



New York State Department of Labor

Andrew M. Cuomo, Governor

Peter M. Rivera, Commissioner

Agriculture Labor Program's 2012 Post-Harvest Report

This report is a collaborative project between the New York State Department of Labor's Agriculture Labor Program (AgLP) staff, the NY State Monitor Advocate (SMA) and the agricultural employers and other agencies that participated in the post-harvest meetings that took place in December 2012 and January 2013. This report highlights the work done by the AgLP staff since the program's transition to the Division of Immigrant Policies and Affairs (DIPA) and will address additional initiatives that the AgLP plans to tackle next harvest season. This report will also cover the Foreign Labor Certification Unit's work with agricultural employers participating in the H2A Guest Worker Program. In addition, we will address some of the issues and concerns that were raised by agricultural employers that participated in the post-harvest meetings.

"New York Farm Bureau staff, along with many of our members, were pleased to participate in the Department of Labor's outreach efforts this year to the farm community. The Division conducted several regional meetings with farmers to gain information about the newly re-constructed program, as well as guidance on various compliance issues such as the newly merged Farm Work Agreement with the Wage Theft Agreement Form. New York Farm Bureau appreciates the program's continued efforts to communicate with employers and employees, and encourages the outreach efforts of the Department of Labor through joint webinars."

Julie Suarez, Director of Public Policy, New York Farm Bureau

Summary of Accomplishments

Since the AgLP rolled out mid season, the following data represents a complete picture of our accomplishments from May to December 2012:

- **995 agricultural businesses visited** to offer business services, technical assistance on labor law compliance and provide information on available resources
- **3,637 workers contacted** (2,271 identified as migrant, seasonal or food processing workers) to offer employment services, supportive services, labor rights education and assure working and living conditions are in compliance with applicable regulations
- **526 apparent violations encountered** by the AgLP staff during their field activity relating to state or federal labor regulations involving 240 businesses
- **506 apparent violations resolved** by the business owner following intervention by AgLP staff including educating and/or providing technical assistance to the business owner. Through informal resolution, issues were corrected without the need to involve an enforcement agency. This is a 96% success rate preventing citations and potential penalties to employers.
- **20 apparent violations referred** to enforcement agencies due to uncooperative business, complexity or jurisdiction issues.

The following data has been provided by the Foreign Labor Certification Unit regarding the AgLP's accomplishments as they relate to the H2A Guest Worker Program:

- **148 H2A job orders received**
- **114 H2A job orders certified**
- **2,830 guest workers requested**
- **2,570 guest workers certified**
- **196 required field checks assigned**
- **168 required field checks conducted** (an 86% completion rate)¹

This information is important because it reflects a commitment by the AgLP to assist farmers in obtaining workers, either through the H2A Guest Worker Program or through a local job order. It also reflects the employers' willingness to work with the AgLP in complying with labor law and therefore avoid a visit from state or federal law enforcement. The success of the AgLP requires the active participation of agricultural employers. Our mission is to assist agricultural employers in their goals of obtaining a workforce and complying with the labor law. We are part of a delicate system that requires agricultural employers, workers and the AgLP staff to work together to ensure that agriculture remains a viable and thriving industry in New York State.

Challenges encountered

The Agriculture Labor Specialists (AgLS) treat each field visit as an opportunity to bring an employer into full compliance with the labor law by identifying potential issues and advising on resolutions. This service is crucial because the AgLS is not a law enforcement official; their role is to provide guidance and assistance if they observe or believe that there may be an issue to be addressed. In most instances, the agricultural employer has the option of working with the AgLS to resolve any apparent violations of labor law. The flexibility provided by the AgLS in assisting the agricultural employer in resolving apparent violations and the employer's willingness to comply is the reason that there has been a 96% resolution rate. Of the 526 situations which appeared to violate the labor law, all but twenty were quickly resolved. The most common issue was missing required federal or state employee notification postings. Other types of apparent violations that were addressed and resolved included failure to register to bring five or more migrant and seasonal farm workers (MSFWs) into the state, failure to register for the required state Farm Labor Contractor² (FLC) permit, housing violations and claims for unpaid wages. The following are labor law requirements we found many employers unaware of.

