

LABOR LAW UPDATE

Sarah L. Wixson

slw@stokeslaw.com

H-2A: Legislative History


- The term “H-2A” comes from the 1952 version of the Immigration and Nationality Act, 8 USC 1101, section (H)(ii)(a)
- The statutory provision, which has been on the books for over 65 years, allows for work visas to be issued to foreign workers to perform agricultural work in the United States to offset any documented seasonal labor shortages.

H-2A Usage on West Coast

	WA	OR	CA
2012	4,443	88	2,862
2013	6,349	74	4,199
2014	9,064	199	6,043
2015	11,844	575	8,591
2016	13,689	759	11,106
2017	18,535	*	15,232

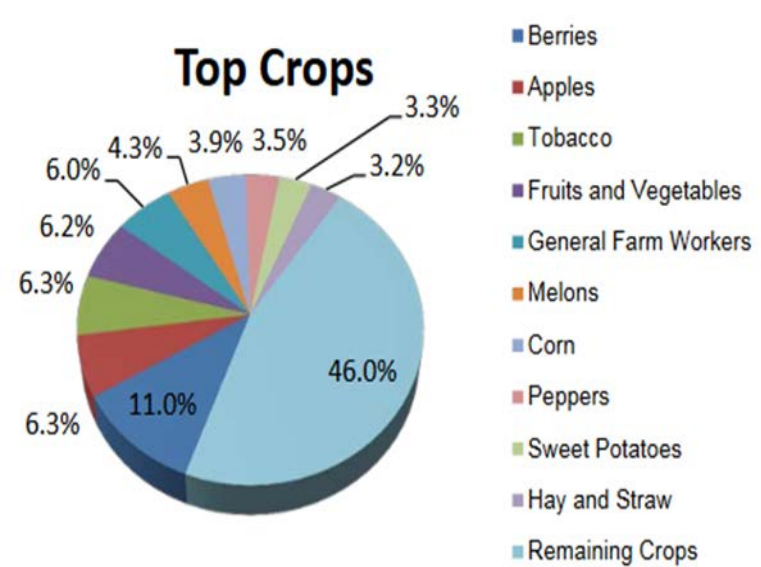
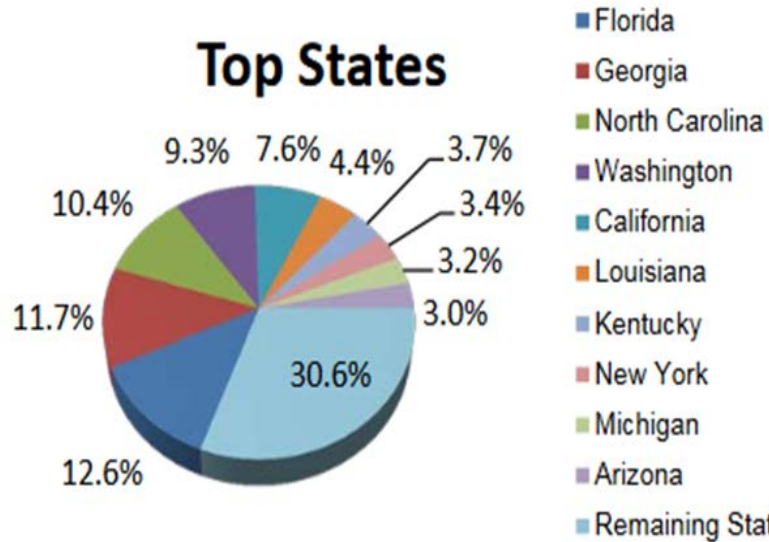
Positions certified.

