

March 25, 2020

Secretary of Labor Eugene Scalia
Secretary of State Michael R. Pompeo
Secretary of Homeland Security Chad F. Wolf

Dear Secretaries Pompeo, Scalia and Wolf:

The organizations listed below write to urge you, as Administration leaders responsible for administration of the H-2A temporary foreign agricultural worker program, to take immediate action to enforce all legal protections within their authority to safeguard farmworkers laboring under the H-2A program during this worldwide public health emergency.

As of this writing, despite global restrictions on travel, visa processing and border crossings, the U.S. continues to enable employers to bring H-2A workers into the U.S. to fill agricultural jobs nationwide.¹ H-2A workers already present in the country whose visas are about to expire are also being called on to extend their stays and transfer to other parts of the country.² As millions around the U.S. are ordered to “shelter in place” or work from home, these farmworkers, deemed “critical to maintaining our food supply,” are expected to travel on commercial carriers from their homelands, keep working in jobs with substantial health and safety risks, moving around the country to reside in crowded, cramped quarters in rural areas with little or no access to health care.³

The H-2A workers and U.S. workers who migrate to H-2A employers travel long distances for jobs that now pose major risks of illness and death. Having deemed them essential workers so that employers could have H-2A visas processed at U.S. consulates in Mexico, the Administration must recognize the serious and extraordinary health and economic risks that workers take to accept these jobs. In this crisis, the current H-2A protections must not only be enforced but must be enhanced. The Administration must require H-2A employers to accept the responsibilities toward workers which arise from the special exemptions that permit H-2A visa processing and employment during this pandemic.

We urge you, as officials who regulate, implement and enforce H-2A program requirements and protections for employers and workers, to act now to protect these critical workers: Failure to take proactive steps now could be catastrophic, not just in terms of the human cost, but to the

¹ Jessica Donati and Alicia A. Caldwell, *U.S. Keeps Processing Seasonal Worker Visas After Warning from Farmers: Shift is an exception to State Department decision triggered by coronavirus*, WSJ (Mar. 19, 2020), <https://www.wsj.com/articles/u-s-keeps-processing-seasonal-worker-visas-after-warning-from-farmers-11584652889>.

² U.S. Secretary of Agriculture Sonny Perdue, U.S. Dep’t. of Ag., Press Release: USDA and DOL Announce Information Sharing to Assist H-2A Employers (Mar. 19, 2020), <https://www.usda.gov/media/press-releases/2020/03/19/usda-and-dol-announce-information-sharing-assist-h-2a-employers> (“[T]hese workers are critical to maintaining our food supply and our farmers and ranchers are counting on their ability to work. We will continue to work to make sure our supply chain is impacted as minimally as possible.”).

³ *Id.*

rural communities in which migrant farmworkers live, the fragile health care system, the entire multi-billion dollar agricultural business, and to everyone that it feeds.

In the context of the current pandemic, we need to ensure that no one is put at risk. The preventative measures below must be put in place now and as a condition before any additional H-2A workers are brought into the U.S., and these same measures need to be implemented to protect all agricultural workers⁴ presently in the U.S. or who are hereafter allowed entry.

1. Ensure Safe Housing: The H-2A Program Must Require All Farmworker Housing to Have Designated Quarantine Living Facilities and COVID-19 Plans (As Approved by All Relevant Licensing Authorities) Prior to Issuing Any Housing License or Allowing Them to Continue to Operate If Already Licensed.

