



# Agricultural and Seasonal Workforce Services Advisory Committee

## Meeting details

**Date:** Wednesday, October 18, 2023

**Time:** 1:00 p.m. – 3:00 p.m.

**Location:** Zoom

### Committee members present

- Jon DeVaney
- Edgar Franks
- Michael Gempler
- Jeff Perrault
- Diana Lopez Batista (Proxy for Rosalinda Guillen)
- Elizabeth Strader (Proxy for Victoria Ruddy)

### Non-voting agency representatives present

- Carmen Rivera on behalf of Uriel Iñiguez
- Ignacio Marquez
- Juan Gamez

### Committee members absent

- Delia Peña
- Michele Besso

### Guest Agency Presenters

- Cristina Rodriguez, Fraud Prevention Labor Standards, WA LNI

### ESD Staff

- Joy Adams
- Bertha Clayton
- Vickie Carlson
- Petra Meraz
- Margarito Cabrera
- Gary Kamimura
- Janette Benham

## Summary

### Welcome and Introductions

Employment Security Department (ESD) Acting Policy Director, Chairperson, Joy Adams, welcomed everyone, roll call was taken. A quorum was established, six voting members were present. Diana Lopez requested an amendment to minutes; add her name to the September meeting minutes as an attendee. Motion to approve September meeting minutes as amended: Jon DeVaney; second: Diana Lopez. Motion carried unanimously.

### Agenda

(Addendum I)

Chairperson Joy Adams reviewed the agenda for the meeting and asked if anyone had any questions.

### ASWS Office – Bertha Clayton, Director, ASWS Office, ESD (Addendum II.)

Recording timestamp **00:03:17**

Office updates on the FLC & Compliance Teams

Office of Foreign Labor Certification (OFLC) Monitoring update

- Fiscal Findings (0); Programmatic Findings (5)

**FLC Dashboard – Petra Meraz, Supervisor, FLC Program**

Recording timestamp **00:13:55**

Questions & Answers / Comments:

**Ignacio:** What are the reasons that applications are withdrawn? **Petra:** The majority are withdrawn for corrections to be re-filed as a new application.

**Jon:** Why is the “commenced applications” and “active applications” data figure different?

**Compliance Team update – Margarito Cabrera, Compliance unit Supervisor**

Recording timestamp **00:22:44**

Questions & Answers / Comments:

**Juan Gamez:** Can counties that have not received a field check receive one from ASWS? **Margarito:** Field checks can only be performed on job orders in which there has been a placement.

**Ignacio:** Is the cumulative site visit figure (531) unique visits? **Margarito/Bertha:** Yes, ASWS does a site visit to every employer/job site. ASWS uses a formula to determine how to “count” a site visit (1 or 2?)

**Mike:** Suggestion to track and include enforcement agency outcome data (i.e. violations, fines, etc.). Outcome data will help ASWS evaluate whether the complaint system is actually discovering non-compliance issues.

**WA Cares Fund – H-2A Work Visa Exemptions (Addendum IV.)**

Recording timestamp **00:34:40**

**Janette Benham, Rules Coordinator, Leave and Care Division, ESD**

Questions & Answers / Comments:

Chat Comment (**Carmen Rivera**): Are there efforts to communicate information to migrant workers coming to WA from other states? **Jeanette:** Yes, WA Cares partnering with other agencies to do in person and online outreach.

**Jon:** Are there resources that committee members can share with others? **Jeanette:** Yes, will be provided to Vickie/Bertha and sent to committee.

**Edgar:** Where can committee members review the legislation for the exemption? **Jeanette:** Legislation is currently in progress.

**Agricultural Overtime (Addendum V.)**

Recording timestamp **00:49:03**

**Cristina Rodriguez, Agricultural Employment Specialist, Fraud Prevention Labor Standards, LNI**

The Farm Labor Unit provides enforcement, outreach, technical assistance (plaintalk guidance on administrative policy).

Questions & Answers / Comments:

**Ignacio:** Has LNI developed an online tool that employers/employees can use to calculate their pay rate when working piece rate? **Cristina:** No, but worksheets are available in English and Spanish online.

**Mike:** Why are agricultural workers categories (i.e. Dairy). **Cristina:** The Supreme Court case re: Ag. OT specifically were dairy workers, however with Ag. OT statute – all ag. workers have the same OT pay structure/schedule.

Chat (**Rafael “iphone”**): Where is the schedule of 2024 LNI Outreach events? **Cristina:** There are monthly SPN/ENG webinars scheduled. SPN webinars are usually in the evening. Information on website.

**Edgar:** Why were farm labor contractors not discussed today? **Joy:** Cristina’s segment this month is Part II of last month’s segment, which covered farm labor contracting.

### Summary of Notice of Proposed Rule Making (NPRM) – Gary Kamimura, Workforce Policy Manager, ESPI Rulemaking, ESD (Addendum V.)

Recording timestamp 01:19:21

- Department of Labor’s NPRM on **20 CFR Parts 651, 653, 655 and 658**
- Department of Homeland Security’s NPRM on **8 CFR Parts 214 and 274a**

#### Questions & Answers / Comments:

**Gary:** ESD will provide public comment re: agency capacity/burden in implementing proposed rules as drafted.

**Jeff:** Do these rules provide any improvements for employers? **Gary:** Rules are focused on worker protection and safety and program transparency and compliance. Employers may feel that these proposed rules create an increased administrative burden.

### Good of the Order & Admin Preview – Joy Adams & Bertha Clayton

Recording timestamp 01:44:33

- November Meeting new date: 11/8/23 at Radio KDNA, 1-5 PM (tentative).  
**Jon:** There is an LNI event the morning of 11/8/23 which may make it difficult for committee members to make it to Granger at 1:00 PM.  
**Joy:** ESD will take that under advisement.
- ASWS Meeting Preferences Survey will be sent out to the committee for 2024 meetings.
- The last 2023 meeting is January 17, 2023
- **Reminders:** 2024 is report writing year. No meeting in December.

