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November 14, 2023

Kimberly Vitelli, Administrator
Office of Workforce Investment
Employment and Training Administration,
Department of Labor
200 Constitution Avenue NW, Room C-4526
Washington, DC 20210

Mr. Brian Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

Amy DeBischop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: United States Department of Labor, Docket ID No. ETA-2023-0003; Improving Protections for Workers in Temporary Agricultural Employment in the United States

Dear Administrator Vitelli, Administrator Pasternak, and Director DeBischop:

Please let this letter serve as New York Farm Bureau's public comment on your agency's rulemaking titled *Improving Protections for Workers in Temporary Agricultural Employment in the United States*.

The New York Farm Bureau (hereinafter "NYFB"), New York State's largest general farm organization, appreciates the opportunity to provide comments to the United States Department of Labor ("U.S. DOL") that was published in the Federal Register on September 15, 2023. Farmers value their employees and trust them to help keep farms operating in our state. As such, farmers understand the critical need to protect the rights of those who work on farms, which are often part of the H-2A program. However, NYFB feels that this proposed rule fails to work with farmers to build upon existing employee protection practices.

Under the Fair Labor Standards Act, there are exemptions for agricultural employees as they pertain to certain minimum wage provisions and/or overtime pay provisions. There is additional statute, the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), which exempts farm

employees from collective bargaining and various other provisions to protect the agricultural community and the greater food supply chain, due to the unique nature and volatility of agriculture.

However, New York farmers are in a particularly unique labor situation. This is because significant state labor standards were signed on July 19, 2019, known as the Farm Laborer Fair Labor Practices Act. During that time, NYFB expressed our concerns with this legislation as it would impose mandatory overtime and allow collective bargaining for farmworkers which has already contributed to labor shortages on farms and substantially increase farm costs in New York State. This can only lead to escalated food costs for consumers in the future.

We raise these points to highlight the current laws, both at the state and federal level, and to prevent confusion for farmers when laws and regulations conflict.

I. Wage Rate Provisions

This rule would require employers to pay any updated Adverse Effects Wage Rates (AEWR) immediately upon publication of the new AEWR in the Federal Register, rather than up to the 14 days after publication. Although this change may seem insignificant, this proposal would hurt farms of all sizes, but particularly smaller farms. Due to the incredibly tight margins farms operate under, especially those farmers in New York due to higher production and labor costs, it will be difficult for farmers to have immediate cash flow to pay the cost of an updated AEWR rate. Those 14 days would allow farmers the ability to secure funds, or even sell assets, to cover the updated AEWR costs. We respectfully ask that farms be exempt through an enforcement waiver, for a two-week period succeeding the Federal Register notice for those farms who may need to move and adjust their payroll to pay the full back pay of affected employees.

This proposed rule would require the employer to include the non-hourly wage rate on the job order along with the highest hourly rate so that both rates are included in the job order and recruitment, where there is an applicable prevailing piece rate or where an employer intends to pay a piece rate or other non-hourly wage rate. Additionally, if an employer offers overtime pay voluntarily or pursuant to federal, state, or local laws, then the employer must disclose on the job order any applicable overtime premium wage rates and the conditions for such overtime payment. This is problematic for New York farmers for a variety of reasons. Often, farm employees are paid "by the piece" which is a rate tied to the worker's per-unit productivity at harvest. However, these piece rates vary due to factors often outside of farmers control such as the weather, equipment, and type of commodity. This creates additional paperwork for farmers that are often hard to predict in order to include in a job order. Also in New York, due to the Farm Laborer Fair Labor Standards Act, and the Farm Laborers Wage Board, New York will be reducing overtime regulations, such that on January 1, 2024 the overtime threshold begins at 56 hours per week, and will reduce by four hours every other year until 40 hours is reached in 2032. This will be an additional step that all New York farmers will have to take due to the recent state law impacting overtime hours on farms.

II. "Termination for Cause" Provisions

The proposed rule would establish six criteria that must be satisfied prior to terminating an employee. New York is an "at-will employment" state that does not have exceptions, meaning that an employer may terminate an employee at any time and for any legal reason, or no reason at all. As with any other business operating in New York, farmer employers must have the ability to correct employees behaviors, or terminate, if appropriate.

This six-step process would create additional paperwork and legal hurdles for farmers that may not have the funds to consult labor professionals and attorneys. As a result, this will continue to place greater burdens on small and medium-sized farms in New York. Farmers in New York spend significant resources and work hard to follow all federal and state labor laws. However, by establishing this proposed rule, there is an insinuation that all farmers as an employer are assigned a presumption of guilt. This is simply not an accurate reflection of the employer-employee relationship on farms. As an industry that continues to struggle with finding a steady labor force, farmers do not take the termination of an employee lightly. Farmers appreciate that without farm employees, we could not sustain our strong and reliable food supply. As such, farmers often do more than other businesses to keep an employee due to the costs and time to train a new employee.

III. Removal of Pre-Discontinuation Hearing

This proposed rule would remove the opportunity for a pre-discontinuation hearing, regardless of the alleged harm while simultaneously extending the ways in which a State Workforce Agency is to discontinue services to an employer, and without the employer addressing allegations. Although it was drafted to "expeditiously and fairly resolving discontinuation proceedings", it must be highlighted that this change would remove fairness for farm employers. The proposed change would only allow post-discontinuation hearing; a change removing fairness for all parties of an employer-employee relationship.

IV. Debarment

The proposed rule would reduce the period in which to file rebuttal evidence or request a hearing of a Notice of Debarment from 30 calendar days to 14 calendar days. If the party receiving a Notice of Debarment does not file rebuttal evidence or request a hearing, the Notice of Debarment will take effect at the end of the 14-calendar-day period unless the party has requested, and the Administrator has granted, an extension of time to submit rebuttal evidence. Extensions will only be granted in limited circumstances.

Although farm employers still have the opportunity to either submit evidence or request a hearing, this condensed time in which to do so will greatly impact the ability for farmers to gather and offer substantive evidence. In essence, this could have the ability to limit the evidence submitted, simply due to a lack of time. This is not fair to farmers, and as such NYFB opposes.

V. Data Protection

This proposed rule seeks to expand the data required from farm employers to "promote transparency". However, it is vital to protect personally identifiable information for both employers and employees alike. This rule would require within one week of a request from a labor organization, a complete list of H-2A workers and workers in corresponding employment to include the worker's full name, date of hire, job title, work location address and zip code. Additionally, if available, it would require to provide the personal email address, personal cell phone and/or profile name for a messaging application used by the workers. This far extends transparency, and is rather an encroachment of the employees private data, that they would be unaware was even shared. Additionally, the rule lacks guidance of what is defined as, or qualifies as a labor organization.

This rule also allows labor organizations to receive attestations of good faith negotiations as it relates to labor neutrality agreements. Although the employer can decline, they must provide a reason. NYFB has concerns with this proposal, and would respectfully request safeguards for employers that they will not be retaliated against.

VI. Conclusion

In sum, NYFB has significant concerns with many sections of this proposed rule. Farmers and farm employees are inherently connected to our country's food security. Farmers rely on both farm employees, many of which are part of the H-2A program, to continue to provide fresh food to our communities all across our country. NYFB continues to promote and advocate for farmers and farm employees across our state. However, it is vital that both farm employers and farm employees are treated fairly.

NYFB appreciates your time and the opportunity to comment on this rule.

Sincerely,

Ashley Oeser
Associate Director of Public Policy
New York Farm Bureau