Unpaid Wages

An employer is required to pay his/her manual workers no later than seven calendar days after the end of the week in which the wages were earned.³ This means that an employer can pay weekly, on his/her designated payday or can pay bi-weekly, so long as he/she pays all wages

¹ The federal minimum compliance level requirement is 25% of all certified job orders.

² NYS Labor Law, Article 19-A, Minimum Wage Standards and Protective Practices for Farm Workers, Section 671 (4).

³ NYS Labor Law, Article 6, Payment of Wages, Section 191.1a.

from the previous 13 days, including all hours for work on the actual payday. In reality, most farmers choose to pay on a weekly basis with a one week lag.

If the worker is unavailable because he/she has been incarcerated or detained by authorities, the employer should contact the AgLS for assistance. The AgLS will assist the employer in getting the wages to the worker.

Many of the cases regarding unpaid wages were primarily related to the final paycheck of employment. Under no circumstances may wages be held by an employer. The employer is required to forward the paycheck on the regular pay day to any address that the worker indicated prior to the worker's departure. The employer cannot require that the worker return to retrieve his/her final paycheck in person. Furthermore, the employer cannot hold wages for property damages or any other outstanding debt. The employer's recourse in these instances is to file a claim with small claims court.

Illegal Deductions

The types of illegal deductions documented during the 2012 harvest season include utilities, loans to workers, boots/supplies, and medical bills. Section 193 of the NYS Labor Law was recently expanded to allow for additional deductions.⁴ The additional deductions do not directly address the needs of agricultural employers who are looking to assist their workers with small loans for provisions or other types of deductions. New proposed regulations will soon be posted, and public comment will be sought from stakeholders at that time.

Minimum Wage Violations on Dairy Farms

In 2012, the AgLP expanded its scope to include outreach/education to dairy farms and their workers. The AgLS have educated dairy employers about minimum wage law and have assisted in employers' attempts to achieve compliance. As a result of the complexity in repaying workers retroactively for minimum wage underpayments, some cases were referred to the Division of Labor Standards for assistance. In each case, all information regarding the employer's efforts at compliance are also sent to the Division of Labor Standards for their consideration when determining penalties, if any.

Overtime and diversified employment

According to the US Department of Labor, agriculture "includes farming in all its branches when performed by a farmer or on a farm as an incident to or in conjunction with such farming operations."⁵ For farmers that expand their agricultural businesses into areas that do not fall within the definition of agriculture, overtime issues arise. The AgLP has encountered overtime issues on farms that have diversified their operations. Some examples of diversified operations include packing houses (where product not grown on the farm is also packed), slaughter houses (where animals not owned by the farmer or raised on that farm are also slaughtered), and even restaurants that are connected to the farm business. In all of these examples, the additional

⁴ NYS Labor Law, Article 6. Payment of Wages, Section 193.

⁵ USDOL Wage and Hour Division Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act.

business activity does not meet the definition of agriculture and overtime would apply for work beyond 40 hours in a pay period that included agricultural (exempt) work and non-agricultural work. For example, an employee working 45 hours a week in the field harvesting onions who then works 10 hours in the packing house (packing another farm's onions) during the same week, is entitled to 15 hours of overtime regardless of what activity the worker was performing during the time beyond 40 hours.

Farm Worker Housing

Housing provided under the H2A Guest Worker Program must comply with either Employment and Training Administration (ETA)⁶ or Occupational Safety and Health Administration (OSHA)⁷ guidelines, depending on when the structure was built or substantially remodeled. The New York State Department of Labor (NYSDOL) entered into an agreement with the New York State Department of Health (NYSDOH) wherein NYSDOL accepts NYSDOH's pre-occupancy housing inspections of housing for five or more workers for purposes of the H2A application process. The NYSDOH enforces Part 15 Migrant Farmworker Housing⁸ regulations. Many H2A employers are confused as to why their housing may pass the pre-occupancy inspection by the NYSDOH but then receive information from the AgLS at a later date that their housing is not in compliance with either the ETA or OSHA guidelines. When an agricultural employer applies for H2A guest workers, they agree to comply with the federal housing requirements imposed by the program (ETA or OSHA regulations). Although the NYSDOL agrees to accept an inspection performed by the NYSDOH, we are required to perform a field check during the season to ensure that all terms and conditions specified in the job order (including housing) are in compliance with the appropriate federal regulations. The AgLP understands that the current procedure of accepting a NYSDOH inspection but then informing an employer that they may not be in compliance with federal regulations presents challenges. The AgLP is exploring some options to address these challenges.