### Future Agenda Items:

Recording timestamp 00:04:28

- ASWS has compiled a list of prior committee actions (with statuses and outcomes). ASWS will provide a list to committee members prior to November meeting.

### Public Comment – None

Recording timestamp 01:50:02

### Adjourned

Joy Adams thanked everyone for their continued active participation and for their commitment to this work, then ended the meeting at 2:58 p.m.

### 2023 Meetings

The next Agricultural and Seasonal Workforce Services Advisory Committee meeting is on:

- **November 8, 2023 – 1:00 p.m. to 3:00 p.m. via Zoom**

ADDENDUM I.



AGENDA

Agricultural and Seasonal Workforce Services (ASWS) Advisory Committee  
 Wednesday, October 18, 2023 | 1:00 pm – 3:00 pm | Zoom | 212 Maple Park Ave SE Olympia WA 98501

OBTIME	TOPIC
1:00 pm	Welcome Joy Adams, Chairperson, Acting Director, ESD Employment System Policy & Integrity Division <ul style="list-style-type: none"> <li>• Roll Call – Vickie Carlson</li> <li>• Agenda Review – Joy Adams</li> <li>• Approval of the September meeting minutes</li> </ul>
1:10 pm	ASWS Office Update – Bertha Clayton, Director, ASWS Office, ESD <ul style="list-style-type: none"> <li>• ASWS Office – Bertha Clayton</li> <li>• FLC Dashboard – Petra Meraz, Foreign Labor Certification Program Supervisor</li> <li>• Compliance Dashboard – Margarito Cabrera, Compliance Unit Supervisor</li> </ul>
1:30 pm	WA Cares Update – H-2A Worker Exemption <ul style="list-style-type: none"> <li>• Janette Benham, Rules Coordinator, Leave and Care Division</li> <li>• Jeff Kendall, Service Delivery Manager, Leave and Care Division</li> </ul>
1:45 pm	Break
1:50 pm	Farm Labor Contractors in Washington – <b>Agricultural Overtime</b> Cristina Rodriguez, Fraud Prevention Labor Standards, Washington State LNI Ignacio Marquez, Assistant to the Director, WA State Department of Agriculture
2:30 pm	Summary of Notice of Proposed Rule Making (NPRM) – Gary Kamimura, Workforce Policy Manager, ESPI Rulemaking, ESD <ul style="list-style-type: none"> <li>• Department of Labor’s NPRM on <b>20 CFR Parts 651, 653, 655 and 658</b></li> <li>• Department of Homeland Security’s NPRM on <b>8 CFR Parts 214 and 274a</b></li> </ul>
2:50 pm	Good of the Order– Joy Adams Preview– Bertha Clayton <ul style="list-style-type: none"> <li>• November 2023 agenda</li> <li>• 2024 meeting schedule</li> <li>• Committee survey</li> </ul>
2:55 pm	Public Comment
3:00 pm	Adjourn

GROUND RULES

No side conversations | Phones on silent | Let people speak without interruption | Respect the opinion of others | Strive for understanding | Speak your mind | Strive for common ground | Assume good intent | Stay focused on task at hand and be willing to come back to the topic | Make sure everyone understands | Look out for each other | Take care of your own comfort | Ask for what you need.

ADDENDUM II

## ASWS Office Updates



Bertha J. Clayton, Director, ASWS Office, ESD

## Office Update - Happenings



### FLC Team

- New program year started 10/1/2023
- H2B job order creation notification (transition to self service as of 10/1/23)
- Developmental Job Assignment position (will start 11/15/2023)
- Coordination with OFLC, DOH, and LNI

### Compliance Team

- Field Checks (coordination, more than one placement on a job order)
- Complaint processing & follow up with enforcement agencies
- Employer assistance and education
- Washington Workforce Conference (November 15, 2023) – Outreach and H-2A overview
- Starting 10/1/23, compliance data reports will align with FLC data reporting (federal fiscal year).

## Office of Foreign Labor Certification (OFLC) Monitoring – Update



### Final Exit Conference (September 29<sup>th</sup>, 2023):

- Fiscal Findings (0)
- Programmatic Findings (5)
  - OFLC has 45 days to deliver report to ESD (November 13, 2023)
  - ESD will then have 30 days to respond with a corrective action plan
  - Majority of corrective action will focus on housing inspection coordination between ESD-DOH-LNI

5

## FLC Dashboard



**Employment  
Security  
Department**  
WASHINGTON STATE

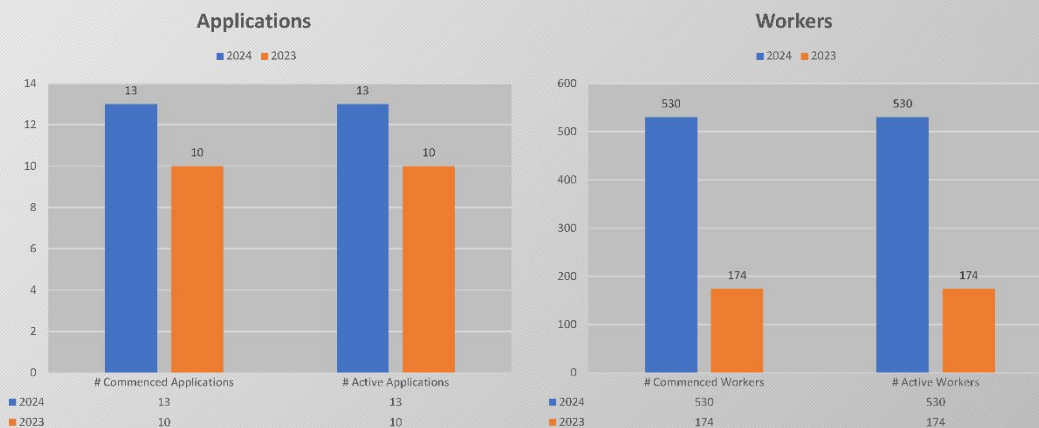
Petra Meraz, Foreign Labor Certification Program Supervisor, ASWS Office, ESD