2018 – Trump Vineyard Estates

 U.S. Department Labor Employment and Training Administration		OMB Control No. 1205-0134 Expiration Date: March 31, 2019	
Agricultural and Food Processing Clearance Order ETA Form 790 Orden de Empleo para Obreros/Trabajadores Agrícolas y Procesamiento de Alimentos			
(Print or type in each field block - To include additional information, go to block # 28 - Please follow Step-By-Step instructions) (Favor de usar letra de molde en la solicitud - Para incluir información adicional vea el punto # 28 - Favor de seguir las instrucciones paso-a-paso)			
1. Employer's and/or Agent's Name and Address (Number, Street, City, State and Zip Code / Nombre y Dirección del Empleador/Pátrno y/o Agente (Número, Calle, Ciudad, Estado y Código Postal): Trump Vineyard Estates, LLC Mail: 100 Grand Cru Dr., Charlottesville, VA 22902 Physical: 100 Grand Cru Dr., Charlottesville, VA 22902		Nos. 4 through 8 (or STATE USE ONLY) Numeros 4 a 8 para USO ESTATAL	
a) Federal Employer Identification Number (FEM) / Número federal de Identificación del Empleador: [REDACTED]		4. SOC (O'NET/IOES) Occupational Code / Código Industrial: 45-2092.02	5. Job Order No. / Num. de Orden de Empleo: 1231151
b) Telephone Number / Número de Teléfono: (434) 226-5907		6. Address of Order Holding Office (include Telephone number) / Dirección de la Oficina donde se radica la oferta (incluya el número de teléfono): 2211 Hydraulic Rd. 434-984-7630 Charlottesville, VA 22901	
c) Fax Number / Número de Fax: (434) 977-6006		a. Name of Local Office Representative (include direct dial telephone number) / Nombre del Representante de la Oficina Local (incluya el número de teléfono de su línea directa): Bob Smith 434-963-2967	
d) E-mail Address / Dirección de Correo Electrónico: cio Employer Agent e-mail: msh2A@maslabor.com		7. Clearance Order Issue Date / Fecha de Emisión de la Orden de Empleo: 11-21-2017	
2. Address and Directions to Work Site / Domicilio y Direcciones al lugar de trabajo: 100 Grand Cru Drive, Charlottesville, VA 22902 100 Winery Hill Ln, Charlottesville, VA 22902 The employer attests that all work locations are controlled by the employer stated above and it is not an H-2A Labor Contractor.		8. Job Order Expiration Date / Fecha de Vencimiento o Expiración de la Orden de Empleo: 4-18-2018	
See "Attachment 1 to ETA 790" Item 2 / Ver "Adjunto 1 a ETA 790" Artículo 2		9. Anticipated Period of Employment / Periodo anticipado o previsto de Empleo: From / Desde: 1/22/2018 To / Hasta: 7/13/2018	
3. Address and Directions to Housing / Domicilio y Direcciones al lugar de vivienda: 85 Grand Cru Dr., Charlottesville, VA 22902		10. Number of Workers Requested / Número de Trabajadores Solicitados: 6	
a) Description of Housing / Descripción de la vivienda: Conventional single-family frame house: capacity - 6 persons		11. Anticipated Hours of Work per Week / Horas Anticipadas/Previstas de Trabajo por Semana. Total: 40 Sunday / Domingo 0 Thursday / Jueves 7 Monday / Lunes 7 Friday / Viernes 7 Tuesday / Martes 7 Saturday / Sábado 5 Wednesday / Miércoles 7 See "Attachment 1 to ETA 790" Item 11 / Ver "Adjunto 1 a ETA 790" Artículo 11	
See "Attachment 1 to ETA 790" Item 3 / Ver "Adjunto 1 a ETA 790" Artículo 3		12. Anticipated range of hours for different seasonal activities / Rango previsto de horas por alas diferentes actividades de la temporada: Performs a variety manual/equipment operation tasks in vineyard operation. See "Attachment 1 to ETA 790" Item 12 / Ver "Adjunto 1 a ETA 790" Artículo 12	
		13. Collect Calls Accepted From / Aceptan Llamadas por Cobrar de: Employer / Empleador: Yes / SI <input type="checkbox"/> No <input type="checkbox"/>	



2017 H-2A Snapshot



H-2A Benefit: Legal Workforce

- No pressure of I-9 scrutiny/audit
- No risk of ICE raid or investigation
- No RICO lawsuits
- Fewer conflicts regarding wage rates
- No mid-season labor loss due to voluntary disclosures/SSN notice

H-2A Benefit: Stable Workforce

- Clarity on size of foreign labor force
- Reduced risk of mid-season loss of labor due to competing wages
- Reduced risk of late-season loss of labor due to competing crops
- 6-7 day week core workforce for both hourly and piece rate work

H-2A Risk: Infrastructure and Logistics

- Housing
- Medical care
- Cooking
- Permitting/Inspections
- Visa/border crossing
- Transportation – Wage Rules
- Recruiting – Legal Exposure