Violations of H2A Job Order

While conducting required field checks on farms with H2A job orders, the AgLS occasionally found violations of the job orders. The most common violations included employers staggering start dates to bring workers at various points during the contract period; H2A workers acting as supervisors and receiving a higher rate of pay than other H2A workers on the same contract; workers performing tasks not described on the job order; and housing violations such as overcrowding, and not utilizing the housing location described in the order. The information presented on the federal form ETA790 (the job order) must be the same as what actually takes place during the contract period. In the instances described above, all workers must arrive at the same time or there must be separate H2A applications for each start date; all workers must receive the same rate of pay or there must be separate applications; housing location and all duties and tasks to be performed must be described in the job order; and any change in housing location, duties or tasks performed must be reported to the state and to USDOL.

⁶ 20 CFR 654, Subpart E.

⁷ 29 CFR 1910.142.

⁸ NYS Public Health Law, Part 15, Migrant Farmworker Housing, Section 225.

H2A Guest Worker Program

The following is a summary of the current H2A application process that takes place from the State Workforce Agency's (SWA)⁹ perspective:

- a. Submission to state: **At least 60-75 days** before the date of need. The NYSDOL Foreign Labor Certification Unit (FLCU) reviews the form ETA790 to ensure there is no incorrect or missing information. If there is, the FLCU will reach out to the employer or agent to correct the issue prior to sending a Deficiency Notice. Within seven calendar days of receipt of a complete ETA790, the FLCU sends the employer or agent the state accepted application.
- b. Submission to Chicago National Processing Center (CNPC): **At least 45 days** before the date of need. When submitting the ETA790 and ETA9142 to CNPC, the ETA790 that is submitted to CPNC must be the version certified by the FLCU. If an employer has updated or changed any information (i.e., the number of workers requested or the start/end date) prior to sending the documents to CNPC, the employer must inform the FLCU so that we can approve the updated document. **(Please note: The earlier the application is submitted, the more likely CNPC will certify it and the workers will arrive on time.)**
- c. Attachments: NYSDOL created two standardized attachments to ensure the employer or agent has all of the required information included in the application. Employers are not required to use the attachments, but must address the required information in the attachments they submit.
The optional standardized attachments are found on the NYSDOL website at the following link:
<http://www.labor.ny.gov/businessservices/lookforworkers/lookingforworkersIndex.shtm>
(Scroll down to Foreign Labor Certification)
- d. Submitting multiple orders: If the employer plans to have workers complete separate tasks (i.e., some only operating agricultural equipment and others only picking apples) they must submit separate applications. Also, if there is a supervisor who makes more than the wage that all other H2A workers make, a separate order must be submitted for that person as well.
- e. Material terms and conditions of the job order in Spanish: Puerto Rico is a supply state for New York (as are New Jersey and Pennsylvania) and all of the CNPC accepted job orders must be sent to these states and territory via the interstate clearance system. Each accepted job order must have a checklist of the material terms and conditions of employment in the language understood by the potential worker(s). As a service to the employer, DIPA has created a Spanish-language checklist of typical job duties and the AgLP staff will provide the material terms and conditions indicated in the job order to the supply states for their use. DIPA will also provide the Spanish language template to the employer for his/her use.

⁹ In New York State, the NYSDOL is the SWA.

The following are issues that have been highlighted as issues on the ETA 790 and attachments by the CNPC:

- a. Item #2 (**Location and Directions to Work Site**): Some CNPC analysts now require this section to state "all worksites owned and operated by employer." If this is an accurate statement for your business, please indicate this on your application.
- b. Item #3 (**Location and Description of Housing**): Please indicate the true capacity of the housing, not the number based on how many workers will arrive under the job order.
- c. Item #16 (**Job Specification**): Provide detail on the **exact job duties to be completed and any necessary experience**. Also include information on the **specific crops** worked on, if applicable. When providing the job order to other states for interstate referrals there cannot be any confusion on the type of work or experience required.
- d. Item #17 (**Wage Rates, Special Pay Information, and Deductions**): Include the correct rate of pay. If you are paying more than the Adverse Effect Wage Rate (AEWR), that rate must be specified in this section.
- e. Please ensure that the same information entered on the ETA790 is also entered on the ETA9142. The most common deficiencies identified by the CNPC are inconsistencies between the two forms.
- f. Production Standard: USDOL has advised state agencies that the statement "the level of production shall not be less than 75% of the average output of the experienced worker" will no longer be accepted on applications. Actual numbers on the average output and production which is calculated as a percentage of the output of an experienced worker must be specifically provided in the H2A order. The workers must be given this information prior to the start of the work under the job order.