The law requires the Administration to ensure that H-2A employers provide their workers with housing that meets safety and health standards and recognizes the interaction between federal and state requirements for farmworker housing.⁵ Once in the United States, H-2A workers and other farmworkers are frequently housed by their employers at isolated, rural farms in packed dormitory-style housing. Often the housing is overcrowded, cramped, neglected or improperly ventilated, which can cause rapid transmission of viruses or disease.⁶

During this crisis, it is crucial that the Administration require and ensure that worker housing comply with CDC standards and that such standards are maintained and enforced. Various laws that protect migrant and seasonal workers require compliance with all applicable state and local laws, in addition to federal protections.⁷ As the virus unfolds, public health concerns are rapidly evolving, as are the legal requirements of various states and localities. The state agencies tasked with reviewing and licensing farmworker housing must ensure that farmworker housing meets health and safety standards with respect to COVID-19 and have the authority to adopt additional COVID-19 plans prior to the issuance of any license. *See* the CDC COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings for guidance on steps to sanitize living facilities. The federal agencies involved in approving applications for H-2A workers, including DHS, USDOL, and DOS, have the ability to ensure that the state agencies are implementing these additional plans and housing providers are in compliance prior to the approval of H-2A applications.

⁴ For brevity, this letter often references “workers,” however, U.S. farmworkers’ spouses and children, who often live with farmworkers in the migrant labor camps whether employed or not, are encompassed within this discussion.

⁵ 8 U.S.C. §1188(c)(4) and 8 U.S.C. §1188(a)(1)(B).

⁶ In April of 2019, 100 H-2A workers from Mexico and Central America needed to be placed in a “limited quarantine” in their Mattawa, Washington labor camp because several contracted mumps due to their living and working in close proximity of one another. Esmy Jimenez and Anna King, *They Came to Washington To Work, Then They Got the Mumps*, KUOW (May 17, 2019), <https://www.kuow.org/stories/they-came-to-washington-to-work-then-they-got-the-mumps>.

⁷ *See* the Migrant and Seasonal Agricultural Worker Protection Act’s (MSPA’s) requirements that any person who owns or controls housing for migrant agricultural workers meet all substantive federal and state health and safety standards. 29 U.S.C. §1823(b)(1); 29 C.F.R. §500.130(a). *See also* the H-2A Program’s requirements that H-2A employers provide assurances in their Clearance Orders that the job complies with all applicable federal, state and local laws and regulations (including those for health and safety). 20 C.F.R. §653.50(c)(iii) and 20 C.F.R. §655.135(e).

Requiring any person who owns, controls or arranges agricultural worker housing to adopt the following COVID-19 measures would vastly improve the public health and reduce risks to farmworkers:

- Ensure housing capacity limits are in compliance with CDC recommendations of a minimum of six feet between bunks or beds and adequate ventilation.⁸
- Provide designated areas with separate sleeping, cooking and bathing facilities for quarantined workers.
- Provide separate living facilities for workers that are over 60 or have underlying health conditions.
- Provide proof of sufficient sanitizing and hand washing supplies at the labor camps and at worksites.
- Provide proof of sufficient masks for all quarantined workers who develop COVID-19 symptoms or test positive for COVID-19.
- Designate a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements.
- Designate a specific individual(s) who is trained and responsible for disinfecting worker housing, any vehicles used to transport workers, and any equipment or tools utilized by workers on a daily basis (or more often) at no cost to the workers.
- Designate a specific individual(s) whose sole responsibility is to care for quarantined workers and ensure that they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.
- Display the CDC's health and sanitation recommendations in a language understood by the workers in a prominent area.
- Provide proof that advance arrangements have been made to ensure sufficient essential supplies (such as toilet paper) and food will be available in the community where the workers will be housed.⁹
- Provide a plan for responding to COVID-19 to limit exposure to other housing occupants and workers and ensure that affected workers/housing occupants receive the needed health care, recognizing the potential limited health care in the local area.
- Provide assurances that no worker will be forcibly removed from the housing prior to the end of the contract period, quarantine period, or restrictive movement period. If a quarantine extends beyond the contract period, no quarantined worker will be removed from the quarantined housing unless approved by USDOL and the appropriate health agencies and the individual is deemed safe to travel. Furthermore, if at the end of a contract period or quarantine period an individual is unable to return to their permanent place of residence due to travel restrictions or border closings, the individual will not be removed from their housing. Written notification will be provided to USDOL and the appropriate foreign consulate to ensure no affected farmworker is removed from the housing without treatment and without a plan for relocation with housing.¹⁰

⁸ The current temporary housing standard requires 50 square feet per person in sleeping areas with beds as close as 3 feet together. See OSHA Temporary Labor Camp Standard 1910.142(b)(2)-(3); ETA Standard §654.407.

