Missouri, Indiana, Ohio, Pennsylvania, Michigan); Atlantic (North Carolina, Virginia, West Virginia, Maryland, Connecticut, Massachusetts, New York, Vermont, New Hampshire, Maine, New Jersey, Rhode Island, Delaware).

Source: Department of Labor (DOL, 2023)

sufficient (without the need for external assistance). A gap between AEWR and livable wage rate per hour (LWH) exists if the ratio $\left(\frac{AEWR}{LWH}\right)$ yields a result of less than 1. In this analysis, we relate LWH to an H-2A worker’s living situation by selecting MIT’s estimates for a single adult with no children, further adjusting to a “net LWH” rate by subtracting the housing component of living expenditures since H-2A provides housing benefits.

In 2022, AEWR levels set for Southern states fell below their respective net LWHs; some states in other regions (except the Midwest) also experienced gaps between their AEWRs and net LWHs. After the 2023 AEWR increases, the South’s AEWR-net LWH gap was almost eliminated, at 0.99, while other regions’ ratios were greater than 1.00. When AEWRs further increased in 2024, the South’s AEWR-net LWH gap disappeared as the ratio increased to 1.05, while the other regions’ ratios improved further. These trends solidify the H-2A

program’s commitment to the worker welfare protection principle in which AEWRs are set at more socially and economically meaningful levels that allow farm workers to afford basic living expenditures and live adequately.

H-2A Program Violations

The DOL’s Wage and Hour Division (WHD) is tasked with protecting the rights of the country’s labor force. This office monitors farm employers’ compliance with program regulations and imposes civil money penalties for labor contract violations (WHD, 2023b). Program violations include (i) employer’s failure to properly pay a worker or honor the labor contract’s terms or conditions, (ii) noncompliance with housing or transportation safety and health provisions of the work contract, (iii) repeat or willful violation of offense(s) in (ii) (WHD, 2023b).

A cursory look at the summary of WHD’s investigations on wage-related offenses in the agricultural sector

Table 2. Adverse Effect Wage Rates (AEWR) and Livable Wages Per Hour (LWH), 2023 and 2024, With (Gross) and Without (Net) Housing Component Scenarios

Region	Gross LWH 2023–2024	Housing % of LWH	Net LWH, 2024	No. of States with Net LWH Gap, 2022 ^a	AEWR-Net LWH Ratio, 2023	AEWR-Net LWH Ratio, 2024
Atlantic	23.72	36	15.03	3 of 13	1.09	1.14
Midwest	20.76	29	14.76	0 of 9	1.17	1.23
Plains	19.94	27	14.45	1 of 6	1.14	1.20
South	20.68	32	14.09	9 of 9	0.99	1.05
West	23.39	34	15.25	3 of 12	1.09	1.14

Notes: The five production regions are defined as follows: South (Arkansas, Florida, Georgia, Louisiana, Mississippi, Alabama, Tennessee, South Carolina, Kentucky); West (California, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Alaska, Hawaii); Plains (Nebraska, Kansas, Texas, North Dakota, South Dakota, Oklahoma); Midwest (Minnesota, Iowa, Wisconsin, Illinois, Missouri, Indiana, Ohio, Pennsylvania, Michigan); Atlantic (North Carolina, Virginia, West Virginia, Maryland, Connecticut, Massachusetts, New York, Vermont, New Hampshire, Maine, New Jersey, Rhode Island, Delaware)

^a A gap exists if the AEWR/Net LWH Ratio is less than 1.

Sources: MIT (2024).

Table 3. Wage Violations in the U.S. Agricultural Sector and under the H-2A Program, Fiscal Years 2016–2023

	2023	2022	2021	2020	2019	2018	2017	2016
Total case investigations								
Agriculture	831	879	1,000	1,038	1,125	1,076	1,307	1,275
H-2A only	413	421	358	377	431	318	330	235
Number of H-2A workers with back wages	5,181	6,066	7,430	5,978	4,994	4,328	3,717	3,572
Total H-2A back wages (\$millions)	3.822	3.659	5.877	3.205	2.420	1.972	2.378	1.452
Percentage of H-2A to all agriculture cases (%)								
Number of workers	70.58	73.44	71.59	53.49	55.66	48.01	50.89	33.86
Nominal back farm wages	55.46	62.91	69.70	44.68	39.92	46.85	47.12	29.96
Back wages per case (\$)								
Agriculture	8,293.89	6,616.54	8,432.45	6,910.49	5,387.48	3,910.86	3,861.91	3,799.88
H-2A workers only	9,255.07	8,690.33	16,416.20	8,502.07	5,614.31	6,200.23	7,206.54	6,176.93

Source: WHD (2023a).

indicates that since 2020, more than 5,000 H-2A workers have been victims of unpaid (or back) wages amounting to almost \$6.0 million (Table 3). In the last 3 years, the program has accounted for over 70% of affected farm workers and about 55%–70% of total back wages. The intensity of H-2A back wage complaints is more alarming: Each H-2A-related case usually involves larger magnitudes of average back wages since at least 2016. In 2021, for instance, a typical farm case’s back wages amount to \$8,432.45, while an H-2A case violation’s average back wages amount to \$16,416.20.

