

HR 1387

Executive summary:

In 2012 the U.S. Department of Labor threatened “hot goods” objections on Oregon farms, denying the farms due process, contacting and warning customers that the farmers’ products might no longer be bought, shipped or sold. At the peak of harvest and with fresh market produce at risk of spoilage the only realistic option for growers to continue harvest was a blanket confession which did not enumerate any specific allegations. The confession form included a waiver of all rights to appeal, even if findings of fact or law later exonerated the farmer. In addition to the blank confession form, USDOL assessed one farm over \$156,000 in fines and back wages it never substantiated to growers or legal counsel, and demanded immediate payment.

USDOL used a statistical method for assuming wage violations. USDOL established a production standard of what workers could harvest per hour. In cases where overage occurred beyond the USDOL determined production standard, the overage was credited to a “ghost worker.” USDOL’s actions in Oregon have left growers with best practices in place in the impossible position of either under-paying top-producing employees or paying them for their full production and risking violating USDOL’s arbitrary hourly production maximum.

HR 1387 only seeks to limit USDOL’s use of hot goods objections only on perishable agricultural products. It does not take away their authority to continue with inspections, worker interviews, assessing fines/penalties/back wages or any other tool to seek worker justice. The agricultural industry firmly believes wage and hour laws and other employee protections are essential and employers must comply with them. We believe USDOL has a legitimate and important role in communicating these standards and investigating complaints and enforcing the law when violations are proven through due process.

Detail:

In late July and early August 2012, agents of the United States Department of Labor (USDOL) began a series of surprise inspections at blueberry farms in the Willamette Valley. USDOL farm visits are an important tool for monitoring compliance with federal wage and hour laws, and are not unusual. What was unusual was the agents’ nearly immediate use of USDOL’s “hot goods” objections on these farms before an investigation had been completed.

When hot goods objections are issued, as the name suggests, it results in labeling items as products of a criminal enterprise. It was created to combat underpayment of workers and the illegal use of child labor in the garment industry during the Great Depression. USDOL demonstrates that products were made but wage laws were not followed. It can then designate the items as hot goods and, through a court order, can prevent the items from being sold until the employer reaches an agreement about whether and how much of an underpayment occurred.

Last summer, USDOL began using the term “hot goods” within hours of their farm visits. At least two farms in question had never had any federal wage violations, or any state wage violations. These are multi-generational farmers and pillars of their community with good practices and a clean record. The farmers all grow fresh market blueberries, one of the most delicate and perishable crops grown in Oregon. Blueberry harvest takes place over a relatively short period of time, meaning that in a few weeks a farmer’s entire yearly income depends on timely harvest and shipment of the fruit.

Farmers were told by USDOL that they had “ghost workers” who did not appear on the payroll. No documentation of these alleged missing workers was provided. Rather than continuing the investigation and presenting evidence, USDOL instead initiated its version of hot goods objections on these farms in these steps:

Farmers were threatened with a hot goods objection if they did not sign a consent judgment and in one case, agree to pay penalties and back wages totaling more than \$156,000 to the USDOL before the hot goods objection would be lifted and shipment would be allowed. USDOL then notified buyers of the blueberries to tell the buyers that the farmers were subject to a hot goods objection and that they should stop receiving, selling, or shipping any product from these farms. USDOL presented a letter to the farmers saying in part, “We will lift our objection to shipment (of your blueberries) upon your agreement to the following terms: you must sign and return the consent judgment...”

The consent judgment requires the farmers to “waive service of process, answer, and any defense to the complaint filed herein; waive further findings of fact and conclusions of law; and agree to the entirety of this judgment without contest.” The document states that the farmers “waive their right to a hearing before the USDOL office of administrative law judges on these assessed civil money penalties.”

The consent judgment states that the violations being penalized and the alleged employees to be compensated are listed in Exhibit A to the judgment. Exhibit A, at the time it was presented read in its entirety, “This information to be supplied at a later date.”

The growers signed a confession, the substance of which was filled in later. Signing the judgment waived the growers right to any remedy if facts or law later exonerate him. The alternative presented to the farmer was that his perishable blueberries would be blocked from shipment or sale and allowed to rot. USDOL contends that the growers could have forced the agency into federal court to seek an injunction. While this is true, the realistic outcome was that while a court order was being sought, the perishable agricultural product, would, again, have spoiled. In other words, his entire year’s income on that crop would be lost if the grower chose to defend himself. Beyond the damage to the farm done by the excessive penalty, there is reputational harm for the farmer. Buyers of blueberries may well stop buying product from a farm as a direct result of the phone call from USDOL alone, irrespective of the final outcome of the matter.