The following are commonly asked questions about H2A related housing inspections:

1. *Who completes the pre-occupancy housing inspection?*
 - a. For orders housing 4 or fewer workers, the Department of Labor will inspect.
 - b. For orders housing 5 or more workers, the Department of Health will inspect.
2. *What regulations does my housing have to comply with?*
 - a. Housing built prior to April 3, 1980 must follow the ETA regulations found at 20 CFR 654.404.
 - b. Housing built or substantially renovated after April 3, 1980 must comply with the OSHA regulations found at 29 CFR 1910.142.
 - c. Rental accommodations must meet local standards for housing. If such standards do not apply, state housing standards apply. In the absence of state standards, OSHA standards apply.
3. *How often does my housing have to be inspected?*

Housing must be inspected at least once every year. If an employer submits an H2A order in January and another in June and uses the same housing for workers, a re-inspection is not required. However, if an employer submits an application in January and another in November that will carry over to the next year, a re-inspection of the housing is required.
4. *Who is required to maintain the housing that I provide to the workers?*

It is the responsibility of the employer to ensure that the housing remains in compliance with applicable regulations. The condition of the housing should be the same at the time of the pre-occupancy inspection and when the AgLS visits the farm during the job order. All of the

necessary regulations apply throughout the time the workers are living in the housing. That means, for example, that smoke detectors must have batteries at all times, window screens must be on the windows at all times, garbage cans must always have lids, etc.

5. *What is the process to follow if I want to use housing for workers that has never previously been part of my H2A application?*

If you submit an H2A job order with a housing location that has never been permitted by the NYSDOH or NYSDOL, please contact the FLCU at (518) 457-7304 and be prepared to report the number of workers you intend to house in each housing unit. You will be advised of which agency must conduct the inspection and either be given a date range or be referred to contact the NYSDOH.

6. *What types of surveys are conducted for the H2A Guest Worker Program and why are they important?*

Annual Apple and Pear Survey

The annual Apple and Pear survey, as required by USDOL to determine prevailing wages and practices, is conducted by NYSDOL's Division of Research & Statistics in collaboration with DIPA. Apple and pear growers should expect to see the survey in the mail in the fourth quarter each year. The survey should be completed and returned by December 31st. It is very important to complete the survey because the results impact the wages H2A workers (and non-H2A workers under the same contract) must be paid in the following year. AgLS will contact employers to remind them to complete the survey in a timely manner. Per guidance DIPA received from the USDOL in the fall of 2012, the results of the survey only impact apple and pear growers in New York State.

Ad Hoc Surveys

Ad hoc surveys must be completed upon request from the CNPC. When an H2A employer submits an application with a minimum qualification or experience requirement not previously requested, NYSDOL is asked by the CNPC to complete a survey of non-H2A employers to verify that the requirement is the same for their workers. For example, in 2012 an H-2A application requested productivity and bruising standards for pear harvesting. Because the 2011 Apple and Pear survey did not contain those standards for pears, CNPC requested an ad hoc survey for this information. The AgLS in the area of intended employment were asked to contact non-H2A pear growers in the area to verify whether or not the same or similar productivity and bruise standards were required of their workers. These surveys must typically be completed within 48 hours and the results can impact whether or not H2A employers may include such standards on their job orders.

Troubleshooting the H2A Application Process

Amending the Job Order

If you plan to change the start or end date of the H2A order, change the number of workers requested, change the housing location, change the rate of pay or extend your order more than two weeks after the original end date, you must send an amendment request to the CNPC. There is not an extra fee for this. You may submit your amendment request by email. The correct CNPC mailbox to send this request to is

h2a.amend&extend.chicago@dol.gov. Depending on the action you are requesting, you must include either "Amendment Request" or "Extension Request" in the subject line of your email. You must also include your CNPC Case Number. If you do not know it or do not have access to that number, please contact FLCU to obtain it.