There is a plausible explanation for these trends. H-2A violations could be more easily assessed and tracked: Its labor contracts more explicitly define employers’ wage- and nonwage-related obligations to their workers. Moreover, the program mandates the implementation of periodic work or employer audits on compliance with established regulations.

Publicly available data from WHD do not provide more detailed information on the specific nature of the violation, especially whether the penalized offenses were intentionally or unintentionally committed by the employers. The following discussions offer several possible scenarios of deviations from the program’s provisions using anecdotal evidence collected from several popular press articles and public commentaries.

Underpaid H-2A Workers

Results of a survey of 100 Mexican workers who completed their H-2A contracts indicate that 43% did not

receive the wages they were promised (Centro de los Derechos del Migrante, CDM, 2020) and were instead paid at rates below the program’s prescribed minimum hiring rate, if they were paid at all (Vasquez, 2023). Many workers’ complaints uncover various “wage ducking” schemes practiced by H-2A employers, such as reverting from hourly to piece-rate payments,² nonpayment of overtime work translating to significantly low overall hourly wage rates (Vasquez, 2023), and delayed check payments.³ Several wage theft cases covered by popular press releases report “employer intimidation tactics” including threatening complaining workers with deportation (Dean, 2022; Ockerman, 2022), with other cases resorting to more serious offenses of “racketeering, forced labor, and human trafficking charges” (Office of Public Affairs, 2021). A case in point is Operation Blooming Onion, in which H-2A workers in Georgia were underpaid while forced to provide difficult manual labor with their bare hands under threats of deportation (Perez, Kenmore, and Favakeh, 2022; Hsu and Bustillo, 2023).

Jobless H-2A Workers and Three-Fourths Work Guarantee Violations

Extreme cases of wage violation extend beyond underpayment offenses. On paper, H-2A labor contracts stipulate a three-fourths work guarantee clause whereby hired H-2A workers are guaranteed to receive minimum compensation equivalent to at least three-fourths of the agreed aggregate working hours during the employment period (CFR §655.122). In practice, however, some H-

² Piece-rate payment arrangement allows employers to optimize workers’ productivity as workers are motivated to work harder and produce more output to maximize pay. However, allegations cite that employers tend to set low rates so that the H-2A workers’ eventual take-home pay falls below the expected contractual rate (Newman, 2011).

³ Allegations in a 2007 case involving H-2A workers in Georgia uncovered employers’ practice of preparing either backdated or false checks that workers preendorsed to hide underpayment of wages (Newman, 2011).

2A workers arrive in the country only to remain unemployed as the work positions they were promised are nonexistent (Grinspan, 2023; Vasquez, 2023; Newman, 2011).

Several explanations are given for these anomalous situations. First, some criticize the program’s processing inefficiencies, specifically the unreliability of lengthy labor certification protocols and the visa processing period to bring in the needed foreign workers at the right time when their services are needed in the farms (Grinspan, 2023). Empirical evidence confirms that resulting delays in foreign workers’ arrival in the country compel farmers to devise coping strategies (such as downsizing, increased reliance on family labor, and sudden adjustments in production plans) to avoid production disruption caused by delayed arrival of H-2A workers (Escalante, Cowart, and Shonkwiler, 2023).

Others blame the mismatch between prevailing H-2A labor supply and demand conditions for sudden production volatility, attributing business disruption to external economic shocks (“poor harvests,” as labeled in Grinspan’s exposition). Under these conditions, they argue that farm businesses could make unplanned modifications in their production plans that, among other effects, would minimize, if not eliminate, the demand for labor inputs. These business adjustments usually affect work positions previously intended for arriving foreign workers (Grinspan, 2023).

Others argue that certain types of violations of workers’ rights are permitted by structural defects within the H-2A

program itself. Critics contend that the most compelling explanation involves the government’s prerogative to tolerate the involvement of farm labor contractors as legitimate H-2A labor recruiters, petitioners, and employers.