⁹ This planning is crucial because, given the recent hoarding of essential supplies and food, it is possible that local grocery and drug stores could run out of such items and leave workers or members of the community vulnerable.

¹⁰ Farmworkers' housing is frequently tied to their employment. In the past, even absent pandemic conditions, those who own or control such housing have revoked workers' access to that housing on short notice. In our current

- Posting in languages the workers understand advising workers of their rights regarding eviction.
- Provide Wi-Fi in the housing and ensure workers have access to phone services.¹¹

2. Ensure Transportation Into and Within the United States Complies with CDC Recommendations and Ability to Safely Return Home.

The law requires the Administration to regulate the transportation of H-2A temporary foreign workers and U.S. workers at H-2A employers and imposes obligations on employers and their recruiters to ensure workers' safety.¹² During this pandemic, it is vitally important that the Administration insist on protections for workers' health and safety during international and domestic travel related to the H-2A program.

Tens of thousands of H-2A workers will soon be crossing over international borders, primarily from Mexico, in crowded, cramped busses, as they make their way to their various employers across the country. If the Administration allows entry of H-2A workers from certain nations, some workers could be transported via airplane. Lacking personal transportation, once at their places of employment, H-2A workers and other farmworkers will be bussed to work, usually in groups, sometimes in old school busses, vans or pick up trucks. They will regularly be transported in groups into rural towns to buy groceries, cash checks, and send money to their families. If H-2A workers are in fact called upon to extend their stays and transfer to other jobs, they will likely be bussed or flown to other states.

Travelling in groups raises serious health and safety risks both for the farmworkers being transported and the communities they join on their arrival. Workers from states or countries with low risk of COVID-19 may be transferred to states with high risk and vice versa. Moreover, a busload of 50 to 100 or so farmworkers all entering stores at busy times for local shoppers could drastically increase the likelihood of spreading COVID-19. Whether H-2A workers are travelling internationally, interstate, or on the job, the agencies tasked with inspecting and certifying farmworker transportation should ensure that:

situation, such eviction from housing could cause a public health crisis. No farmworkers should be evicted or in any way removed from their housing without prior review and approval of the Department of Labor and written notification provided to the appropriate foreign consulate. Any person who owns or controls migrant agricultural housing is also subject to compliance with all emergency state or local laws barring evictions during the epidemic. *See* the Texas Supreme Court's Fourth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9045 (March 19, 2020)(barring eviction proceedings except in extreme circumstances needed to protect imminent threats to tenants or employees or to prevent criminal activity). Likewise, there is a temporary prohibition against entry to premises for the purpose of removing or excluding a tenant or mobile homeowner from their home in Michigan. Exec. Order No. 2020-19 (available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522509--,00.html). *See* also Sarah Holder, "What Cities Are Doing to Stall Evictions and Foreclosures", CITYLAB, (March 17, 2020), (<https://www.citylab.com/equity/2020/03/covid-19-housing-security-eviction-utility-shut-off-mortgage/607951/>).

¹¹ Many H-2A workers do not have data plans for calls made from the United States and must use internet-based services (like WhatsApp) to make calls. Also, several labor camps do not have cell service or internet services available due to their remote location. It is important that workers who are sick can call a medical provider from their home, before seeking medical treatment, in accordance with CDC recommendations. Also, due to the lack of in-person oversight and recruitment of workers, it important that workers can contact the federal and state enforcement agencies from their migrant labor camp.

¹² 20 C.F.R. § 655.122, and 8 U.S.C. § 1188(a)(1)(B) and (c)(3).