Notification to CNPC/USCIS for Abandonment or Termination

If you terminate a foreign temporary worker or a local domestic worker for just cause, or a worker (or more than one worker) voluntarily abandons the job, you are obligated to notify both CNPC and U.S. Citizenship and Immigration Services (USCIS) within 48 hours.

The email notification must be sent to the following addresses:

CNPC- H2a.abandonment&termination.chicago@dol.gov

USCIS- CSC-X.H-2AAbs@dhs.gov

In each notification, you must include the CNPC Case Number or USCIS Receipt Number; your information including your name, address, phone number, and FEIN; and the name of each worker who is terminated or has abandoned the job with his/her country of origin, SSN, and visa number, if you have access to that information.

Sending Workers Home Early

If you plan to end the contract period early and send your workers home, you must notify the h2a.amend&extend.chicago@dol.gov mailbox to change the end date on the order, and you must also send an email to USCIS at CSC-X.H-2Aabs@dhs.gov with the subject as "Early Completion." All of the same information requested for abandonment or termination must be provided for early completion. You must also ensure that you have met the $\frac{3}{4}$ guarantee obligation described at 20 CFR 655.122(i).

Contract Impossibility Clause

In 2012, there were several weather-related events which caused employers to terminate their H2A orders due to Contract Impossibility. Under this clause, employers may terminate the job order due to fire, weather, or an Act of God which makes fulfillment of the job order impossible. If you decide to terminate your H2A order under Contract Impossibility, you must send a written request to CNPC at the h2a.amend&extend.chicago@dol.gov mailbox, and include the statement "H2A Contract Impossibility Request" in the subject line.

*Please note: if you do not use or do not have access to a computer and need to send CNPC and USCIS notification by postal mail or fax, please contact the FLCU at 518-457-7304 and staff will provide you with the appropriate number and/or mailing address.

Legal Reason for not Hiring Migrant and Seasonal Farm Workers (MSFWs)/Domestic Workers

Until the expiration of the 50% rule, you are obligated to hire domestic workers or MSFWs who qualify for the job. If a domestic worker or MSFW contacts you about a potential job opportunity, you are only allowed to turn him/her away if he/she does not meet the experience requirement specified on the job order. If you do not specify an experience requirement in your ETA 790, nearly any applicant will be presumed to be qualified and you must hire the MSFW or domestic worker.

Pay to MSFWs and H2A Workers

If you hire both domestic and H2A workers under the same job order, and they are doing the same tasks on the farm, they must all be paid the highest of the AEW, prevailing wage, state or federal minimum wage, or agreed upon collective bargaining rate. For example, if H2A workers are picking apples and making \$10.91/hour, MSFWs or domestic workers doing the same work must also receive \$10.91/hour. However, if the MSFWs or domestic workers on your farm are paid more than the H2A workers, that is allowable.

New to the H2A Application Process: Electronic Filing

Electronic Filing for the H2A program began on December 10, 2012. Employers and agents must create an account on the USDOL iCERT Portal to use the electronic system. If you do not currently have an account, please visit <http://icert.doleta.gov/> to create one.

The H2A application process will not change due to the electronic filing system implementation. All ETA790 submissions will go to the NYSDOL as before. If you prefer to email the application, you may do so by submitting it to ForeignLaborCert@labor.ny.gov. We can return a scanned image of the certified application to you so that you may submit it electronically.

If you prefer to continue mailing the application to the SWA, please submit it to the following address:

**New York State Department of Labor
Division of Immigrant Policies and Affairs
Foreign Labor Certification-H-2A
State Office Campus
Building 12, Room 570
Albany, NY 12240
518-457-7304
ForeignLaborCert@labor.ny.gov**

Please be sure the ETA790 and relevant enclosures are signed. The NYSDOL will review the application and notify you if there are any deficiencies. Once you receive the NYSDOL certified application, you may submit that and the ETA9142 electronically through the iCERT Portal. If you wish to continue mailing the application to the CNPC, you may do so by sending it to the following address:

**U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604-2105**

Use of the electronic filing system will save time and contribute to timely processing of your H2A job order by the CNPC. You will also be able to save the majority of the information from year to year, helping you to save time in the filing process in the future. If you were not able to

view one of the November 2012 webinars about the new system, you can view the slides from the presentation by visiting http://www.foreignlaborcert.doleta.gov/h2ah2b_icert_rollout.cfm.