# FLC Applications – October 1, 2023

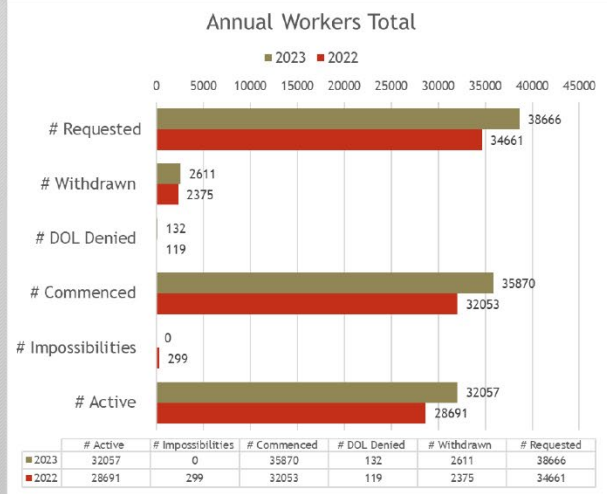
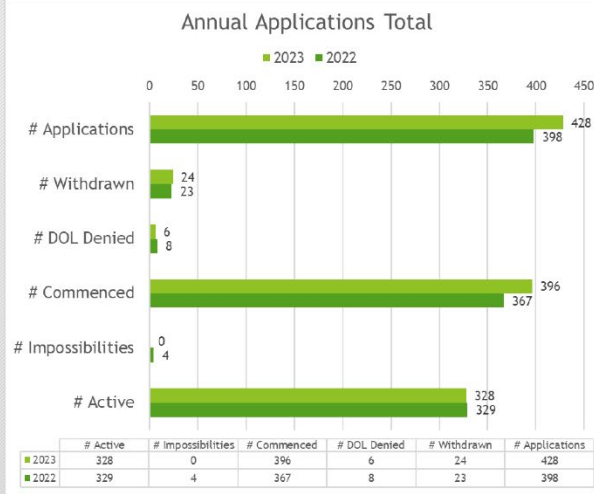


	2024	2023
# Contracts	0	0
# Workers Requested	0	0
# Withdrawn Contracts	0	0
# Withdrawn Workers	0	0
# DOL Denied Contracts	0	0
# DOL Denied Workers	0	0
# Impossibilities Contracts	0	0
# Impossibilities Workers	0	0

# Commenced & Active – October 1, 2023



# Annual Totals – PY2022 & PY2023



## Compliance Team



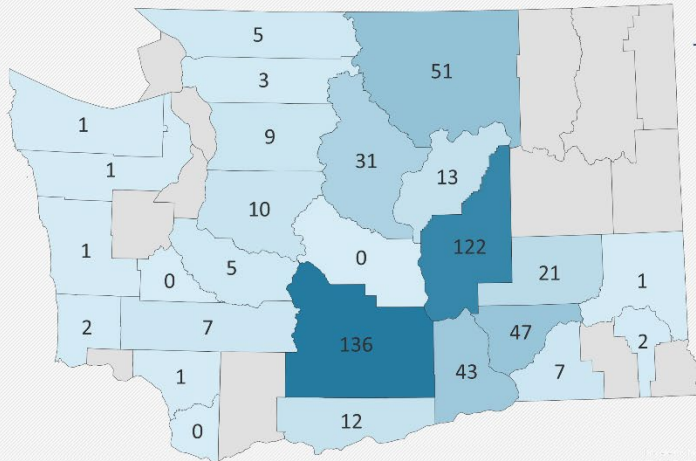
Margarito Cabrera, Compliance Unit Supervisor, ASWS Office, ESD



