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Re: Notice of Proposed Rulemaking, Employment and Training Administration and Wage and Hour Division, Department of Labor; Improving Protections for Workers in Temporary Agricultural Employment in the United States (88 Fed. Reg. 63,750-63,832, September 15, 2023)

Dear Administrator Vitelli, Administrator Pasternak, and Director DeBischop:

The U.S. Chamber of Commerce submits the following comments on the above-referenced notice of proposed rulemaking ("NPRM" or "proposal"). The Chamber is very concerned with the approach the U.S. Department of Labor ("Department" or "DOL") has taken with this proposal. Many of the most significant changes DOL purports to make to the H-2A Temporary Agricultural Worker Program are unconstitutional, are without statutory authority, or clearly contravene existing federal

law. Many other proposed changes will only serve to make it more difficult for American farmers to use the one program that allows them to meet their workforce needs at a time when their companies are struggling mightily to do so.

The Chamber and the agricultural commodity producers we represent take the issues of worker safety and fair treatment of employees very seriously. However, the Department's goals of protecting the interest of agricultural workers in the U.S. will not be served by making it incredibly difficult for honest employers to hire legally authorized workers. If this proposal is finalized, not only will the workforce challenges of U.S. businesses be exacerbated, but it will also worsen the very problems that DOL seeks to address in this rulemaking effort.

For the many reasons stated below, we urge the Department to abandon this rulemaking effort and we encourage DOL to undertake significant outreach with the American business community and labor advocates to pursue policies that both enhance worker protections and provide businesses certainty regarding their agricultural workforce planning decisions. The Chamber thanks Alex McDonald, Shareholder at Littler Mendelson P.C., for his assistance in preparing these comments.

The Department's Proposal Relies on Dubious Assumptions About the Labor Market for Agricultural Workers

In the NPRM, the Department proposes several new union-organizing rules for H-2A employers, as well as several other changes that will significantly raise the compliance costs for agricultural commodity producers in the U.S. and in turn, raise food prices for American consumers. Regarding the proposal's attempt to expand union organizing in U.S. agriculture, it contains, among other things, provisions that impose new requirements on employers that allow for union access to their worksites, new restrictions on labor-related speech, new limitations on property rights, and new protections for secondary boycotts.[1]

The Department argues that these new regulatory provisions are needed to address supposedly deteriorating labor conditions for H-2A workers, which the Department refers to time and again as a "vulnerable population" throughout the NPRM.[2] The Department notes that demand for H-2A workers has risen, even as agricultural employment has remained stable.[3] From that trend, it concludes that domestic workers must be avoiding agricultural employment because of poor working conditions.[4] More importantly, it attributes those conditions to alleged employer

[1] *See* 88 Fed. Reg. 63750, 63824 (setting out proposed 20 C.F.R. § 655.135).
[2] *Id.* at 63787–88.
[3] *Id.* at 63788.
[4] *Id.*

abuses of agricultural workers.[5] That is, because fewer domestic employees are choosing to work in agriculture, the Department assumes that employers must be violating their rights.[6] The Department justifies its allegations of vulnerability in the U.S. agricultural workforce by citing a few examples of its "enforcement experience"[7] and the nature of the work that is performed by H-2A workers.[8]

While the Chamber acknowledges the cases documenting certain employers mistreating their workers in terrible ways, the Department is sidestepping a fair examination of the facts to justify its radical unionization agenda. Researchers at the University of California, Davis examined Wage and Hour Division investigations data from Fiscal Year 2005 to Fiscal Year 2019 and concluded that labor law violations in U.S. agriculture are "concentrated among a relative handful of employers."[9] The five percent of U.S. crop farms with the most employment law violations between FY05 and FY19 accounted for 70% of all such violations during that period of time. Similar results were found with respect to U.S. farm labor contractors, as five percent of farm labor contractors accounted for 65 percent of the total number of violations. This data tends to suggest that targeted approaches to compliance enforcement might be a better course of action to take, as opposed to the top-down, one-size-fits-all agenda being put forth by the Department in this proposal.

Furthermore, the Department's assumption that the drop in U.S. farmworkers is due to alleged widespread employer abuses sidesteps a less salacious—but much more likely—explanation: abundant employment opportunities in many other fields of endeavor in the U.S. Years of low unemployment and rising wages have drawn candidates into the workforce at a steady clip.[10] Even so, the labor market remains tight, and employers across the economy are struggling to fill open positions. They have boosted pay and benefits, bidding scarce workers away from one another.[11] The result has been a fertile market for candidates but a challenging one for employers.[12]

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[5] *Id.*
[6] *Id.*
[7] See *Id.* at 63753, 63788.
[8] *Id.* at 63788.
[9] *The H-2A Program in 2022*, Rural Migration News, https://migration.ucdavis.edu/rmn/blog/post/?id=2720
[10] *See, e.g.*, *The Tight US Labor Market: Missing Hours, Missing Workers*, NAT'L BUREAU OF ECON. RESEARCH (Feb. 2023), https://www.nber.org/digest/20232/tight-us-labor-market-missing-hours-missing-workers; Lisa Shalett, *How Tight Is the U.S. Labor Market?*, Morgan Stanley (June 15, 2021), https://www.morganstanley.com/ideas/tight-labor-market-signs-factors.
[11] *See* Romain Duval et al., *Tight Jobs Market Is a Boon for Workers But Could Add to Inflation Risks*, INT'L MONETARY FUND (March 31, 2022), https://www.imf.org/en/Blogs/Articles/2022/03/31/tight-jobs-market-is-a-boon-for-workers-but-could-add-to-inflation-risks.
[12] *See id.* ("Labor shortages have pushed up wage growth, benefiting low-wage workers but adding to inflation risks.")

Agricultural employers are not immune to those forces. Like other employers, they must compete for workers.[13] And increasingly, they can't find enough workers at home.[14] So their only option is to seek more help from abroad.[15] The result has been more demand for H-2A visas and a higher proportion of foreign workers in the agricultural labor market.[16] That is not labor abuse, but basic economics.