Looking Forward to 2013

AgLP and non-H2A farm workers:

- **Job matching services for the farmer:** This program is set to start in the first quarter with the AgLS contacting employers in his/her territory to discuss the employer's labor needs. They will obtain information on the employer's needs and encourage employers to submit job orders to be shared in the inter/intrastate clearance system.
- **Interpretation Assistance (Spanish language) in interviewing MSFWs for local jobs:** The AgLS will be available to provide Spanish language interpretation assistance to the employer who has filed a job order with the NYSDOL job bank for workers (regardless of whether it is MSFW or year round) and that job order has resulted in a referral or an applicant.
- **Scheduling visits to the farm:** The AgLS will contact employers to schedule visits to the farm and the workers to provide services. Contact will begin in the first quarter of 2013.
- **Presentations to workers:** The AgLS presentations will be brief during the season. They will speak to the workers for 5-10 minutes giving out literature and contact information. This does not include the time spent by the AgLS in providing services to the farmer, and in attempting to resolve apparent violations. Their goal is to visit all MSFW farms twice in the season.
- **Proactive effort in registering local/seasonal/MSFW labor:** In addition to encouraging employers to submit job orders, the AgLS will similarly encourage workers to register for employment services including referrals to available jobs. The AgLP staff will not make informal referrals of workers. They will explain the benefits of either self registering or using the AgLS to register for NYSDOL services.

AgLP/FLCU and H2A farmers:

- **Arranging better times/days to perform required unannounced field checks to the farm:** Federal law requires that the NYSDOL conducts unannounced field checks during the contract period. AgLS will contact the farmers to find out better days and times for visiting them and the workers. They cannot guarantee that those days/times will be used, but will make every reasonable effort to take the farmers preferences into consideration when scheduling their field work. Contact with the farmers will occur when the job orders are approved and the workers are set to arrive.
- **Job matching services for the farmer:** This service is scheduled to start in March with the AgLS contacting farmers in their territory to discuss their labor needs. They will obtain information on the employer's needs and encourage the farmers to submit non-H2A job orders to be entered into the inter/intrastate job clearance system.
- **Interpretation Assistance (Spanish language) in interviewing MSFWs for H2A jobs:** The AgLS will be available to provide Spanish language interpretation assistance in the interviewing process for MSFWs for H2A jobs. We will not be able to provide these services for hiring of H2A guest workers.
- **Exit interviews:** In situations where an H2A worker or an MSFW employed on an H2A contract, either voluntarily ends employment (abandons employment) or is terminated by the agricultural employer for cause, the AgLS can provide support in the form of conducting an exit interview. The purpose of the exit interview is to memorialize events

surrounding a termination or voluntary end to employment. This is important because the H2A employer may be obligated to comply with the $\frac{3}{4}$ guarantee, subsistence, and transportation requirements if the voluntary abandonment or termination is not properly documented and reported to the SWA, CNPC, the US Department of Homeland Security and USCIS. **It is important to note that it is the responsibility of the H2A employer to contact the AgLS to request an exit interview.** At that time, the AgLS will remind the employer of their additional responsibilities under 20 C.F.R. § 655.122(n).

Questions from Agricultural Employers at Post Harvest Meetings

The agricultural employers that participated in our Post Harvest meetings had numerous questions regarding the AgLP and the H2A application process. Many of the questions were addressed at the meetings, but some required additional research or follow up with the CNPC or other resources. The following are some of the questions and the answers we were able to obtain:

How is the Adverse Effect Wage Rate (AEWR) calculated?

This question was posed to the USDOL's Ombudsman Program at the Office of Foreign Labor Certification (OFLC) and this is the guidance that has been provided:

Synopsis: The Adverse Effect Wage Rate (AEWR) is an annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey. AEWRs are the minimum hourly wage rates that the Department of Labor (Department) has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment for a particular area in order that the wages of similarly employed U.S. workers are not adversely affected.