# Site Visits

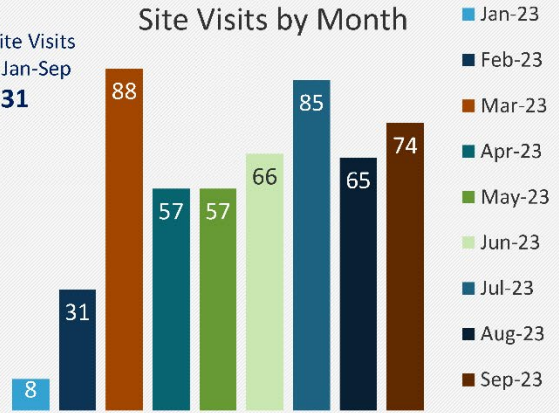


Site Visits By County from Jan-Sep 2023



Total Site Visits From Jan-Sep  
**531**

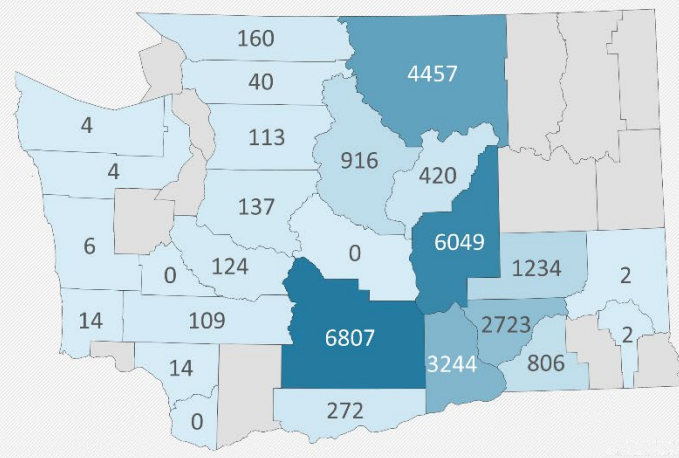
Site Visits by Month



# Approximate Workers Contacted

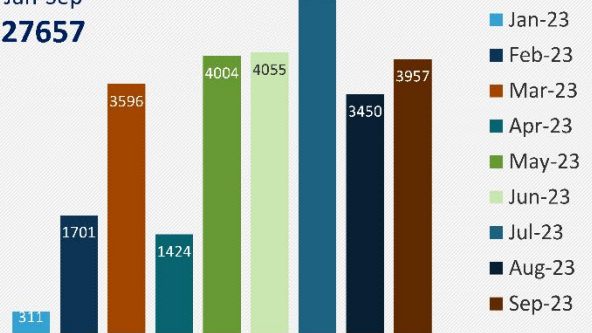


By County from Jan-Sep 2023



Total From Jan-Sep  
**27657**

Workers Contacted by Month



# Field Checks – 2023



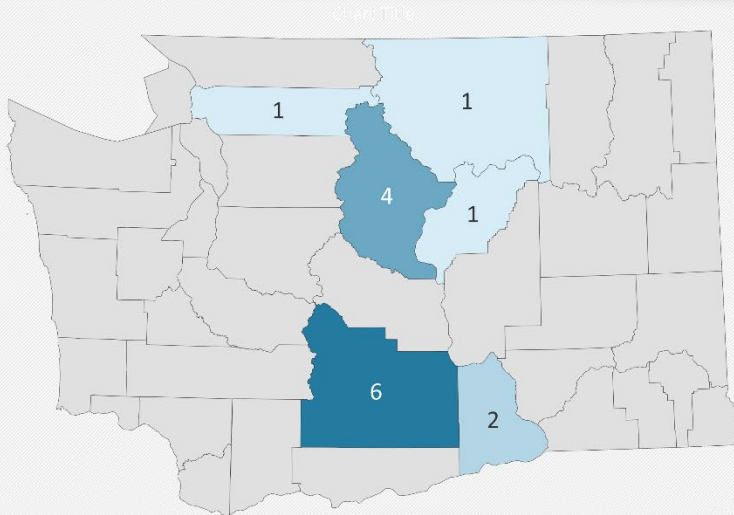
## 20 CFR 653.503 Field Checks

(a) If a worker is placed on a clearance order, the SWA must notify the employer in writing that the SWA, through its ES offices, and/or Federal staff, must conduct random, unannounced field checks to determine and document whether wages, hours, and working and housing conditions are being provided as specified in the clearance order.

(c) Field checks must include visit(s) to the worksite at a time when workers are present. When conducting field checks, ES staff must consult both the employees and the employer to ensure compliance with the full terms and conditions of employment.

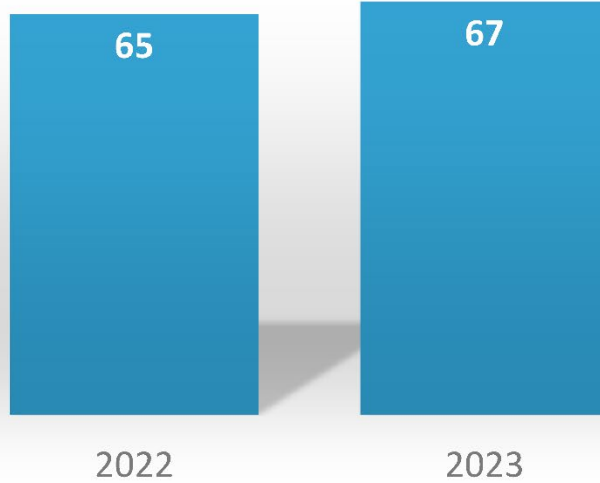
Number of Placements <i>(seeker referred and started working)</i>	19
Number of Field Checks Performed by ASWS	15
Number of Field Checks currently pending	2

# ASWS Field Checks by County in 2023

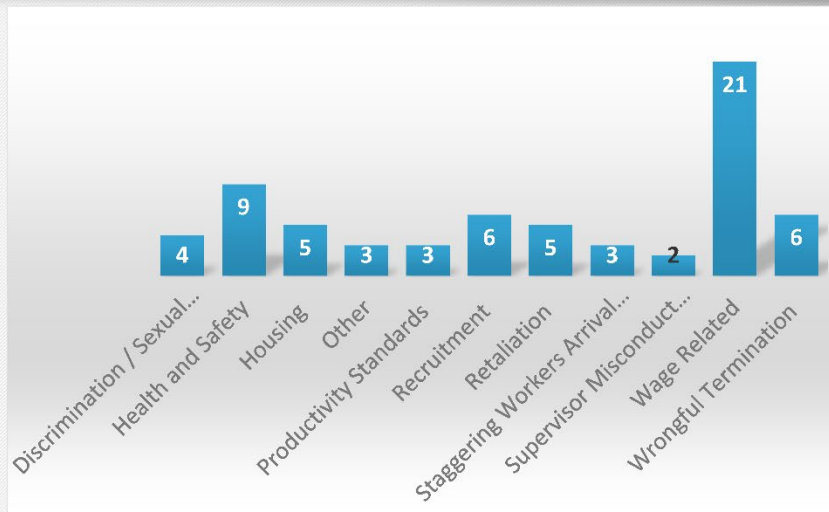


Total  
Field Checks  
**15**

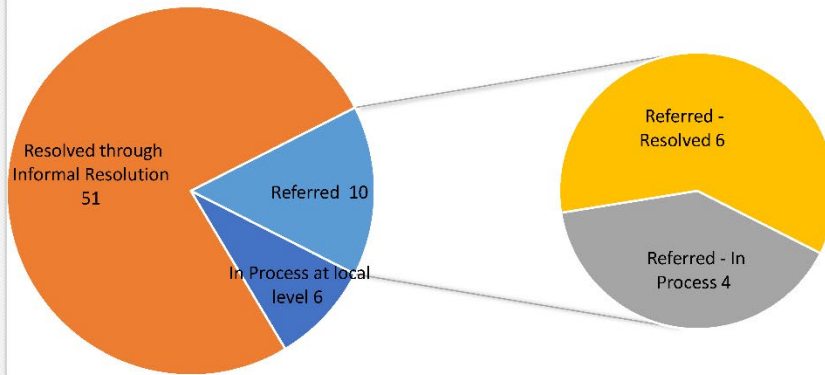
### Complaints / Apparent Violations – 2022 vs 2023



### Type of Allegations On Complaints / Apparent Violations Jan - Sep 23



# Status of Complaints / Apparent Violations Jan - Sep 2023



## ADDENDUM III.

### WA Cares Fund Non-immigrant Work Visa Exemptions



Janette Benham, Rules Coordinator, Leave and Care, ESD  
Jeff Kendall, Service Delivery Manager, Leave and Care, ESD



# WA Cares Fund

## Non-immigrant Work Visa Exemptions

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JANETTE BENHAM | RULES COORDINATOR  
LEAVE AND CARE DIVISION

JEFF KENDALL | SERVICE DELIVERY MANAGER  
LEAVE AND CARE DIVISION

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## ESD Agency Request Legislation

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### Summary of proposed changes

- ESD is proposing legislation to automatically exempt employees who hold non-immigrant temporary work visas, unless they want to participate.
- If an employee becomes a permanent resident or citizen employed in WA, they will become subject to the rights and responsibilities of the WA Cares Fund Program.