- Each worker is tested for COVID-19 prior to admission to the U.S. or transfer to a new place of employment.
- Capacity limits for the number of individuals transported at one time comply with CDC recommendations, including regarding physical distancing, ensuring that workers are not sitting directly next to other workers, that handwashing and sanitizers are available during travel including during rest stops, and that vehicles have sufficient ventilation.
- Employers have designated a specific individual(s) responsible for disinfecting daily (or more often) any vehicles used to transport workers at no cost to the workers and ensure disinfecting occurs.
- Each vehicle used to transport workers is equipped with a posting, in a language understood by the workers, informing workers of best health practices, including washing hands frequently for a minimum of 20 seconds and maintaining a six-foot distance.
- Additional driver(s) are certified to drive and transport workers in case driver is unable to continue services.
- Employers have designated a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements while traveling.
- Trips to the worksite or into town are scheduled in advance to limit the number of workers in a bus or in the community at any one time.

3. Ensure Appropriate Social Distancing at Work and in Communities to Protect Workers and Public Health.

The Administration is required by law to regulate job terms and practices at H-2A employers.¹³ During this crisis, employers must ensure, and the Administration must insist, that worksites comply with CDC recommendations and that they have a plan for preventing and responding to COVID-19. OSHA plays a unique and essential role in developing measures to address workplace health and safety issues nationwide and must consider the needs particular to farmworkers when developing protections. The Administration should ensure that OSHA acts to protect health and safety at H-2A employers.

As a condition of obtaining labor certification under the H-2A program, the agencies tasked with reviewing employers' applications, job orders and other documents should ensure that an employer has a plan for preventing and responding to COVID-19 at the worksites, including requiring employers to:

- Plan work crew activity to ensure proper distancing to avoid unnecessary transmission of the disease at work.
- Ensure sufficient bathroom and hand washing facilities are available at the worksite.
- Ensure daily sanitization of bathroom and handwashing facilities, vehicles used to transport workers, and any equipment or tools utilized by workers at no cost to the worker.

¹³ 8 USC §1188(a)(1) and (c)(3).

- Provide proof of sufficient personal protective equipment required for any workers handling or working around pesticides.
- Post information and communicate verbally about CDC recommendations for prevention and treatment in languages workers understand.
- Designate a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements.
- Ensure implementation and enforcement of all required terms of employment under the H-2A program, state, local and federal laws, and their contracts, including, as applicable, unemployment insurance, paid sick leave, workers' compensation coverage, compensation for lost wages based on the ¾ guarantee if the worker is unable to complete the contract due to illness, layoff or other causes related to COVID-19, and transportation cost payments.

4. Ensure Paid Medical Treatment for All COVID-19 Related Testing and Treatment and Appropriate Procedures for Workers with COVID-19 Symptoms.

The Administration must insist that H-2A program employers adopt and implement plans and practices for fair, humane and medically-competent responses when farmworkers are affected by COVID-19. These responses must address workers who have symptoms of COVID-19; require testing and treatment in the U.S.; are laid off, terminated or forced to leave work due to their own illness or illness among coworkers or family members or for business reasons; and/or are returning to their homeland.

The challenges that farmworkers face in this crisis are in addition to many they already experience. Farmworkers, including H-2A workers, are often exempt from federal and state protections that many other workers enjoy such as health insurance, unemployment benefits, and paid sick leave. Missing a day of work could lead to the worker's termination or a loss of much needed wages. Coupled with language barriers, a lack of sufficient funds or transportation, and inability to easily access medical care, farmworkers are likely to forego COVID-19 testing and suffer in silence or go to work even though they are symptomatic.¹⁴ Moreover, because H-2A workers' housing is tied to their employment, they are susceptible to evictions or being sent home on short notice, if they are terminated for falling ill. In our current situation, such eviction from housing could cause a public health crisis.