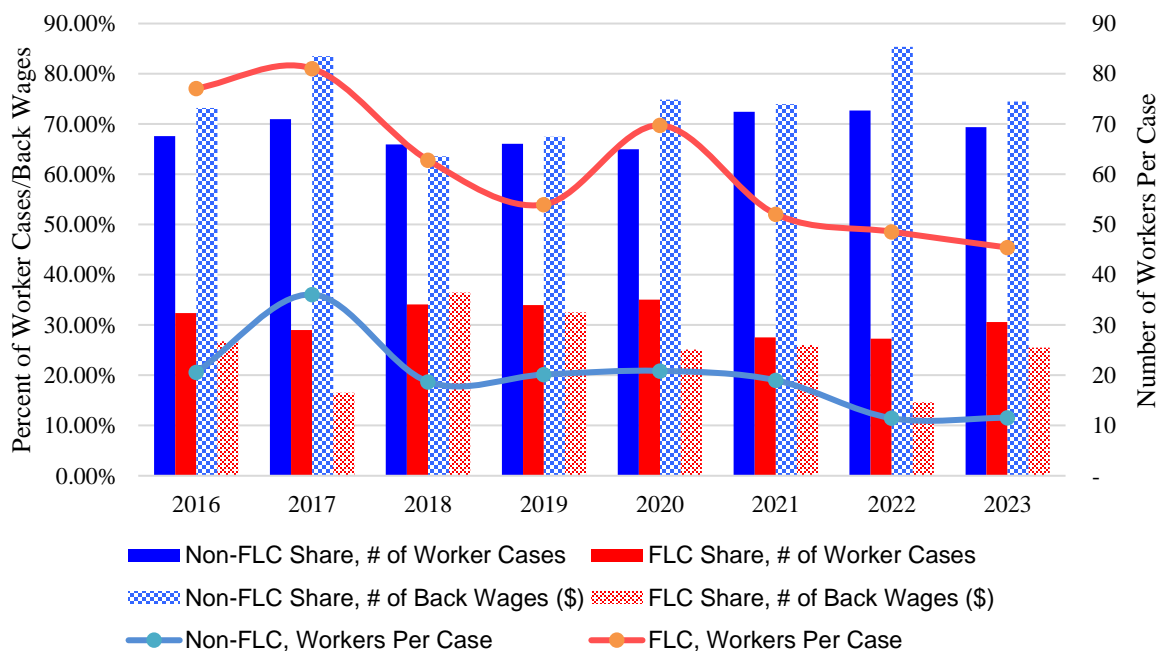
Farm Labor Contracting Violations

Existing H-2A regulations allow Farm Labor Contractors (FLCs) to petition and hire H-2A workers (CFR §655.132), which the FLC then makes available to multiple farm employers. FLCs can file a single foreign labor certification application for a batch of workers intended to service multiple farms at several farm work locations, even extending beyond the boundaries of the FLC’s home state (Castillo, Martin, and Rutledge, 2022). In 2021 and 2022, FLCs have hired more than 40% of all DOL-certified H-2A workers.

The FLC-H-2A hiring scheme could easily be justified by the FLCs’ more familiar grasp of the farm labor supply conditions in other countries, given their extensive social and business networks in those local communities. In contrast, individual U.S. farm businesses usually do not enjoy such hiring advantages. Thus, the FLCs’ good connections enable them to identify and recruit prospective H-2A workers among residents in their target localities.

Analysts, however, argue that foreign workers are more vulnerable to abuses under the FLC hiring scheme (CDM, 2020). Based on WHD’s wage violations data (Figure 1), FLCs’ share in the number of workers with back wages range from 27.30% (2022) to 35.03%

Figure 1. Share of Farm Labor Contractors’ (FLC) in Number of Wage Violations and Total Back Wages, 2016–2023



Source: WHD (2023a).

(2020). The share of back wages owed to FLC's H-2A workers range from 14.63% (2022) to 36.42% (2018) of all H-2A back wages. FLC cases usually affect more workers (annual counts of 34–56 per case) than non-FLC cases (11–36 workers per case). Workers' accounts expose at least two types of FLC-related violations: petition padding and collection of illegal recruitment (placement) fees (Grinspan, 2023; Vasquez, 2023; CDM, 2020; Newman, 2011).

a) Petition Padding

Driven by profit goals, some FLCs resort to petition padding (Vasquez, 2023), where the number of H-2A workers requested for labor certification exceeds the actual needs of prospective farm employer-clients. These practices explain three-fourths work guarantee violations resulting in some H-2A workers being left with no work upon their arrival. Despite DOL's precise requirement for detailed, verifiable documentary support for worker petition requests, FLCs are still able to "pad their petitions" with extra, unnecessary workers (Vasquez, 2023).