### Progress of the proposal

- Stakeholder work with overall support of the change
- Submitted to the Governor's office on September 14th

### Challenge ESD is addressing with the proposal

- Administrative burden for employers and ESD
  - Customer experience
-

## Exemptions Update (YTD as of October 13, 2023)

	Veterans with disability	Military spouses	Non-immigrant temporary workers	Out-of-state residents	TOTALS
<b>Applications submitted</b>	3,604	1,395	30,894*	19,512	55,432*
<b>Applications processed</b>	3,509	1,332	27,031	18,750	51,590
<b>Applications processed %</b>	97.36%	95.48%	87.50%	96.09%	93.07%

\* ESD received over 21,440 paper exemption applications YTD as of October 13, 2023. 1608 are pending processing.

### Ongoing outreach

- Joint L&I community relations/ASWS compliance team
- MSFW Outreach Program (WorkSource)
- Spanish radio ads – broadcast in areas with large populations of migrant farm workers
- Press releases – targeting all markets in WA and border markets in OR and ID
- Social media ads
- Communications targeting employers of large numbers of non-immigrant work visa holders (coming soon)

## Thank You

Janette Benham  
 Rules Coordinator  
 Leave and Care Division  
[janette.benham@esd.wa.gov](mailto:janette.benham@esd.wa.gov)

Jeff Kendall  
 Service Delivery Manager  
 Leave and Care Division  
[jeffery.kendall@esd.wa.gov](mailto:jeffery.kendall@esd.wa.gov)

## Questions?

To learn more, please visit:  
[wacaresfund.wa.gov](http://wacaresfund.wa.gov)

ADDENDUM IV.



# Agricultural Overtime

10/18/2023

Agricultural and Seasonal Workforce Services Advisory Committee

Cristina Rodriguez, Agricultural Employment Specialist



## Who is considered an agricultural worker and a dairy worker under the Minimum Wage Act?

**Agricultural worker** includes any individual employed:

- On a farm performing any of the following activities:
  - Cultivating soil and harvesting any agricultural or horticultural commodity.
  - Handling livestock – raising, shearing, feeding, caring for, and management.
  - Farm operations – management, conservation, improvement, or maintenance.
- Packaging, and Commercial Canning of any agricultural or horticultural commodity.
- Oysters – Cultivating, raising, harvesting, and processing.



**Dairy worker** includes any individual engaged in dairy cattle and milk production activities.



More info: [L&I Administrative Policy ES.A.1 Minimum Wage Act Applicability](#)



## History and changes

- Agricultural workers have historically been exempt from receiving overtime pay under the Washington State Minimum Wage Act.
- On November 5, 2020, the Washington State Supreme Court issued a decision in *Martinez-Cuevas vs. DeRuyter Brothers Dairy, Inc.* in which the court found dairy workers in the state of Washington eligible for overtime pay.
- During the 2021 legislative session, the state legislature enacted Engrossed Substitute Senate Bill (ESSB) 5172, which extends the right to overtime pay to all agricultural workers in Washington.



## What do these changes do?

- Dairy workers are now entitled to receive overtime pay for hours worked in excess of 40 hours per workweek.
- Dairy workers can file claims for overtime hours if they feel they earned overtime pay after November 5, 2020, and they did not receive pay.



### Effective Jan. 1, 2022

- Agricultural workers are entitled to receive overtime pay with a phase-in schedule that lasts three years.
- The agricultural overtime exemption is removed from the Minimum Wage Act.







## Agricultural overtime phase-in schedule

The new changes are implemented with the three-year phase-in schedule, which gradually reduces the number of hours agricultural workers need to work in a workweek to receive overtime pay.



After 2024, the overtime threshold will remain at 40 hours per workweek.



## What you should also know

- The new law does not prohibit agricultural workers from working over the overtime threshold. It just determines when they need to be paid overtime.
- Employers can choose the number of hours workers are scheduled to work and are not required to offer overtime hours.
- Overtime pay must be at least 1.5 times the worker's regular rate of pay for each overtime hour worked.
- Agricultural workers cannot waive their right to overtime pay.



## What can a worker do if they do not receive overtime pay?

- If agricultural or dairy workers do not receive the overtime pay that they are entitled to under the new law, they can file a Workers' Rights Complaint with L&I by:
  - ❖ Calling the toll free number 1-866-219-7321 to request information and the Worker Rights Complaint Form.
  - ❖ Filing online
  - ❖ Mailing the Worker Rights' Complaint form (F700-148-000)
  - ❖ Dropping off the complaint form by visiting the nearest L&I office (drop box).
  - ❖ Phone intake services
    - People can file a complaint by calling toll free 1-866-219-7321, Option 3.
- The Employment Standards Program investigates all complaints.

### ADDENDUM V.

Summary of Notice of Proposed Rule Making:  
 (DOL) 20 CFR Parts 651, 653, 655 and 658  
 (DHS) 8 CFR Parts 214 and 274a



Gary Kamimura, Workforce Policy Manager, ESPI Rulemaking, ESD

## DOL Pursuing Rule Changes for H-2A



- The U.S. Department of Labor (DOL) published a Notice of Proposed Rule Making (NPRM) on 20 CFR Parts 651, 653, 655 and 658 (titled *Improving Protections for Workers in Temporary Agricultural Employment in the United States*) on September 15, 2023.
- Employment Security, as the State Workforce Agency (SWA), is reviewing the proposed rule changes and intends to submit formal comments by the November 14, 2023 deadline.
- NPRM Link: [2023-19852.pdf \(govinfo.gov\)](#)

34

## Areas of Proposed Rule Changes for H-2A



- The proposed rule changes are “bucketed” into six categories:
  1. Protections for workers who advocate for better working conditions and labor organizing activities.
  2. Classification of justifiable termination for cause.
  3. Immediate effective date for updated AEWR.