The Department Lacks Statutory Authority for its New Union-Organizing Regime

The Department's proposal suffers from the fundamental flaw of failing to identify any legitimate authority for its new union-organizing regime. The Department's omission is not an oversight. The proposal identifies no authority because there is none.

The Department purports to rely on 8 U.S.C. § 1188(a)(1) of the Immigration and Nationality Act ("INA"). That section of the INA allows the Department to issue a temporary labor certification for H-2A workers when a) there are not enough able, willing, qualified, and available workers at the time and place where the agricultural worker is needed and b) the foreign worker's employment will not adversely affect the wages or working conditions of similarly employed U.S. workers. This section of the INA outlines the two primary goals Congress set for the executive branch with respect to agricultural labor needs in the U.S. – provide U.S. agricultural employers with the ability to meet their workforce needs with legally-authorized workers and ensure that the employment of these foreign nationals does not adversely affect the wages and working conditions of similarly situated American workers. All too often in this proposal, the Department focuses only on the latter goal and pays no mind to the former one.

The Department now interprets the statute as requiring "parity" in domestic and H-2A working conditions.[17] The Department takes this view in spite of the decades of precedent where the federal government's lack of parity was historically viewed as necessary to ensure that American workers were not adversely impacted by the H-2A workers. One such lack of parity with regard to worker treatment concerns the housing and transportation requirements for H-2A workers, whereas there is no such requirements that the farmer provide such benefits to his/her U.S. farmworkers. Now, the Department is changing its view with respect to the notion of parity and now

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[13] *See* Skyler Simnitt & Philip Martin, *U.S. Fruit and Vegetable Industries Try to Cope with Rising Labor Costs*, U.S. DEP'T OF AGRICULTURE ECON. RESEARCH SERV. (Dec. 28, 2022), https://www.ers.usda.gov/amber-waves/2022/december/u-s-fruit-and-vegetable-industries-try-to-cope-with-rising-labor-costs/.
[14] *See* Philip Martin, *Farm Labor Shortages: How Real, What Response?*, UNIV. OF CAL. GIANNINI FOUNDATION OF AGRICULTURAL ECON., https://s.giannini.ucop.edu/uploads/giannini_public/67/33/673330c9-c5a1-4664-ade5-6e9b406b8ef3/v10n5_3.pdf.
[15] *See id.* (describing proposed immigration-law reforms designed to ease agricultural labor shortages).
[16] *See id.*
[17] 88 Fed. Reg. at 63787.

seeks to erect a new program designed to promote union organizing among H-2A workers.[18] H-2A workers, it reasons, cannot have true parity without more access to unions.[19]

That rationale leaps past a major legal hurdle: the National Labor Relations Act ("NLRA").[20] Adopted in 1935, the NLRA protects certain labor-related activity by "employees."[21] The statute defines "employee" broadly, covering most of the private-sector workforce,[22] but it specifically excludes agricultural workers from its coverage.[23] The statute has been amended several times over the ensuing decades[24] and it has never brought agricultural workers into its scope.[25] Instead, it has left agricultural labor relations mostly to regulation by the states.[26]

The Department acknowledges this history.[27] It concludes, however, that when Congress excluded agricultural workers from the NLRA, it left agricultural labor relations free for regulation under other federal statutes.[28] That is, though Congress concluded that the NLRA was inappropriate for the agricultural workforce, it also concluded the NLRA's rules could be imported through other laws—including section 1188(a)(1).[29]

To state this "logic" is to refute it. There is no reason to think Congress wanted to regulate an entire sector of the workforce through statutory indirection. Rather, the simpler conclusion is that Congress excluded agricultural workers from the NLRA because it did not want the NLRA to apply.[30] It instead wanted working conditions in the agricultural sector to be determined through other means and by other decisionmakers.[31] Those decisionmakers might include state governments; they might

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[18] *See id.* (interpreting parity to require full suite of labor-law rules).
[19] *See id.*
[20] Pub. L. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).
[21] 29 U.S.C. §§ 152(3), 157.
[22] *See id.* § 152(3); *Jurisdictional Standards*, Nat'l Labor Relations Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards (last visited Oct. 17, 2023) (describing statutory coverage and NLRB jurisdiction).
[23] 29 U.S.C. § 152(3).
[24] *See, e.g.*, Labor Management Relations Act of 1947, Pub. L. 80-191, 61 Stat. 136 (the "Taft–Hartley Act"); Labor Management Reporting and Disclosure Act, Pub. L. 86-257, 73 Stat. 519 (1959) (the "Landrum–Griffin Act").
[25] 29 U.S.C. § 152(3).
[26] *See, e.g.*, California Agricultural Labor Relations Act, Cal. Labor Code §§ 1140–1167 (extending collective-bargaining rights to farmworkers under state law); Herman M. Levy, *The Agricultural Labor Relations Act of 1975: La Esperanza de California Para El Futuro*, 15 SANTA CLARA LAWYER 783, 783–84 (1975) (observing that the exclusion of agricultural workers from the NLRA left space for regulation by the states).
[27] *See* 88 Fed. Reg. at 63789.
[28] *See id.*
[29] *See id.* (arguing that the new rules are not preempted by the NLRA).
[30] *See Di Giorgio Fruit Corp.* v. *NLRB,* 191 F.2d 642, 646 (D.C. Cir. 1951) ("It seems clear from the legislative history . . . that Congress meant to exclude agricultural laborers from the provisions of the Act.").
[31] *Cf.* Villegas v. Princeton Farms, Inc., 893 F.2d 919, 921 (7th Cir. 1990) (holding that NLRA did not displace Illinois wrongful-discharge law as applied to agricultural worker, who was excluded from the NLRA's coverage).

also include the workers and employers themselves.[32] But they did not include other federal agencies acting under vague, indirect statutory language.[33] After all, if Congress had wanted to impose the NLRA's rules by federal law, it could simply have written the NLRA to apply.