H-2A Risks: Domestic Recruiting and Hiring

- Radio advertising
- Print advertising
- **FLCA licensing – State and Fed**
- Interviewing - Documenting
- Gate hires
- DOL hire/fire/quit reports
- Housing, food and transportation for domestic workers

H-2A Risks: Litigation and Governmental Enforcement

- DOL Audits
- Transportation liability/wage grey zone
- Legal Services – Domestic Workers

Hiring Opportunities

*Wages for “corresponding”
employment*

- EEOC – “Human Trafficking” **Sarbanand*
- Attorney General: Preferences on rehire
- **Unlicensed Foreign Recruitment ***

Contractor

- State: Washington Farm Labor Contractor Act, RCW 19.30.010
- Penalties – Currently no limits
- **Mandatory Minimum Penalty of \$500 per person per violation**
- Liability for farmers who knowingly use services of unlicensed contractor
- Attorneys' Fees Discretionary
- Federal: Migrant and Seasonal Agricultural Worker Protection Act, 29 USC 1801
- Penalties – “Up to \$500” per violation, limitations for class action (\$500k or \$500/plaintiff)
- Liability for farmers who are “joint employers”
- Exception for “Agricultural Employers”
- No Attorneys' Fees

Washington - FLCA

RCW 19.30.010(3): Definition of Farm Labor Contracting Activity

Recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees

RCW 19.30.010(5): Definition of Agricultural Employee

Any person who renders services to anyone growing, producing or harvesting of farm or nursery products (Also Christmas tree and forestation work)

What is a Farm Labor Contractor?

RCW 19.30.010 (2): Any person who engages in farm labor contractor activity *for a fee*

Exemptions:

- Employment Security Department
- Commercial transportation companies
- Services performed in the scope of regular employment for one agricultural employer, unless commission or fee is paid

Nonprofit Exemption

A nonprofit corporation that “performs the same functions for its members”, so long as:

- No directors, officers are employees are deriving any profit beyond a reasonable salary
- Dues and fees are used solely for maintenance of corporation

What is a “fee”?

- Any person who recruits, hires, employs or transports agricultural employees *for a fee* must register as farm labor contractor and comply with all requirements of FLCA
- A “fee” is defined as “any money or other valuable consideration paid or promised to be paid for services rendered by a farm labor contractor”
- *Reimbursement* of gas expense constitutes a “fee”. *Escobar v. Baker*, 814 F.Supp. 1491, 1498-99 (W.D. Wash. 1993).

RCW 19.30.200

- **Unlicensed farm labor contractors—
Liability for services.**
- Any person who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in this chapter.

RCW 19.30.170(2)

Civil actions—Damages, costs, attorney's fees—Actions upon bond or security deposit.

(2) ...if the court finds that the respondent has violated this chapter or any rule adopted under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of five hundred dollars per plaintiff per violation, whichever is greater, or other equitable relief.

Perez-Farias v. Global Horizons: (2012)

Farm workers brought federal class action against farm labor contractors and farm owners alleging violations of the farm labor contractors act (FLCA). Supreme Court of WA, *reversing federal trial court*; rules that damages under the FLCA are mandatory at minimum of \$500 per plaintiff per violation; no cap on damages; **farmer jointly liable for using unlicensed farm labor contractor**

Result: Farmer pays unlicensed contractor to recruit agricultural laborers and contractor fails to provide written notices required by RCW 19.30.110(7). Farmer is automatically liable for minimum of \$1,000 per worker. Statute of limitations goes back three years

Case Law – Custom Farmers

Saucedo v. John Hancock Insurance: (2016)

Custom farming company hired crews of ag workers to farm apples for tenant of property owner. Custom farmer made all farm decisions and employed all ag workers directly; but property owner retained title to the fruit and kept profits, simply reimbursing custom farmer for all labor expense. Supreme Court of Washington ruled that custom farmer was farm labor contractor under FLCA because it hired workers “for a fee”. Custom farmer went out of business and property owner had to pay \$1M plus under RCW 19.30.200.

Our take: Custom farmer did not “hire workers” for a fee. It didn’t do any farm labor contracting for a fee. It *farmed* for a fee. Big difference. Pass through of labor expense and title of fruit appeared to be factors in decision.