(continued)

35

## Areas of Proposed Rule Changes for H-2A



(continued)

4. Enhanced transparency for job opportunity and foreign labor recruitment.
5. Enhanced transparency and protections for agricultural workers.
6. Enhanced integrity and enforcement capabilities.

36

## Proposed Rule Changes for H-2A



### 20 CFR 651.10

Codify additional and revised definitions for clarity and transparency:

- Agent
- Criteria clearance order / Non-criteria clearance order
- Discontinuation of services
- Employment-related laws
- Farm labor contractor
- Joint employer
- Successor in interest
- Week

37

## Proposed Rule Changes for H-2A



### 20 CFR 653.501

- Require SWAs to consult USDOL's OFLC, WHD, and OWI debarment and discontinuation of services lists before placing intrastate and interstate clearance orders and initiate discontinuation of ES services if employers seeking clearance orders are on any of those lists.
- Prohibit SWAs from approving interstate clearance orders from employers whose ES services have been discontinued by other States.
- Requires SWAs to apply discontinuation of ES services to all applicable entities, not just employers.

38

## Proposed Rule Changes for H-2A



### 20 CFR 653.501 (continued)

- Require employers to notify workers placed under clearance orders rather than all who are referred because the obligation to provide housing and subsistence to those already traveling to the place of employment and to pay wages for up to 2 weeks or provide alternative work is relevant only to workers who are placed with employers and not to those referred but not placed.

39

## Proposed Rule Changes for H-2A



### 20 CFR 653.501 (continued)

- Require employers to provide housing and subsistence to all workers already traveling to places of employment at no cost to the workers until work begins and to pay the specified hourly or piece rate of pay on the clearance order, with the latter being the higher of the Federal or State minimum wage or prevailing wage, and further require employers that fail to provide the required notice at least 10 business days before the original date of need to pay the required wage for up to 2 weeks.

40

## Proposed Rule Changes for H-2A



### 20 CFR 653.501 (continued)

- Clarify that any alternative work must be in approved clearance orders to ensure employers do not require workers to perform work at sites not approved by SWAs and, for criteria clearance orders, instruct SWAs to process violations of these requirements as apparent violations that are observed or for which information has been received by SWAs or ES office or outreach staff, which must be documented and referred for further action.

41

## Proposed Rule Changes for H-2A



### 20 CFR 655.135

- Enhance protections for H-2A workers to advocate and negotiate for better working conditions for themselves and coworkers (including domestic workers under H-2A clearance orders) and prevent employers from suppressing this activity by:
  - Expanding and explicitly protecting certain activities in which workers can engage without intimidation, threats, or retaliation.
  - Permitting workers to invite or accept guests to worker housing and provide labor organizations limited right of access to worker housing.

42

## Proposed Rule Changes for H-2A



### 20 CFR 655.122

- Define “termination for cause” at 655.122(n) by proposing six criteria that must be satisfied and which will assist in determining whether an individual worker was terminated for just reasons to ensure employers do not arbitrarily and unjustly terminate workers.

43

## Proposed Rule Changes for H-2A



### 20 CFR 655.120

- Designate the effective date of updated Adverse Effect Wage Rates (AEWRs) as the date of publication in the Federal Register and revise 655.120(b)(3) to state that employers are obligated to pay updated AEWRs immediately upon publication of the new AEWRs in the Federal Register to help ensure workers are paid at least the updated AEWRs as soon as they are published in order to not adversely affect the wages and working conditions of similarly employed U.S. workers.

44

## Proposed Rule Changes for H-2A



### 20 CFR 655.122

- Require employers to disclose any minimum productivity standards imposed as a condition of job retention so workers are fully apprised of the terms and conditions of employment, including productivity standards that may serve as a basis for termination for cause.
- Prohibit employers from terminating workers for failure to meet minimum productivity standards if they did not disclose the standards in advance.

45



## Proposed Rule Changes for H-2A



### 20 CFR 655.122 (continued)

- Require minimum productivity standards to be bona fide and normal and accepted among non-H-2A employers in the same or comparable occupations and crops.
- Require employers to offer and advertise on the job order any applicable prevailing piece rate, the highest applicable hourly wage rate, and any other rate the employer intends to pay, and to pay workers the highest of these wage rates.

46

## Proposed Rule Changes for H-2A



### 20 CFR 655.122 (continued)

- Require employers to specify in job orders any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which such overtime hours will be paid.
- Prohibit employers from operating employer-provided vehicles required by the U.S. Department of Transportation (DOT) to have seat belts unless all passengers and the driver are properly restrained by seat belts that meet DOT standards and employers maintain those seat belts in good working order and ensure that each worker is wearing a seat belt when the vehicle is operated.

47

## Proposed Rule Changes for H-2A



### 20 CFR 655.135

- Prohibit employers from holding or confiscating workers' passports, visas, or other immigration or government identification documents beyond compliance with the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), which is required under current H-2A regulations.

48

## Proposed Rule Changes for H-2A



### 20 CFR 655.175

- Limit minor delays to 14 calendar days or less and require employers to notify each worker and the SWA of any delay in the start date of work.
- Require employers to pay workers the applicable wage rate for each day work is delayed, for a period of up to 14 calendar days, starting with the certified start date, if employers fail to provide adequate notice of the delay.

49

## Proposed Rule Changes for H-2A



### 20 CFR 655.182

- In debarment matters, reduce from 30 calendar days to 14 calendar days, unless employers request an extension of the rebuttal period, in writing, and demonstrate good and substantial cause for extensions:
  - The time for parties to submit rebuttal evidence to OFLC.
  - The time for parties to appeal Notices of Debarment to the Office of Administrative Law Judges (OALJ).
  - The time for parties to appeal debarment decisions to the Administrative Review Board (ARB) from the OALJ.