This conclusion is neither difficult nor complicated. To the contrary, it is supported by traditional rules of statutory interpretation. When interpreting a statute, we do not assume that Congress meant to give an agency broad authority over major social or economic questions.[34] We do not spin vague, elliptical statutory phrases into unfettered grants of power.[35] Instead, we give statutes their fair meaning in their appropriate context.[36] And nothing in INA § 1188's words or context suggests that Congress meant to enact a full-scale program of labor-management relations. Instead, the statute's language suggests that Congress meant to ensure that U.S. employers can obtain workers when they cannot find them domestically and that the employment of these foreign nationals would not undermine conditions in the domestic labor market.[37] Nothing more, nothing less.[38]

Unfortunately, the Department resists accepting this common-sense conclusion. It tortures both language and logic to reach its desired result. It assumes that Congress both excluded workers from the NLRA and wanted the NLRA to apply.[39] This is a form of interpretive irony—statutory interpretation through a funhouse mirror. It leads to absurd results that do not withstand even the most superficial review.[40]

The ridiculousness of the Department's position on the regulatory labor protections that it recently "found" in the INA becomes even more evident when one compares these provisions with those that are contained within the NLRA. While

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[32] *See id.*; Cal. Labor Code §§ 1140–1167 (extending collective-bargaining rights to farmworkers under state law).
[33] *Cf.* NFIB v. OSHA, 595 U.S. 109, 117 (2022) (rejecting attempt by OSHA to impose rules affecting a "vast number of employees" under vague, general statutory language).
[34] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." (internal quotation marks omitted)); *NFIB*, 595 U.S. at 117 (quoting *Ala. Ass'n of Realtors*).
[35] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
[36] *See* Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018) (stating the general rule that without some other statutory instruction, courts will give a statute its "fair" reading).
[37] *See* 8 U.S.C. § 1188(a)(1).
[38] *Cf.* Biden v. Nebraska, No. 22-506, slip op. at 21 (U.S. June 30, 2023) (rejecting attempt by Department of Education to wield "sweeping power" to forgive student loans under a "provision [that was] no more than it appears to be: a humdrum reporting requirement).
[39] *See* 88 Fed. Reg. at 63789 (interpreting absence of preemption as an affirmative grant of authority).
[40] *Cf. Nebraska*, No. No. 22-506, slip op. at 3 (Barrett, J., concurring) (explaining that the traditional rules of statutory interpretation require courts to adopt the statute's "most natural meaning" rather than some strained interpretation to achieve exogenous policy goals).

employers may have issues with the NLRA, it does balance the interests of employers and labor organizations in that Congress found that both types of entities were capable of committing unfair labor practices.[41] In the Department's proposal, there is an utter lack of acknowledgement of both an employer's rights or any meaningful limitations on the actions of agricultural workers or the labor organizations that may represent their interests. In short, the Department is arbitrarily and capriciously picking which provisions of the NLRA it intends to graft onto the INA and the H-2A program. The Department does this in a manner that provides employers without meaningful recourse or due process protections to challenge allegations made against them by labor organizations or by the Department itself. If allowed to stand, this new regime, with the various provisions discussed below, will inflict untold damage upon U.S. agricultural productions, which will harm businesses and consumers alike with higher food prices.

The Department's "Captive Audience" Rule Violates the First Amendment.

The Department's proposal contains unconstitutional restrictions on employers' free speech rights. The Department claims that to protect the speech of H-2A workers, it must muzzle the speech of H-2A employers.[42] In particular, it targets certain "captive audience" meetings, by which it means mandatory work meetings in which an employer talks about unions.[43] Such meetings have long been lawful under the NLRA and, more important, protected by the U.S. Constitution.[44] Since 1941, the U.S. Supreme Court has recognized that employers have a constitutional right to express their views on labor issues.[45] That right is tempered only by the need to avoid coercion.[46]

The NLRA balances those interests by protecting employer speech except when the speech amounts to a "promise of benefit" or "threat of reprisal."[47] That is, the statute limits speech only when the employer promises a quid pro quo or threatens retaliation.[48] Otherwise, the employer is free to express its views.[49] More to

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[41] Compare §§a-b of 29 USC § 158, which outline the enumerated unfair labor practices for employers as well as those disallowed practices for labor organizations or their agents.
[42] *See* 88 Fed. Reg. at 63796, 63799.
[43] *Id.* at 63799.
[44] *See* Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948). *See also* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (affirming that employers have a constitutional right to communicate their views about union organizing).
[45] *See* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 479 (1941) (reasoning that finding of coercion in organizing campaign could not be sustained on employer's speech alone). *See also* Thomas v. Collins, 323 U.S. 516, 537 (1945) (recognizing "that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty").
[46] *See Gissel*, 395 U.S. at 617.
[47] 29 U.S.C. § 158(c).
[48] *Id.*
[49] *See Babcock*, 77 N.L.R.B. at 578; *Gissel,* 395 U.S. at 617–18 (affirming that employers have a constitutional right to communicate their views about union organizing).

the point, it is free to express those views in a mandatory work meeting—one the employees are paid to attend.[50]

As longstanding as this principle underlying employers' speech rights might be, the Department now questions it and seeks to undermine the rights of employers. The Department concludes, contrary to decades of law, that mandatory meetings to discuss unions are inherently coercive.[51] It asserts that such meetings always carry an implied threat of reprisal: if the worker does not attend the meeting, he or she will be fired.[52] Moreover, the Department claims that a threat is present regardless of what the employer says during the meeting.[53] No matter how careful the employer is to couch its message in personal opinions or verifiable facts, the mere requirement to attend results in coercion.[54]

But that argument proves too much. It could apply just as well to any mandatory meeting, regardless of the subject. For example, if an employer instructs workers to attend a meeting about workplace safety, that instruction normally implies a consequence. If the worker fails to show up, he or she may be disciplined. The same is true of any attendance requirement, or indeed, any instruction. All directions from a superior carry an implied message: "Do this, or else." The "else" may be a simple writeup; it may be termination. But some consequence is always implicit. Otherwise, the instruction is no instruction at all; it is merely a request.[55]

It stands to reason that the Department cannot mean what it states in this proposal. It cannot mean that all instructions are coercive. Nor can it mean that all mandatory meetings violate the law. Instead, it seems to mean that all meetings *about unions* are coercive.[56] And that point draws the Department into regulating the substance of an employer's speech—a subject it is constitutionally forbidden to touch.[57] Ultimately, the Department is trying to silence speech because it does not like the message. But it cannot do that. The Constitution forbids it.[58]

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[50] *See Babcock*, 77 N.L.R.B. at 578 (holding that section 8(c) protects an employer's right to express its views about unionization at a mandatory work meeting).
[51] *See* 88 Fed. Reg. at 63799.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Cf.* Electrolux Home Prod., Inc., 368 NLRB No. 34, 2019 WL 3562131, at *4 (Aug. 2, 2019) (concluding that employer did not violate NLRA when it disciplined employee for legitimate refusal to follow instructions).
[56] *See* 88 Fed. Reg. at 63799.
[57] *See* Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").
[58] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

The Department's Secondary Boycott Provisions Violate the NLRA.