As a condition of approval of H-2A employers' applications and job orders and the processing of visa applications, the Administration should establish requirements and procedures which ensure that an employer has a plan for caring for workers who feel symptomatic or fall ill due to COVID-19, including, ensuring that:

- H-2A workers who contract COVID-19 and who are quarantined will receive food and water at no expense and will be ensured access to medical care and advice.
- Any worker who is tested for COVID-19 will have those costs covered, even if the result is negative for COVID-19.

¹⁴ Miriam Jordan, 'We're Petrified': Immigrants Afraid to Seek Medical Care for Coronavirus, NY Times (March 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html?action=click&module=Top%20Stories&pgtype=Homepage>.

- Workers are provided access and transportation to COVID-19 testing centers.
- Workers are informed, prior to entry into the United States or transfer of employment, of the risk of exposure to COVID-19 by providing information regarding the danger of COVID-19, the prevalence of COVID-19 in the community where the worker will be working, the risk of exposure during transportation, the CDC recommendations for work and social distancing and the proposed living and working conditions, including their rights if they contract COVID-19.
- Decisions regarding termination of employment and repatriation will be made in coordination with competent medical advice and CDC recommendations. Workers will not be required by employers to return home until their symptoms are resolved.
- Transportation costs of workers returning home will be paid by the employer for workers who return home due to COVID-19 illness among themselves, their families, or the risks posed by illness among coworkers.

In addition, federal agencies tasked with overseeing the H-2A program and related programs should do the following to encourage H-2A workers to seek medical treatment:

- Set up a hotline capable of receiving internet-based calls (such as WhatsApp) or text messages 24 hours a day to allow farmworkers to report potential symptoms and request medical assistance.
- Coordinate with state agencies and H-2A employers to ensure that workers' compensation coverage should cover farmworkers who contract COVID-19 or must be quarantined due to the virus.

5. Transparent Recruitment Information is a Bedrock Principle of the Laws Protecting Farmworkers and is Essential to Address Workers' Health Risks in the COVID-19 Pandemic.

The Administration must ensure that employers and recruiters under the H-2A program provide recruited workers with accurate, detailed information about COVID-19 during the recruitment and hiring process. Present laws require that farmworkers be provided detailed, accurate (and language accessible) information, at the time and place where they are recruited, regarding the terms and conditions of their work.¹⁵ Such laws require disclosure of material terms (including the existence of any strikes or lockouts), but do not specifically address the pandemic. Information about the COVID-19 risks at H-2A employment is clearly a vitally important component of terms and conditions of work that must be disclosed. Moreover, many migrant workers, be they “follow-the-crop” migrants or H-2A workers, are unlikely to travel given the pandemic, especially great distances, absent guarantees from their employers regarding adequate

¹⁵ See the MSPA's provisions regarding the written disclosures required to be provided for migrant agricultural workers contained at 29 U.S.C. §§ 1821(a) and 1831(a); see also the MSPA's prohibition against recruiters or employers knowingly giving false or misleading information to workers, contained at 29 U.S.C. §§ 1821(f) and 1831(f). For H-2A workers, these rights apply no later than when the worker applies for their U.S. visa. 20 C.F.R. §655.122(q). The ameliorative intent of the MSPA's advance disclosure provisions for migrant workers are well-recognized. See *Bobadilla-German v. Bear Creek Orchards, Inc.*, 2009 WL 3448212 at *11 (D. Ore., Oct. 21, 2009); *Castillo v. Case Farms of Ohio, Inc.*, 96 F.2d 578, 610, n. 40 (W.D. Tex. 1999); *Smith v. Bonds*, 1993 WL 556781 at *13 (E.D.N.C., Sept. 28, 1993).

safety provisions. All persons recruiting workers for agricultural employment in 2020 should provide detailed information about COVID-19, prior to the workers' departure of his/her current residence, including:

- The health risks, risk of exposure during travel, and the prevalence of COVID-19 in the community where the worker will be working and living.
- How employers will protect workers' safety while transporting, housing, and employing them in the United States.
- The provision of free and ample cleaning and sanitizing products and handwashing facilities
- The schedule for regular sanitizing of the housing and buses/vans and other communal areas.
- The employer's approved COVID-19 Response Plan, including that workers will receive free testing and treatment at no cost should they develop COVID-19 symptoms, that they will be quarantined if they develop symptoms or test positive, and that they will not be sent home until all COVID-19 symptoms have been fully resolved and the quarantine period has ended.
- Paid sick leave, workers' compensation, $\frac{3}{4}$ guarantee, unemployment insurance, or other benefits that will be paid if the worker is unable to complete the contract due to COVID-19.
- Workers' rights to a safe workplace; rights against retaliation; and protection from eviction.
- A designated hotline number capable of receiving internet-based calls (such as WhatsApp) or text messages 24 hours a day should be established to allow workers to report potential symptoms and request medical assistance, and the hotline should have ready access to COVID-19 testing.
- Recruitment fees that workers have already paid will be reimbursed, regardless of the worker's informed decision to travel to the United States.
- Assurance that any extension or transfer of work is voluntary. A worker cannot be penalized for refusing to extend or transfer a work contract or visa. If the worker decides to extend or transfer work, the employer must provide an approved I-94 verifying the workers' transfer/extension was approved.
- Assurance that any worker may be permitted to return home, whether at the end of their contract or at any time they deem necessary for their health and safety.
- Assurances that in case of a quarantine or travel restriction, the worker can remain in the housing until the quarantine or travel restrictions are lifted without penalty and with provision of food and water.

Finally, we understand that the state workforce agencies and enforcement agencies are also doing their part to "flatten the curve" by avoiding in-person contact, which may significantly impact their ability to recruit U.S. workers and oversee compliance. Please provide clarification regarding what, if any, steps your agencies are taking in response to COVID-19 and suspended outreach plans in order to ensure U.S. workers be employed when possible. In addition, please provide guidance as to what mechanisms will be used to ensure compliance, respond to complaints, and enforce workers' rights while there are restrictions on movement.

Conclusion

The undersigned organizations and persons request that the Administration immediately take action to enforce all laws within their authority to protect farmworkers, including the steps described above and additional appropriate action to ensure the safety and health of farmworkers and their families and communities during the COVID-19 crisis. We also request a telephonic meeting or series of meeting to promptly discuss the above information. You may contact Bruce Goldstein, President, Farmworker Justice, bgoldstein@farmworkerjustice.org, 202-800-2521, and Alexis Guild, Director of Health Programs and Policy, Farmworker Justice, aguild@farmworkerjustice.org. We look forward to your prompt response as you to continue refining and improving all aspects of the COVID-19 emergency planning and coordinate the services you provide.

Sincerely,

Farmworker Justice
Southern Migrant Legal Services
Texas RioGrande Legal Aid
Farmworker Legal Services (Michigan)
AFL-CIO
California Rural Legal Assistance Foundation
Centro de los Derechos del Migrante
Columbia Legal Services
Community Legal Services in Arizona
Community to Community (Washington)
Familias Unidas por la Justicia (Washington)
Farmworker and Landscaper Advocacy
Project (Illinois)
Justice for Migrant Women
Justice in Motion
La Cooperativa Campesina de California
Legal Aid Chicago's Illinois Migrant Legal
Assistance Project
Legal Aid Justice Center (Virginia)
Legal Aid of Nebraska
Legal Aid Society of Metropolitan Family
Services
League of United Latin American Citizens
(LULAC)
MAFO
Michigan Immigrant Rights Center
Migrant Legal Action Program
Migrant Legal Aid (Michigan)
National Center for Law and Economic
Justice
National Consumers League

National Employment Law Project
National Migrant and Seasonal Head Start
Association
Northwest Workers' Justice Project
PCUN (Oregon)
North Carolina Justice Center
Southern Poverty Law Center
UMOS
UnidosUS
Worker Justice Center of New York