50

## Proposed Rule Changes for H-2A



### 20 CFR 655.104

- Clarify the liability of successors in interest for debarment purposes and streamline DOL's procedures to deny labor certifications filed by or on behalf of successors in interest to debarred employers, agents, and attorneys under the well-established successorship doctrine and to better ensure that debarred entities do not circumvent the effects of debarment.
- Propose conforming revisions to 655.103(b), 655.181, and 655.182 and 29 CFR 501.20.

51

## Proposed Rule Changes for H-2A



### 20 CFR 655.103

- Define *single employer* and codify use of the single employer test (sometimes called “integrated employer” test) or similar analysis to determine if separate employers are a single employer for purposes of assessing seasonal or temporary need, or for enforcement of contractual obligations.
- Prevent employers from using their corporate structures to circumvent statutory and regulatory requirements.

52

## Proposed Rule Changes for H-2A



### 20 CFR 658.501

- SWAs must discontinue ES services to employers who submit and refuse to correct or withdraw job orders containing terms and conditions that are non-compliant with employment-related laws, not just alter certain specifications as currently provided under the rule.
- Remove language that limits the basis for discontinuation to only those assurances involving employment-related laws because employers must ensure that workers referred on clearance orders are made aware of all assurances and protected by those assurances if placed on the orders.

53

## Proposed Rule Changes for H-2A



### 20 CFR 658.501 (continued)

- Requires SWAs to initiate procedures for discontinuation of ES services to employers who are currently debarred from H-2A/H-2B programs.
- Add that the basis for discontinuing ES services includes employers who violate ES regulations to clarify that ES violations may be found as a result of apparent violations.
- Clarify that the requirement to accept qualified workers applies only to criteria clearance orders and not to non-criteria clearance orders.

54

## Proposed Rule Changes for H-2A



### 20 CFR 658.501 (continued)

- Explains what SWAs must do when employers participating in the ES system may not have complied with the terms of their certification under the H-2A and H-2B programs.
- Requires SWAs to determine whether they must initiate discontinuation of ES services because they cannot proceed based solely on information that employers *may* have violated the terms of their certifications and must instead take that information and determine whether one of the bases for discontinuation applies and, if so, initiate discontinuation.

55

## Proposed Rule Changes for H-2A



### 20 CFR 658.502

- Clarify that this section relates only relates to SWAs initial notices to employers proposing discontinuation and not to the final notices and that the initial notices must state the reasons for proposing discontinuation and that the SWA intends to discontinue services and the SWA must initiate discontinuation under all applicable bases if more than one applies.

(continued)

56

## Proposed Rule Changes for H-2A



### 20 CFR 658.502 (continued)

- Remove language providing employers the opportunity for pre-discontinuation hearings to align hearing procedures for discontinuation of ES services with hearing procedures for the ES Complaint System, which allows for hearings by State hearing officials only after SWAs issue final decisions on complaints.
- State that SWAs must notify employers that all ES services – rather than all employment services – will be discontinued per scope of the rule.

57

## Proposed Rule Changes for H-2A



### 20 CFR 658.502 (continued)

- Clarify what evidence and assurances employers may provide to avoid discontinuation of ES services by stating that employers may provide evidence that the determinations at issue are not final because and SWAs cannot discontinue services where determinations are not final.
- Add language requiring employers to submit evidence that their period of debarment is no longer in effect and that they have taken all actions required by the enforcement agency as a consequence of the violation.

58

## Proposed Rule Changes for H-2A



### 20 CFR 658.502 (continued)

- SWAs must list and provide facts in notices to employers proposing to discontinue ES services when based repeatedly causing the initiation of discontinuation of ES services explaining prior instances and notify employers that all ES services will be terminated unless the employers provide adequate evidence that the SWA's initiation of discontinuation in prior proceedings was unfounded.

59

## Proposed Rule Changes for H-2A



### 20 CFR 658.502 (continued)

- Explains the circumstances that warrant immediate discontinuation of services and states that SWAs must discontinue services immediately without notice or opportunity to respond if employers have met any of the bases for discontinuation of ES services and, in the judgment of the SWA Administrator, exhaustion of administrative procedures would cause substantial harm to workers. The current rule says SWAs “may” discontinue services and only when there may be harm to a substantial number of workers.

60

## Proposed Rule Changes for H-2A



### 20 CFR 658.503

- Require that within 20 working days of receipt of the employer’s response to the SWA’s notification, or at least 20 working days after the SWA’s notification is received by the employer if the SWA does not receive a response, the SWA must notify the employer of its final determination in a manner that allows the SWA to track receipt of the notification, such as certified mail, and specify the reasons for its determination.

61



## Proposed Rule Changes for H-2A



### 20 CFR 658.503 (continued)

- Add language explaining the procedures for immediate discontinuation of ES services and state that SWAs must notify employers in writing that services are discontinued as of the date of the notice, that employers may request reinstatement or hearings, and that a request for a hearing on immediate discontinuation does not stay discontinuation pending the outcome of the hearing and specify the facts supporting the basis for discontinuation under 658.501(a) and the reasons that exhaustion of the administrative procedures would cause substantial harm to workers.

62

## Proposed Rule Changes for H-2A



### 20 CFR 658.503 (continued)

- SWAs must notify the ETA Office of Workforce Investment of any final determination to discontinue ES services.
- SWAs must notify relevant ETA regional offices if ES services are discontinued subject to Federal Contractor Job Listing Requirements.
- SWAs must notify complainants of employers' discontinuation of ES services if the discontinuation is based on a formally-filed complaint.
- SWAs must remove active job orders from the clearance system and must not process any future job orders for as long as services are discontinued.

63

## Proposed Rule Changes for H-2A



### 20 CFR 658.504

- Require that employers who request hearings following discontinuation do so within 20 working days of the date of discontinuation.
- Clarifies the circumstances and procedures under which **SWAs** must reinstate services when employer submit a written reinstatement requests.
- Retains the 20-day timeline within which **SWAs** must notify employers whether they grant or deny reinstatement requests, but require SWAs to specify the reasons if they deny requests.