In meetings and phone calls with Oregon Farm Bureau, USDOL’s response to questions about its procedures and criteria for use of hot goods was, and remains, a Catch 22 logic circle. Questions are answered with either, “We judge these matters on a case-by-case basis,” or, “We cannot comment on the facts of a particular case.”

How did USDOL determine there were underpaid “ghost workers” at these farms? They set a never-before applied production standard for blueberries and assumed that any berries picked above these levels must have been picked by ghost workers. In one case a farm was told that any amount beyond 50 pounds per hour per person indicates a ghost worker. At another farm USDOL said the threshold is 60 pounds per hour. One USDOL employee called anything over 50 pounds per hour, “Michael Phelps numbers.” No basis for USDOL’s creation or application of this hourly number has ever been offered. When asked if there was national standard set by USDOL the answer was no. When asked for an explanation, USDOL responded that the production standard determined by the specifics of individual cases, which begs the question how is picking blueberries (absent terrain differences and picking (1st, 2nd, 3rd, etc.)) different in Oregon as opposed to Michigan or New Jersey?

A survey of farmers found that many of top employees can and do pick well over 60 pounds per hour on a sustained basis. A wage study conducted by a recently-retired USDOL farm inspector found sustained picking rates of over 80 pounds per hour common. The study was conducted with the same employees on one of the farms USDOL penalized. The wage study was conducted on a third picking on the same variety being harvested during the USDOL visit. The best employees were documented to reach levels of 100 pounds per hour in this study.

USDOL has not responded to a formal inquiry about its assumptions about maximum hourly production by employees. Without clarification, farmers risk triggering USDOL’s statistical ghost worker threshold if they pay their top employees the full amount owed under piece-rate picking arrangements. It should be noted that it is common for blueberry harvest employees to earn \$15-\$20 or more per hour on this piece rate basis. Some earn much more.

Seven months later, those directly affected are not aware that a single “ghost worker” has been identified, and not one penny of alleged back wages now sitting in USDOL’s coffers has been paid to any employee. USDOL’s outreach to workers appears limited to an English-only press release issued at 4:30 p.m. the Friday of Labor Day weekend. Two years from the date it received these alleged back wages, USDOL may keep all moneys collected but not distributed to employees.

The agricultural industry firmly believes wage and hour laws and other employee protections are essential and employers must comply with them. We believe USDOL has a legitimate and important role in communicating these standards and investigating complaints and enforcing the law when violations are proven through due process.

But to be a credible regulator, USDOL must offer due process, evidence of violations, and penalties commensurate with the alleged violations. USDOL has a full range of tools and remedies available to it, including criminal prosecution. Assessing civil money penalties and back wages are legitimate tools that do not require threats of hot goods orders. Farmers, tied to the land of their parents and grandparents, are not a flight risk. There were no employees identified as being owed back wages, so there was no urgency in collecting money ostensibly on their behalf in these Oregon cases. USDOL also has the discretion to assess penalties and back wages and give farmers up to two years to pay. There was no reason to give these farms only days to pay the full amounts assessed.

Industry representatives have learned that half of the reported 2012 uses of hot goods by USDOL in the nation were in Oregon over that single week last summer. To our knowledge, these USDOL farm inspections were not complaint-driven. There was no probable cause. These farms had spotless records.

News coverage spotlighting USDOL's improper use of hot goods in Oregon has included a page one exposè in the *Oregonian* and led to an editorial board piece titled, "Hot goods order spoils trust in the blueberry field." The *Bend Bulletin* and *Capital Press* have also reported on, and published editorials decrying USDOL's actions.

Hot goods is a nuclear option and can be easily be used on other products, including Christmas trees, cherries, wine grapes, cane berries just to name a few. It should be a last resort in cases of repeated or truly egregious violations. An August 2012 call with USDOL, congressional offices and Oregon Farm Bureau, USDOL confirmed that a hot goods objection is only to be used in the most extreme, egregious situations, which they have since recanted. It should not be the first resort. And it should not be applied in an arbitrary and capricious manner without any policy or procedural transparency or safeguards. USDOL hurt farmers, hurt workers and eviscerated its own credibility with its misuse of hot goods powers in Oregon last summer.

Thank you for your consideration of our views on this important matter.