The Department unlawfully seeks to provide all agricultural workers with the ability to engage in secondary boycotts.[59] Secondary boycotts are, in short, boycotts aimed at an innocent third party.[60] They are designed to gain leverage in a labor dispute by dragging other people into the fray.[61] For much of our nation's history, they have been illegal. They were disfavored under the common law and strictly regulated under antitrust law.[62] And since the 1950s, they have been banned under the NLRA.[63]

The Department, however, is undeterred by historical precedent and now proposes to legalize them for any worker that is engaged in agriculture.[64] Not only that—it proposes to offer them an affirmative legal shield. It interprets INA § 1188(a)(1) to give workers and labor organizations the right to conduct secondary boycotts against farmers, growers, and other H-2A participants.[65] And it purports to preempt whatever remedies the participants may have under state law.[66]

The Department recognizes that secondary boycotts are generally illegal.[67] It does not deny that general rule or the history behind it.[68] But it argues that the general rule does not apply to agricultural workers because they are not "employees" under the NLRA.[69]

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[59] See 88 Fed. Reg at 63824-5, which states that employers must provide assurances in both the Application for Temporary Employment Certification and the job order that they will not unfairly treat anyone person engaged in agriculture, as defined in 29 USC § 203(f), that partakes in activities related to a secondary boycott.

[60] *See, e.g.*, SEIU Loc. 87 v. NLRB, 995 F.3d 1032, 1038 (9th Cir. 2021) (surveying law on distinction between secondary and primary activity under section 8(b)(4)(ii)(B)); JOHN HIGGINS JR., ET AL., THE DEVELOPING LABOR LAW § 22.I.B (7th ed. 2017).

[61] *secondary boycott*, Black's Law Dictionary (11th ed. 2109) (defining *secondary boycott* as a "boycott of the customers or suppliers of a business so that they will withhold their patronage from that business).

[62] *See, e.g.*, Loewe v. Lawlor (Loewe I), 208 U.S. 274, 308–09 (1908) (treating secondary boycott, including secondary picketing, as a restraint of trade under federal antitrust law); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949) (endorsing same result under state antitrust law); Vegelahn v. Guntner, 167 Mass. 92, 98–99 (1896) (treating labor picketing as a form of coercion actionable under common-law tort doctrine); Quinn v. Leathem [1901] A.C. 495, https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd759 (holding that labor picketing in support of wage demands for higher wages and a closed shop violated common law and English Combination Acts) ("[P]icketing is a distinct annoyance, and if damage results is an actionable nuisance at common law . . . ."). *See also* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 215–16 (1991) (explaining that under both American and English common law, labor combinations were not illegal per se; but boycotts aimed at coercing third parties to join the combination were tortious, even criminal).

[63] *See* 29 U.S.C. § 158(b)(4)(ii)(B).

[64] See proposed 20 CFR §655.135(h)(2)

[65] 88 Fed. Reg. at 63799.

[66] *See id. Cf. Giboney*, 336 U.S. at 495 (holding that state could, consistent with the Constitution, enforce its antitrust laws against secondary labor boycotts).

[67] *See* 88 Fed. Reg. at 63799.

[68] *See id.*

[69] *See id.* (citing 29 U.S.C. § 152(3)).

That argument fails for multiple reasons. First, the Department answers the wrong question in this context. The question is not whether the NLRA bans secondary boycotts by agricultural workers; it is whether the NLRA bans secondary boycotts by labor organizations. The answer to that latter question is unequivocally yes, as the NLRA directs its ban not at individuals, but at the labor organizations those individuals may form or join.[70] It defines *labor organization* to include organizations in which employees "participate,"[71] but to qualify, an organization need not consist entirely of statutory employees; it need only have some employee members.[72] It could include, for example, both statutory employees and agricultural workers.[73] Such a "mixed" organization would fall under the NLRA's definition and thus be subject to its ban on secondary boycotts.[74]

Mixed organizations are not hypothetical. The Department itself acknowledges their existence.[75] In fact, elsewhere in its proposal, it suggests that *only* mixed organizations can qualify for certain benefits, such as the right to demand a neutrality agreement.[76] However, the Department fails to acknowledge that mixed organizations are subject to the NLRA and that any organization subject to the NLRA is barred from staging secondary boycotts.[77]

Another issue here is the specific language used in the statutory text of the NLRA, which undermines the Department's position. In 29 U.S.C. § 158(b)(4), Congress uses the terms "person" and "employees" in the same section, both of which have distinct definitions under the NLRA. Even assuming for the sake of argument that agricultural workers are not employees under the NLRA, as the Department posits, the prohibition on secondary boycotts nevertheless applies in these contexts. Labor organizations are not prohibited from engaging in or encouraging only "employees" from engaging in these prohibited activities; they are prohibited from encouraging "**any person engaged in commerce or in an industry affecting commerce"** from partaking in these activities (emphasis added).[78] Simply put, the statutory language in this section covers more than just "employees" as they are defined under the NLRA, thus these activities would still be prohibited under the Department's own reasoning.