64

## Proposed Rule Changes for H-2A



### 20 CFR 658.504 (continued)

- Clarify circumstances and procedures under which SWAs must reinstate services when employers submit timely, written requests for hearings.
- Require SWAs to notify the Office of Workforce Investment (OWI) of determinations reinstating ES services or decisions upholding SWA determinations to discontinue services within 10 working days of the issuance of the determinations so a proposed OWI discontinuation of services list can be kept current and reinstated employers can promptly access ES services.

65

## Proposed Rule Changes for H-2A



### 29 CFR 501.3

- Add definitions for *key service provider* and *labor organization* in 501.3(a) to conform to the proposed addition of these terms to the definitions in 20 CFR 655.103(b)
- Remove the definition of *successor in interest* from 501.3(a) to conform to and for the reasons described for proposed 20 CFR 655.104.
- Add definition of *single employer* to conform to and for the reasons described in the discussion of proposed 20 CFR 655.103(e).

66

## Proposed Rule Changes for H-2A



### 29 CFR 501.4

- Revise 501.4(a) to conform to proposed changes to 20 CFR 655.135(h) to expand and strengthen anti-retaliation provisions, but leave untouched provisions in 501.4(b) on WHD investigations and enforcement of 501.4.

### 29 CFR 501.10

- Add severability clause to explain that any provision of 29 CFR part 501 held to be totally invalid or unenforceable will be severed from 29 CFR part 501 while not affecting the remainder of 29 CFR part 501.

67

## Proposed Rule Changes for H-2A



### 29 CFR 501.20, 501.33, and 501.42

- Conform WHD regulations to maintain consistency with and implement various proposed changes to ETA's debarment regulation at 655.182 as they relate to the following:
  - Successors in interest
  - Passport withholding
  - Timelines to appeal
  - Requests for hearings

68

## DHS Pursuing Rule Changes for H-2A/B



- The U.S. Department of Homeland Security (DHS), through its U.S. Customs and Immigration Service (USCIS), published a Notice of Proposed Rule Making (NPRM) on 8 CFR Parts 214 and 274a (*Modernizing H-2 Program Requirements, Oversight, and Worker Protections*) on September 19, 2023.
- Employment Security, as the State Workforce Agency (SWA), is reviewing the proposed rule changes and plans to submit formal comments by the November 20, 2023 deadline.
- Link: [https://www.regulations.gov/document/DHS\\_FRDOC\\_0001-2344](https://www.regulations.gov/document/DHS_FRDOC_0001-2344)

69

## Categories of Proposed Rule Changes



The proposed rule changes fall into three broad categories:

1. Program Integrity and Worker Protections
2. Worker Flexibilities
3. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

70

## Proposed Rule Changes for H-2A/B



### **Program Integrity and Worker Protections**

- 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F): DHS proposes to add stronger language requiring petitioners or employers to consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS's authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.

*(continued)*

71

## Proposed Rule Changes for H-2A/B



- 8 CFR 214.2(h)(20): DHS proposes to provide H-2A and H-2B workers with whistleblower protection comparable to that currently offered to H-1B workers.
- 8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), 8 CFR 214.2(h)(6)(i)(D): DHS proposes to strengthen the existing prohibition on and consequences for charging certain fees to H-2A and H-2B workers, including new bars on approval for some H-2 petitions.

*(continued)*

72

## Proposed Rule Changes for H-2A/B



- 8 CFR 214.2(h)(10)(iii): DHS proposes to institute certain mandatory and discretionary bars to approval of H-2A or H-2B petitions.

73

## Proposed Rule Changes for H-2A/B



### Worker Flexibilities

- 8 CFR 214.2(h)(5)(viii)(B), 8 CFR 214.2(h)(6)(vii)(A), 8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C): DHS proposes to change grace periods so they will be the same for the H-2A and H-2B programs and create a 60-day grace period following any H-2A or H-2B revocation or cessation of employment during which workers will not be considered to have failed to maintain non-immigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.

*(continued)*

74

## Proposed Rule Changes for H-2A/B



- 8 CFR 214.2(h)(11)(iv): DHS proposes to clarify the responsibility of H-2A employers for reasonable costs of return transportation for workers following a petition revocation.
- 8 CFR 214.2(h)(16)(ii-iii): DHS proposes to clarify that H-2 workers may take steps toward becoming lawful permanent residents of the U.S. while still maintaining lawful nonimmigrant status.
- 8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), 8 CFR 214.2(h)(13)(i)(B): DHS proposes to eliminate the “interrupted stay” calculation and instead reduce the period of absence to reset an individual’s 3-year period of stay.

*(continued)*

75

## Proposed Rule Changes for H-2A/B



- 8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), 8 CFR 274a.12(b)(21): DHS proposes to make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.
- 8 CFR 214.2(h)(2)(i)(I)(3): DHS proposes to clarify that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.

76

## Proposed Rule Changes for H-2A/B



### **Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration**

- 8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E): DHS proposes to eliminate the lists of countries eligible to participate in the H-2 programs.

77



ADDENDUM VI.

Good of the Order & Administrative Preview



Joy Adams, ASWS Advisory Committee Chairperson, ESD  
Bertha J. Clayton, Director, ASWS Office, ESD

In Closing



**Good of the Order:**

- Summary of Meeting
- Future Agenda Items

**Administrative Preview:**

- November 2023 Agenda
- 2024 Meeting Schedule
- Committee Survey

Public Comment



- Public Comment



Agricultural and Seasonal Workforce Services  
ADVISORY COMMITTEE



Next In-Person

**ASWS Advisory Committee Meeting**

Wednesday, November 8, 2023

1:00 p.m. – 5:00 p.m.

KDNA

121 Sunnyside Ave, Granger WA 98932

**Contact information**

Joy Adams, Chairperson, Acting Director of Employment System Policy & Integrity Division

*Employment Security Department • Employment System Policy & Integrity*