Even if one discounts deliberate FLC acts of "petition padding," the fact remains that there could be possible mismatch between the available supply of transported foreign workers and the contracted H-2A employers' actual labor needs (Grinspan, 2023) given the FLCs' disconnection from their client farms' business realities. FLCs do not always have accurate, updated knowledge of actual business conditions and exact need for new H-2A workers.

In a recent exposé, Grinspan (2023) discloses the difficult predicament of unemployed H-2A workers who eventually "wind up leaving the farms where they were sent and instead unlawfully (pursuing) other jobs (in other nonfarm industries)." These difficult decisions are made given the workers' need to survive, earn income to pay off debts, and feed family members back home. However, such actions are clear violations of the law and could result in eventual deportation when workers are apprehended.

b) Exploitative, Illegal FLC Recruitment Schemes
DOL's mandate clearly disallows the charging of H-2A recruitment (placement) fees and imposes sanctions and penalties if hiring companies are caught receiving payments from aspiring foreign workers in exchange for access to U.S. farm jobs (WHD-DOL, H-2A Compliance Review).⁴ However, many worker accounts uncover violations as they disclose their payments of such illegal recruitment (placement) fees to FLCs. In the 2020 CDM survey of Mexicans who completed their H-2A contracts, 26% of the respondents paid as much as \$4,500 in recruitment fees per worker. A U.S. fraud prevention manager in the U.S. Consular Office in Monterrey,

Mexico estimates the range at \$2,000–\$8,000, with the lower bound estimate already amounting to almost a typical Mexican worker's annual take-home pay (Vasquez, 2023).

Unacceptable Housing Conditions

Mandated employer-provided housing for H-2A workers must meet government safety standards for temporary labor camps. Clear, specific regulations clarify the nature of acceptable sanitation, laundry, water supply, toilet and bathing, and pest control facilities (CFR §1910.142).

In practice, however, substandard workers' living facilities further compound the H-2A workers' rights violation record. Among the CDM survey respondents, 45% revealed living in overcrowded and unsanitary workers' quarters during their H-2A work contract period (CDM, 2020). Several workers' accounts featured in popular press interviews provide more vivid, corroborating details of unsafe and unhealthy living conditions, such as "dirty and cramped" living spaces (Newman, 2011; Perez, Kenmore, and Favakeh, 2022; Grinspan, 2023), having either nonfunctioning or inadequate bathroom facilities (Vasquez, 2023), "dilapidated" trailer housing (Khim and Silva, 2020), and "pest-ridden premises" (Vasquez, 2023; Newman, 2011).

Workers' Fear and Silence

When H-2A workers become victims of such abuses, many are powerless and silenced by their fear of retaliation. Their immigration status renders them vulnerable and scared of potential harsh countermeasures, especially the possibility of contract termination and deportation (Costa and Martin, 2023). Newman (2011) points out that the foreign workers' access to legal assistance and the court system can be limited. Access constraints are caused by language barriers, the "low dollar value (priority)" of these cases versus other more lucrative client contracts, difficult access to workers' rural locations, workers' possible defaulting absence during litigation (carrying over after contracts expire), and conflicts of interest arising from H-2A employers' more extensive social connections that span into the legal circles.

Incapacity to Protect and Rectify

H-2A workers' desperation is compounded by the inadequacies and struggles within DOL's WHD, the government office tasked with protecting all workers' rights. Statistics indicate that the farm-related wage violation cases handled by WHD (Table 2) comprise only about 1% of all farm employers in the country (Vasquez, 2023).⁵

⁴ WHD uses the term "recruitment fees" for unnecessary payments demanded by FLCs from the foreign workers being recruited. These are synonymous with "placement" fees (WHD, 2023b).

⁵ These investigations usually yield a violation rate of 70% (Costa and Martin, 2023).

Costa and Martin (2023) provide an in-depth analysis of the severity of deficiencies in WHD's resource endowment and funding patterns over the past several decades. Their findings provide compelling evidence of serious understaffing and under-funding of WHD. Specifically,

- (a) WHD's 2022 budget (\$246 million) is almost equivalent to its 2006 budget (\$241 million), despite the growth in farm employment (including H-2A) over those years; and
- (b) WHD's 810 employees in 2022 handled 202,824 cases each (from all industries), with the workload almost triple the 1973 rate, when 808 employees handled 72,588 workers each.⁶
- (c) As the number of H-2A certified positions exceeded 370,000 in recent years, each WHD employee handles an additional workload of about 460 new H-2A workers each year.