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[70] *See* 29 U.S.C. § 158(b)(4) (making it an unfair labor practice for any "labor organization" to engage in certain forms of secondary activity, including secondary boycotts).
[71] 29 U.S.C. § 152(5).
[72] *See id.*
[73] *See Di Giorgio Fruit,* 191 F.2d at 648.
[74] *See id.* (explaining that if an organization included statutory employees, it would fall under the secondary-boycott ban even if it also included non-employee agricultural workers).
[75] *See* 88 Fed. Reg. at 63799.
[76] *See id.* (asking for comment on whether to limit the good-faith negotiation requirement "by including only those labor organizations that are subject to the Labor Management Reporting and Disclosure Act").
[77] *See Di Giorgio Fruit,* 191 F.2d at 648.
[78] 29 USC §158(b)(4)

Those errors, while fatal in the Chamber's view, are far from these specific provisions' biggest flaw. The most serious problem is the Department's disregard for the will of Congress. When Congress banned secondary boycotts, it expressed concern for their effect on workers, consumers, and small employers—including small farmers.[79] It worried that farmers would be crippled by the spread of labor disputes and the loss of productive capacity.[80] Far from wanting to protect secondary boycotts in the agricultural sector, Congress sought to end them.[81]

At the time, Congress focused on employees who transported agricultural goods.[82] It never explicitly extended the ban to agricultural workers themselves.[83] But to say that the ban does not apply to those workers is far from saying that Congress wanted to affirmatively protect secondary boycotts that labor organizations encouraged agricultural workers to embark upon. It defies reason to assert that Congress meant to protect farmers from boycotts under one statute but expose them to those same boycotts under another.[84]

There is no question that Congress has expressed a strong policy against secondary boycotts.[85] By trying to revive these types of boycotts under INA § 1188(a)(1), the Department defies Congress's will and is acting far outside of the bounds of its authority.

The Department's Neutrality-Agreement Rule Violates the Labor-Management Relations Act.

A similar lawlessness permeates the Department's neutrality-agreement provisions. As defined in the proposal, a neutrality agreement is an agreement not to oppose union organizing.[86] The Department proposes to require all H-2A participants to certify whether they will negotiate such an agreement with a labor organization.[87] And if the participant refuses to negotiate, it must explain why.[88] The Department argues that this disclosure will help inform job candidates.[89] It says that candidates need to know an employer's philosophy toward union organizing.[90] An employer with a

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[79] *See id.* at 644–45 (citing 93 Cong. Rec. 3424, 3432 (1947)).
[80] *Id.*
[81] *See id.*
[82] *Id.*
[83] *See* 29 U.S.C. § 152(3).
[84] *See Di Giorgio Fruit,* 191 F.2d at 648 (observing that "there is certainly no indication that . . . [Congress] intended to deprive farmers of any portion of their protection against secondary boycotts").
[85] *See, e.g.*, H.R. Rep. No. 245, at 23–24, 44–45 (1947) (describing the "many forms" of illegal boycotts targeted by Congress, including secondary picketing).
[86] 88 Fed. Reg. at 63799.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

neutrality agreement theoretically has a close relationship with a union. And that close relationship will, the Department assumes, translate into worker-friendly policies.[91]

But that assumption is founded on ignorance. It ignores both the history and the structure of U.S. labor law. Labor unions and management have long had an adversarial relationship.[92] The early days of the American labor movement were marked by fierce conflict.[93] The results were often disruptive—even violent.[94] Yet, when Congress passed the NLRA, it sought to end the violence, but not the opposition. It made clear that employers and unions were to remain on opposite sides of the table. That is why it outlawed unions formed with management's help.[95] The reason was simple: any union formed with management's help—a "company union"—could hardly stay independent.[96] It would feel indebted to management and be inclined to cooperate.[97] It would not press its full weight at the bargaining table. Workers, in turn, would not get the full benefits of its representation.[98]

Congress extended that philosophy into the Labor-Management Relations Act ("LMRA"). In an effort to preserve union independence, Congress forbade employers from giving any "thing of value" to a labor organization.[99] And to bolster that safeguard, it defined *labor organization* broadly, to include any organization that would admit the employer's workers as members.[100] The idea, again, was simple: an

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[91] *See id.* (asserting that the employer's willingness to negotiate in good faith with a union is essential information for potential workers).
[92] *See* WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59–62 (1991) (describing early legal and industrial struggles between management and labor).
[93] *Id.* at 76 – 77.
[94] *See id.* (describing Pullman strike and resulting violence). *See also* David J. Saposs, *Voluntarism in the American Labor Movement*, 77 MONTHLY LAB. REV. 967, 967 (1954) (reporting that by 1908, AFL had had "lost out" in most major industries, in part because of counteroffensive by employers); Harold C. Livesay, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 7 (1978) (explaining that AFL's early overtures to management and attempts at cooperation were rejected).
[95] *See* 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer to dominate or assist a labor organization).
[96] Tom Campbell, *Exclusive Representation in Public and Private Labor Law After Janus*, 70 SYRACUSE L. REV. 731, 754 (2020 (observing that one of the purposes of the NLRA was to strengthen "real" unions against company unions); U.S. GOVERNMENT PRINTING OFFICE, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2437–38 (1935) (statement of Congressman Boland) (arguing that existence of company unions allowed employers to undercut independent unions and play workers against one another).
[97] *See* Sen. Robert F. Wagner, Speech on the National Labor Relations Act (Feb. 21, 2023), https://web.mit.edu/21h.102/www/Primary%20source%20collections/The%20New%20Deal/Wagner,%20National%20Labor%20Relations%20Act.htm (explaining that NLRA was intended to ban company unions). *See also* Charles J. Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace—The Blue Eagle Can Fly Again*, 39 UNIV. S.F.L. REV. 701, 715 (2005) (explaining that pre-NLRA disputes between company unions and external unions informed drafting of NLRA).
[98] William Green, *The Taft–Hartley Act: A Critical View*, 274 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 204–05 (1951) (arguing that to preserve collective bargaining, the law must prevent employers from interfering with union's "internal affairs").
[99] 29 U.S.C § 186(a)(2).
[100] 29 U.S.C § 152(3).

employer should not be able to buy a friendly union.[101] A paid-for union would be founded not on worker choice, but company bribes.[102]

Bribes, of course, come in many forms. They include not only cash payments, but also intangible gifts, such as organizing assistance.[103] A union is no less indebted when it accepts a company's election help than when it cashes a company's check.[104] In both cases, the union sustains itself on company largess. Courts have therefore found that neutrality agreements can be a "thing of value" under the LMRA.[105] And if such an agreement is indeed a "thing of value," a company that signs one breaks the law.[106]