Background: Under the Immigration and Nationality Act (INA) and the U.S. Department of Labor's administering regulations, the employer seeking to hire nonimmigrant workers on a temporary basis in the H-2A visa category must first apply for a labor certification from the Department of Labor. The labor certification is conditioned, in part, on a determination that the employment of nonimmigrant workers will not adversely affect the wages and working conditions of workers in the United States who are similarly employed.

To ensure no adverse effect on the wages of similarly employed U.S. workers, employers of H-2A workers must offer and pay at least a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage except where a special procedure is approved for an occupation or specific class of agricultural employment. Employers are required to pay the appropriate wage that is in effect at the time the work is performed.

The AEWRs are established annually by the U.S. Department of Labor based on the annual weighted average wages for field and livestock workers combined established by the U.S. Department of Agriculture's Farm Labor Survey that is published each November.

The AEWRs are published for the 49 States that are included in the survey and for which regional annual weighted average wages are established by the Farm Labor Survey; i.e. each State excluding Alaska.

Can the AgLP assist with translating the H2A job orders into Spanish?

As reflected in the current SWA's procedure detailed above, our AgLP staff will provide a summary of the material terms and conditions of the H2A job order to be included for review by potential customers that may be referred to the job order in our supply states (Pennsylvania, New Jersey and Puerto Rico). The AgLP will perform this function in compliance with 20 CFR 653.501. Under the Migrant and Seasonal Agricultural Worker Protections Act (MSPA)¹⁰ each farm labor contractor, agricultural employer, and agricultural association which **recruits any migrant agricultural worker** shall ascertain and disclose in writing to each such worker who is recruited for employment the following information **at the time of the worker's recruitment** in the language most understood by the worker:

1. the place of employment;
2. the wage rates to be paid;
3. the crops and kinds of activities on which the workers may be employed;
4. the period of employment;
5. the transportation, housing, and any other employee benefit to be provided, if any, and costs to be charged for each of them;
6. the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and
7. the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

To assist the agricultural employer with their requirement under MSPA, DIPA staff will forward employers the translation that the AgLP provides to the supply states for their records. For the translation to comply with MSPA requirements, **all** the material terms and conditions must be contained in the job order including the existence of any arrangement with a farm labor contractor for their services and provided to the worker at the time of employment.

Are H2A employers able to use other electronic means for advertising (i.e., Monster, Indeed.com, local online boards, etc.) or must the ads appear in print newspapers?

This question was posed to the CNPC and their response was that, under current regulations, the advertising must appear in print newspapers.

What does the USDOL look for when reviewing H2A employer documents and conducting audits of their past job orders?

The CNPC declined to provide any information regarding their procedure during an audit of an employer's past job orders because it is their position that they are attempting to determine the employer's compliance with federal regulations. The CNPC stated that disclosing their audit methodology would not be prudent and would defeat the purpose of the audit.

¹⁰ 29 CFR Part 500

How can the NYSDOL ensure that workers referred to farms have the required experience and skills listed in the job order?

The SMA and FLCU are in the process of putting together a training tool for the One Stop Career Center staff to address these issues and concerns. A webinar addressing the needs of the agricultural employer and the farm worker is scheduled for mid-March. It is our expectation that training the staff about the skills needed to do farm work will reduce the number of unqualified referrals to agricultural job orders. The AgLP management is also exploring the possibility of having a clarifying written advisory issued to all staff that refer workers to job orders.

Additional concerns being addressed by AgLP

The following question came up during the Post Harvest meetings and AgLP management is working to address the issues raised:

- **Using the services of local Farm Labor Contractors (FLCs):** Many farmers have expressed an interest in exploring the use of the services offered by FLCs in the hopes that they can contract for MSFWs next season. Currently, the NYSDOL offers some information about registered FLCs at www.labor.ny.gov/workerprotection/laborstandards/farmProgramRegistrants.asp. However, the database does not provide direct contact information for the FLC. The AgLP is exploring whether the database can be expanded to include the direct contact information for NYS registered FLCs so that meaningful contact and possible use of the FLCs services can take place.

Conclusion

In 2012, Agriculture Labor Program staff had many successful interactions with farmers. We are looking forward to the 2013 growing season and continuing to serve the stakeholders in this important industry.