Implications and Recommendations

The H-2A program was originally conceived as a mutually beneficial contract between farm employers and foreign workers. U.S. farms' frustrations in luring reluctant domestic workers are relieved by the availability of foreign workers who prove to be even more reliable and productive replacement workers. Meanwhile, the program caters to guest workers hailing from more economically depressed origins. These workers' decisions to come to the United States and endure any kind of work are driven by their desire to earn "promised" returns that would somehow alleviate difficult household economic situations back home.

However, WHD investigations into wage violations reveal that most infractions in recent years are H-2A-related. Multiple sources of anecdotal evidence present several forms of transgressions. Some foreign workers begin their work contracts already heavily in debt (when illegal recruitment fees are enforced), could receive less than the "promised" wages, or find themselves either underemployed or unemployed (when FLCs could not place them in their original work destinations).

These allegations are already serious, but the reality becomes even more alarming when analyzed in the proper context. Evidence suggests that verified wage violation citations comprise only a very minimal portion of the entire range of possible abuses committed against foreign workers. First, given WHD's staffing and funding woes, its investigative and corrective capability can only cover a very insignificant fraction of all possible contract infringements. Second, foreign workers' fear of deportation threats and dire economic needs make them powerless, voiceless, and meek. Third, wage- and employment-related cases expose only part of the abuses committed against H-2A workers, including substandard housing conditions, workplace threats,

racial and gender discrimination, and workplace safety endangerment (Hsu and Bustillo, 2023; Grinspan, 2023; CDM, 2020; Newman, 2011).

From a policy perspective, several concerns need to be addressed for the sake of fully realizing the program's optimal benefits to both workers and employers. The government must prioritize the establishment of more efficient, effective, and adequate monitoring and compliance audit systems. Policy makers should realize the urgency of allocating reasonable federal funds that will improve WHD's acute resource and funding gap situations to allow the agency to significantly fulfill its mission.

To avert the program's unintended contribution to the illegal immigration issue, the following ideas are offered: First, interagency data-sharing arrangements (similar to the USDA-DOL co-operation during the pandemic) and more coordinated worker tracking co-operation between DOL and immigration regulating agencies could quickly apprehend H-2A workers who (either willingly or unwillingly) migrate to jobs outside their original work contracts at the risk of becoming undocumented. Second, FLCs' petition padding practices can be suppressed by requiring validations of actual work sites relative to FLCs' declarations in their labor certification applications as H-2A workers arrive and are deployed to their work sites, with additional penalties imposed on discrepancies.

More effective sanctions on FLCs' violations need to be established and faithfully enforced, including a revamp of the existing surety bond penalty for erring FLCs that currently only yields accrued benefits to the government for assessed infractions with no beneficial consequences to affected workers (CDM, 2020). Moreover, foreign governments' intervention and co-operation with our authorities may significantly help curb FLCs' illegal recruitment schemes overseas given the former's jurisdiction and extensive built-in policing infrastructure.

H-2A's farmer patrons can also help minimize FLC-related infringements. They should avoid dealing with FLCs that have dubious hiring records even during periods when their farms are in dire need of workers. This selective, cautious stance among farmers should help oust notorious FLC operations. Closer working relationships with selected FLCs in good standing would lead to better communication and coordination of H-2A demand and supply dynamics, ensuring the rightful employment of H-2A workers and the farms' proper realization of business benefits supplied by its foreign workers.

H-2A's prominence in wage violation discussions does not necessarily suggest that the program's employers

⁶ These figures are derived from an estimated total of over 164 million hired workers in all industries, with about 2 million working in the agricultural sector (Costa and Martin, 2023).

are more delinquent than their non-H-2A peers. Conversely, the H-2A program presents a truly transparent employment model that carefully and succinctly lays out the protection of the rights of both workers and their employers while other industries lean toward ad hoc, unregulated practices. Such clarity and the mandated periodic compliance audits only allowed for relatively quicker identification and easier apprehension of irregularities in hiring and work relationships within the program. Elsewhere, the need for similar transparency and commitment to the welfare

of both workers and employers cannot be understated as that can pave the way for healthier and more productive working co-operation and collaboration. In this regard, other employment sectors and work programs must take heed of H-2A's intentions to promote and uphold the preservation of the rights of workers and their employers.

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Acknowledgments: This study was funded in part by a grant from the Georgia Farm Bureau and is partially related to a project funded by the Southern Sustainable Research and Education (#LS 23-387).