Like the rule against secondary boycotts, the rule against company assistance applies only to labor organizations in which "employees" participate.[107] And agricultural workers are not employees.[108] But again, that point answers the wrong question. Agricultural workers may participate in organizations alongside statutory employees, and such mixed organizations fall under the general rule.[109] So if an employer signs a neutrality agreement with a mixed organization, it places itself in legal peril.[110]

To that extent, the Department's rule should be easy to satisfy. An informed employer will simply state that it will not sign a neutrality agreement because such an agreement is potentially illegal.[111] But not all employers are so well informed. Many will miss the legal risk. Or worse, they will understand the Department's requirement as an implied demand. The Department obviously wants employers to sign neutrality agreements. Should this rule be finalized, many employers that are hard-pressed to find workers today will likely follow that instruction. Congress surely did not want such an anomalous result. If it did, we should expect to see some clear evidence. The Department cites no such evidence—because there is none.

The Department's Union Access Rules Violate the Fifth Amendment.

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[101] *See* Prime Healthcare Servs., Inc. v. Servs. Emps. Int'l Union, 97 F. Supp. 3d 1169, 1187 (S.D. Cal. 2015) (explaining that purpose of rule against giving "things of value" is to prevent "corrupt practices").
[102] *See* Mulhall v. Unite Here Loc. 355, 667 F.3d 1211, 1214 (11th Cir. 2012).
[103] *Id.*
[104] *See id.* (explaining that nonmonetary forms of assistance raise the same policy concerns as cash bribes).
[105] *Id.* (concluding that neutrality agreement was a thing of value under LMRA).
[106] 29 U.S.C § 186(a)(2).
[107] 29 U.S.C §§ 152(3), 186(a)(2).
[108] 29 U.S.C § 152(3); NLRB v. C & D Foods, Inc., 626 F.2d 578, 581 (7th Cir. 1980).
[109] *See Di Giorgio Fruit,* 191 F.2d at 648.
[110] *See* 29 U.S.C § 186(a)(2); *Muhall*, 667 F.3d at 1214.
[111] *See Muhall*, 667 F.3d at 1214 (concluding that neutrality agreement may be a thing of value in some circumstances and that signing such an agreement may violate the law).

The Department's proposed union-access rules constitute a taking under the Fifth Amendment to the U.S. Constitution. The Department proposes to give unions access to an employer's property in two ways.[112] First, it gives H-2A workers the right to invite "visitors" onto the property.[113] These visitors may include union organizers.[114] Second, the Department gives the organizers themselves a right to enter.[115] Organizers can exercise that right up to ten hours a month, whether invited or not.[116]

It is hard to exaggerate this proposal's hubris. Less than three years ago, in *Cedar Point Nursery v. Hassid*,[117] the Supreme Court held that a similar California regulation violated the Fifth Amendment of the U.S. Constitution. Like the Department's proposal, the California regulation required agricultural employers to give union organizers access to their property for a fixed period each year.[118] The Court characterized that requirement as a forced easement.[119] And under the Fifth Amendment's Takings Clause, if the government wants an easement, it must pay for one.[120]

To be sure, the Court's decision was limited. The Court recognized that some access rules are valid even without payment.[121] For example, the government may still conduct certain regulatory inspections without infringing upon one's property rights.[122] The Court also recognized that the government may continue to put certain conditions on property use.[123] The government may, for example, require developers to take certain precautions in exchange for receiving a building permit.[124]

However, those recognized caveats do not save the Department's proposal. In the same breath that it recognized legitimate land-use conditions, the Court also cautioned that these conditions must have an "essential nexus" with the property owner's activity.[125] The government cannot use conditions to extract unrelated concessions.[126] And union access, the Court said, had no connection with agricultural land use.[127]

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[112] 88 Fed. Reg. at 63800.
[113] *Id.*
[114] *See id.*
[115] *Id.*
[116] *Id.*
[117] 141 S. Ct. 2063, 2072–75 (2021).
[118] *Id.* at 2069 (citing 8 Cal Code Regs. § 20900).
[119] *Id.* at 2073.
[120] *Id.* at 2075 ("[W]hen the government takes an interest in property, it must pay for the right to do so.").
[121] *Id.* at 2078–79.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).
[126] *Id. See also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).
[127] *Hassid*, 141 S. Ct. at 2080 ("[U]nlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.").

The Department's proposal violates that instruction. It extracts an easement, which it transfers to union organizers.[128] And it does so without even trying to identify the "essential nexus" required by *Cedar Point*.[129] In fact, the Department never even cites the decision.[130] It is hard to imagine any proposal more directly in conflict with recent Supreme Court precedent. Nevertheless, the Department cannot avoid the law by ignoring it. The Constitution's protections apply whether the Department acknowledges them or not.

The Discontinuation of Services Provisions Will Cause Significant Business Disruptions for H-2A Employers

The Chamber is worried that the proposed revisions to the Wagner-Peyser Employment Services regulations will have a significantly negative impact upon employers' ability to obtain and retain H-2A workers. These employment services requirements act as a clearinghouse for agricultural employers, as the ability to access these services is mandatory for participation in the H-2A program. These proposed revisions will incur additional processing costs, increase the likelihood of delays in obtaining workers, and create significant risks for business disruptions should employers run afoul of these new requirements in the middle of the seasons. All these additional operating costs will be borne by American consumers, who are currently paying significantly higher prices for food than they were a few short years ago.

The Department proposes to add agents (which includes attorneys), farm labor contractors, joint employers, and successors in interest to the entities that are subject to discontinuation of services.[131] The Chamber is convinced that inclusion of all these types of parties into this section will have far reaching impact. As the Department is aware, farmers turn to agents and attorneys to assist in the processing of their H-2A clearance orders, certifications, and petitions. The role these third parties play in the process is invaluable to farm employers, specifically small farming operations that simply do not have the staff to undertake these processes on their own.