Examples

1. Farmer in H-2A program uses supervisor to recruit domestic laborers. No extra pay to supervisor. FLC?
2. Farmer in H-2A program hires Mexican company to recruit workers in Mexico for employment in WA. FLC?
3. Warehouse Corporation packs fruit from orchards that are owned in the names of related ranch LLCs. Warehouse employs and compensates orchard workers and deducts labor from net returns. Is warehouse “providing” labor to LLCs in exchange for a fee? FLC?
4. Neighbor provides crew to pick block; farmer reimburses neighbor for labor costs. Is farmer who helped neighbor providing labor for a fee?
5. Custom farmer farms 1,000 acres for a variety of landowners. Customer farmer is compensated on a flat per acre basis with no line items for labor or other expenses. FLC?
6. Warehouse and co-owned ranches set up master payroll entity to handle payroll for various ranches. Is master payroll entity supplying labor in exchange for a fee?

Breathe



Demetrio v. Sakuma - 2015

Rest breaks

if you're not picking your not earning

Ag Rest Breaks

WAC 296-131-020

Every employee shall be allowed a rest period of at least ten minutes, on the employer's time, in each four-hour period of employment.

Calculating rest break pay

$$\frac{\textit{Earnings}}{\textit{hours worked (less break time)}} = \textit{regular rate}$$

Cost

Depends

up to 4.3%

BY SUSAN L. CARLSON
CLERK

NO. 94229-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on
behalf of others similarly situated,

Petitioners/Plaintiffs

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant

**DOVEX FRUIT COMPANY'S
STATEMENT OF ADDITIONAL AUTHORITIES**

Non-productive time

“time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.”

California



Labor Code section
226.2(a):

- Employees must be compensated for other nonproductive time *separate from any piece-rate compensation, and*

If you're not picking you're not earning



Protect yourself

1. Minimize class exposure. Training, traveling, waiting time pay hourly.
2. Pay hourly + production.
3. Communicate with workers.
4. Be quick to adjust to changes.

Cost

Depends

Paid Sick Leave

- Seasonal workers
- Agricultural worker
- H2-A workers

How much?

1 hour for every 40 worked

0.025 an hour

90 seconds an hour

2000 = 50 hours a year

= 6.5 days a year

Accrual

January 1st

First day of employment

Eligibility

Beginning on the 90th calendar day after the commencement of employment

"Commencement of his or her employment" means no later than the beginning of the first day on which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace.

Cost

0.025 x labor hours

Paid at “normal hourly rate”



Paid Sick Leave

<http://www.stokeslaw.com/blog/stokes-law-briefs/post/paid-sick-leave-9-things-every-washington-employer-needs-to-know-including-agricultural-employers->

Overtime

Martinez v. DeRuyter Bros.

Overtime exemption is
unconstitutional

Privileges and Immunities



Paid Family & Medical Leave – 2020

1. Family Leave: 12 weeks annually for:
 - Bonding after the birth or placement of a child who is under the age of 18;
 - A family member's serious health condition; or
 - Certain military assignments like leave for short notice deployments, military events, urgent childcare and related activities, and post-deployment activities.

AND

Employees may also receive up to 12 weeks of paid medical leave benefits annually for their own serious health conditions, as defined in the federal Family Medical Leave Act (FMLA) and its regulations.

If workers experience both scenarios in a given year, they may receive up to 16 weeks of combined benefits or up to 18 weeks if the employee experiences a serious health condition with a pregnancy that results in incapacity.

Costs

Premiums 2019 0.4% wages

- Fewer than 50 employees – exempt from employer premium
- 0.4% of wages - deduct 100% from employee's wages for family leave and up to 45% for medical leave
- Employer 55% of the medical premium



Pregnancy



What is a reasonable accommodation?

Assistance or changes to a position or workplace that will enable an employee to do his or her job despite having a disability.

Employers are required to provide **reasonable accommodations** to qualified employees with disabilities, unless doing so would pose an undue hardship

Healthy Starts Act

- More frequent, longer or flexible restroom breaks;
- A change to policies precluding eating or drinking during work;
- Access to seating or more frequent sitting breaks, if the job requires the employee to stand; and
- Restricting lifting to 17 pounds or less.

Costs

?