As proposed, a discontinued party, such as an attorney or agent, would be prevented from gaining access to employment services on behalf of any other clients it may have at that time. These clients could be located across the U.S. and farmers in these situations would likely be relying in good faith on those agents to operate their business in a lawful manner. The structure of these provisions are such that one wonders whether the Department is under the impression that farms across the

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[128] 88 Fed. Reg. at 63800.
[129] *See id.*
[130] *See id.*
[131] 88 Fed. Reg. at 63757.

country possess the requisite crystal ball to alert them when an agent or an attorney they've hired is subject to a discontinuation of services under this proposal. It strains credulity that the Department could reasonably expect any farm business to anticipate such actions, let alone be able to act upon that information in real time to avoid getting caught up in the problems of another company with which it had no direct involvement in the alleged wrongdoing. This is critically important in the field of agriculture, as there is very little time between the point at which an employer files a clearance order with the relevant State Workforce Agency ("SWA") and the company's date of need for the workers. History has shown that these types of delays can yield significant crop losses for growers, and most importantly, these problems would be caused by circumstances that are outside the control of the farmers. Additionally, they would have increased costs associated with the hiring a new third party or using staff resources to file their own clearance order, all of which will drive up the prices of the crops that they bring to market.

The Chamber is also concerned about the potential cascading effect that the relationships between certain businesses and agents could have on companies that are not privy to these contracts. The proposal provides very little insight for a situation where ABC Farm hires Agent Ed to conduct some recruitment efforts and the local SWA finds that ABC Farm must be discontinued from the Employment Services. It remains an open question to us and many of our members whether such a discontinuation is limited to ABC, or does it apply to both ABC Farm and Agent Ed. If the discontinuation applies to both parties and Agent Ed has 15 other clients, do those 15 other employers become the collateral damage of ABC Farms' actions? If that is the Department's intention, the result would affect several employers and many more workers, causing significant business disruptions for U.S. agricultural commodity producers.

These concerns also extend to the lack of due process protections that the Department provides for employers subject to the new discontinuation of services provisions. Specifically, the proposal eliminates the option for a pre-discontinuation hearing and provides a 20-day response period to a Notice of Discontinuation for most situations. The Department empowers SWAs to execute this authority and we anticipate employers will see an increase in notices sent without proper basis. This proposal takes a guilty-until-proven-innocent approach and by precluding a pre-discontinuation hearing, an employer's ability to participate in the H-2A program rests in the hands of a single official at a State Workforce Agency. A baseless notice of discontinuation will cause delays in processing, which can bring about significant hardship to employers. The lack of adequate due process protections in these contexts need to be addressed by the Department, as the potential for business disruptions caused by this vastly suboptimal structure pose a significant risk to domestic food production.

Moreover, the expansion of this authority over agents, attorney's, FLCs, etc., under the discontinuation of services provisions would harm clients of that third-party who are left without any recourse. Even more concerning is that an allegation does not require any verification of claim prior to the SWA immediately discontinuing services.[132] The alleged "substantial harm" may allegedly impact a single worker and that would be sufficient under the terms of this proposal for shutting out an employer from the H-2A program.[133] Allowing an immediate discontinuation of services based on a State Administrator's judgment of an unverified claim does not provide an employer adequate due process in a situation where their ability to meet their workforce needs hangs in the balance. In the aggregate, these changes will not only make it harder for companies to find workers, but the additional costs imposed upon American farmers will cause food prices to rise even more than they have in recent years. For these reasons, the Chamber steadfastly opposes these changes and urges the Department to provide adequate due process protections to employers.

New Foreign Labor Recruitment Requirements are Unworkable

The proposal seeks to increase the disclosure obligations of an employer who hires an agent or foreign labor recruiter to find potential H-2A workers.[134] The Chamber opposes any exploitation of workers by foreign recruiters, but we do not support the imposition of onerous compliance burdens on companies. It is impractical to require them to monitor every single action of the recruiters with whom they have entered into a contract. Not even the largest employers with abundant resources have the ability to identify and maintain the information required under this section. The paperwork burdens associated with these requirements would be incredibly harmful to small businesses.

The Department provides no guidance on how an employer should come to identify the foreign recruiter information and provides no definition of what level of due diligence is required. The Chamber is also concerned about members being forced to share contractual agreements to the Department, particularly with regard to sensitive, proprietary business information. The Department specifically asked stakeholders whether foreign recruiter information should be shared with foreign governments and the Chamber is opposed to that idea as well, as companies are loathe to share such sensitive business information outside the confines of the business.

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[132] *Id.* at 63765-63766.
[133] *Id.*
[134] Proposed 20 CFR §655.137; 88 Fed. Reg. at 63825-6.

Changes to Adverse Effect Wage Rate Implementation and Wage Requirements Will Cause Undue Harm to Both Employers and Employees

Currently, when the Department publishes updates to the Adverse Effect Wage Rate (AEWR) for H-2A employers in the Federal Register, it provides for a 14-day adjustment period for farmers to adjust their payment system to comply with the wage requirements they owe to their workers. The Chamber's view is that this 14-day window for employers to update their payment processes and systems is an appropriate period of time with which to comply with these changes, as it removes administrative burdens on employers. The Chamber is very concerned that the Department's proposal removes this two-week grace period and forces employers to update the wages they need to pay to their workers on their date of publication in the Federal Register.[135]

If the Department eliminates this grace period, it will only be adding to the administrative burdens that must be borne by American farmers and ranchers. The variability in wage rates can fluctuate significantly, costing single employers hundreds of thousands of dollars. It is tough enough for companies to prepare contingency plans to deal with those shocks in two-weeks' time; taking that time away from employers will not only make it difficult to comply with this burden, but we predict that many employers will needlessly be caught in a situation where they will be technically violating the terms of their job orders as they scramble to confront these types of changes, which under this proposal, could subject well-meaning employers to debarment.[136] If the Department is concerned about ensuring workers are paid an updated AEWR when it is in effect, the Chamber suggests providing employers with the flexibility to back pay the employees within an established time frame, perhaps the 14 day period after the new AEWR is published. Doing so will ensure that workers are paid the most recently established wages, while providing employers with the flexibility to make the necessary pay adjustments without the potential risk of non-compliance.

Significant problems also exist with respect the proposal's wage requirements. The Department proposes to add to the list of required wage rates "any other wage rate the employer intends to pay" and if there are different units of pay, the employer must list the highest applicable rate for each unit of pay in its job order and must advertise all of these wage rates in its recruitment.[137] The Chamber opposes these changes, as the current regulations with regard to the offering, advertising, and paying of applicable wages are sufficient to apprise workers of the pay they should receive.

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[135] 88 Fed. Reg. at 63773.

[136] See proposed 29 CFR § 501.20, subjecting employers to debarment for violating material terms of a temporary agricultural labor certification.

[137] *Id.* at 63744; proposed 20 CFR §655.120.

The requirement for employers to list each rate of pay on the job order along with the highest hourly rate is going to be incredibly confusing for all sorts of employers. In the production of various types of crops, growers pay workers using a piece rate that varies based upon the specific commodity, the variety among that commodity (e.g. various types of apples), the quality of the crop, among other considerations. In addition, the piece-rate wages offered by employers might vary between the units of measurements, whether they be bins, buckets, boxes, or bushels. The Department's proposal evidences a lack of understanding with regard to the complexities associated with the various rates that could be paid throughout the season. Even the most conscientious of employers will be hard pressed to anticipate all of these factors at the time the job order is placed. This requirement will add considerable time to the application process, increase risk of technical errors on the job order, and increase the opportunity for companies to be caught in technical program violations that put the ability of these companies to meet their workforce needs in jeopardy. None of these developments are positive, whether it is viewed from the perspective of the businesses, the workers at those businesses, or the consumers purchasing these agricultural commodities in the marketplace.

The Department also proposes to require the highest applicable wage rate to be paid during the pay period. Specifically, the Department proposes to remove the current regulatory language requiring an employer to supplement workers' pay where a worker is paid by a piece-rate and does not earn the required hourly wage rate for each hour worked. The current regulation does not require an employer to supplement workers' pay when a worker who is paid by the hour does not earn enough to meet the applicable prevailing piece rate.[138] The Department proposes that an employer must evaluate the highest applicable rate of pay for every pay period – essentially requiring review of hour-by-hour productivity regardless of pay structure, which would be an administrative nightmare for employers.

In practice, employers pay piece rate as an incentive to increase workers earning potential. However, there are instances when an employer wants the workers to move more slowly and therefore, switches the pay to hourly. This could include situations where the grower is harvesting particularly high value crops and the employer wants the workers to be careful so as ensure the highest possible yield. This also includes situations involving the weather where it may be abnormally hot outside or there had been severe rainstorms and the employers want their workers take their time due to safety concerns. The Department incorrectly assumes that growers have "processes in place to accurately record information needed for compliance with the proposed changes."[139] Given the confusion that will ensue if this proposal is finalized,

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[138] *Id.* at 63744.
[139] *Id.* at 63775.

the uncertainty created by these provisions will likely have a chilling effect on employers' willingness to offer piece rates and just limit their pay to the AEWR, particularly among smaller farm operations that have nowhere near the resources to even attempt to comply with these new requirements. In addition, the language in proposed 20 CFR §655.122(l)(2) indicates that for employers that offer both hourly wages and piece-rate wages in their job orders would be required to pay a higher piece-rate wage, even if the worker did not work on a piece-rate basis during that day. That lack of clarity creates yet another disincentive for employers to offer piece-rate wages as an incentive for worker productivity. We urge the Department to abandon these unworkable policy changes.

New Termination for Cause Requirements Constitute an Arbitrary Limitation on Employers' Ability to Operate Their Businesses

The Department proposes to define "termination for cause" in an incredibly onerous manner whereby employers must meet six separate criteria prior to an employer being legally to terminate an employee for cause.[140] The only exception is for "rare circumstances" where disciplinary consequences for a first-time offense is justified due to "egregious misconduct."[141] The Department states that having a clear definition of termination for cause would provide "structure and clarity to both workers and employers, but also make it easier for the Department to identify pretextual terminations."[142]

The Chamber opposes these proposed changes. The Department provides very little guidance as to what it means by "progressive discipline." The Department defines progressive discipline as a "system of graduated and reasonable responses to an employee's failure to meet productivity standards or failure to comply with employer policies or rules."[143] This standard is going to be very difficult to implement for employers, as it will curtail what companies can do to respond to serious worksite issues. Growers will likely have to expend significant resources on attorneys to develop these policies and to train their staff to become familiar with these new changes. The Department suggests these changes are necessary in light of its enforcement experiences,[144] but it only provides anecdotal evidence as a justification for these significant policy changes.

Moreover, the Department proposes to require that the employer bear the burden of demonstrating that any termination for cause meets this standard.[145] The

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[140] Proposed §655.122(n)(2)(i); 88 Fed. Reg. 63823.
[141] *Id.* at 63783.
[142] *Id.* at 63781.
[143] Proposed §655.122(n)(2)(i)(F); *Id.* at 63823.
[144] 88 Fed. Reg. at 63781.
[145] Proposed §655.122(n)(2)(iv); *Id.* at 63824.

Department justifies this proposal as "reasonable" because the entities are seeking an exemption from various terms and conditions of the program (e.g., outbound transportation, three-fourths guarantee). This is a ridiculous characterization of the reasons why an employer would terminate an employee for cause. Workplace order and the safety of employees are the types of consideration that drive companies to remove individuals for cause; avoiding H-2A compliance burdens are not one of those reason. The Department's costly policy changes include significant record-keeping requirements. We urge the Department to rethink its approach and provide companies with the flexibility they need to make the necessary employment decisions for their businesses.

Conclusion

This proposal will make it increasingly difficult for American farmers to meet their workforce needs using the H-2A visa program. We urge the Department to abandon this rulemaking effort. It is our view that our national interests would be better served if the Department began a dialogue with the business community, organized labor, and other stakeholders interested in the future of agricultural workforce issues in the U.S. The Chamber would be happy to serve as a convenor in those types of efforts and we hope the Department seriously considers taking that approach to address our country's agricultural labor problems. Thank you for considering our views.

Sincerely,

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U.S. Chamber of Commerce

Outside Counsel
Alex McDonald
Shareholder, Workplace Policy Institute
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