



Agricultural Legislative & Public Policy ADVISORY ■

OCTOBER 2, 2023

Biden Administration Proposes More Changes to the H-2A Program

by [Kristi Boswell](#)

The H-2A temporary agricultural program – administered by the U.S. Department of Labor (DOL), Department of Homeland Security (DHS), and State Department – allows agricultural employers that anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services on a temporary or seasonal basis.

Due to instability in the domestic workforce, the use of seasonal nonimmigrant programs has become vital to ensuring businesses can have an adequate supply of labor. The H-2A program has expanded significantly in recent years. Similarly, applications for the H-2B program have well exceeded its statutory cap of 66,000 visas. In the H-2A program, the DOL reports over 302,000 certified positions for H-2A workers through the 3rd quarter of Fiscal Year 2023. Through the entire Fiscal Year 2020, there were only 275,430 certifications. During this same time frame, employers have been hit with multiple rulemakings changing the rules of the program.

In recent weeks, the Biden Administration has issued yet another series of proposed rulemakings that would incorporate further reforms to the H-2A program. The DOL and DHS assert that the proposed reforms are intended to strengthen protections for temporary agricultural workers and enhance federal agencies' capabilities to monitor program compliance and take necessary enforcement actions against program violators. Regardless, employers will likely see administrative delays, higher costs, work disruptions, and increased enforcement activity.

The series of regulatory proposals include:

1. Department of Labor Proposed Rule: [Improving Protections for Workers in Temporary Agricultural Employment in the United States](#); RIN 1205-AC12 [DOL Docket No. ETA-2023-0003]. Comments are due November 14, 2023.

DOL proposes to:

- Remove the 14-day payroll implementation window for changes in the adverse effect wage rate.
- Expand labor organizations' access to the H-2A program and corresponding workers' private information and ability to access private employer property.
- Require public disclosure of names of all agents and foreign labor recruiters used by employers.

This alert is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

- Provide the DOL with greater authority to initiate enforcement actions against employers that allegedly violate the program rules.
 - Shorten the period to file rebuttal evidence or request a hearing upon service of notice of debarment from 30 calendar days to 14 calendar days.
2. Department of Homeland Security Proposed Rule: [Modernizing H-2 Program Requirements, Oversight, and Worker Protections](#); RIN 1615-AC76 [DHS Docket No. USCIS-2023-0012]. Comments are due November 20, 2023.

DHS proposes to:

- Provide DHS additional authority to deny or revoke petitions based upon failure to comply with H-2A and H-2B program requirements, violation of labor laws, or charging workers prohibited fees.
- Create whistleblower protection for H-2A and H-2B employees.
- Modify worker grace periods to 10 days before the petition's validity period, up to 30 days following its expiration, and up to 60 days if the H-2A or H-2B worker was terminated or resigned or if a petition has been revoked.
- Allow an H-2A or H-2B worker to discontinue employment and begin new employment, within the same classification, immediately upon the proper filing of a new petition.
- Shorten the period of absence to reset the three-year limit of stay to an uninterrupted 60 days.

Given the Administration's recent efforts regarding the H-2A program, these proposals are not unexpected. However, due to the two previous rulemakings, farmers are already struggling to comply with complex regulatory burdens and rising costs of the H-2A program. These proposed rules only add layers of complexity and the risks of unintentional errors.

The comment period is currently open for both proposed rules. This is a critical window for stakeholders and agricultural employers to provide input as the Administration considers potential revisions to the final rule.

Our team at Alston & Bird is available to strategize and draft comments to ensure your feedback is considered during the rulemaking process.

You can subscribe to future *Agricultural Legislative & Public Policy* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our [Agricultural Legislative & Public Policy Team](#).

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2023

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ +1 404 881 7000 ■ Fax: +1 404 881 7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: 1120 South Tryon Street ■ Suite 300 ■ Charlotte, North Carolina, USA 28203-6818 ■ +1 704 444 1000 ■ Fax: +1 704 444 1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ +1 214 922 3400 ■ Fax: +1 214 922 3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ +1 214 922 3400 ■ Fax: +1 214 922 3899
LONDON: LDN:W ■ 6th Floor ■ 3 Noble Street ■ London ■ EC2V 7DE ■ +44 20 8161 4000
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ +1 213 576 1000 ■ Fax: +1 213 576 1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ +1 212 210 9400 ■ Fax: +1 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ +1 919 862 2200 ■ Fax: +1 919 862 2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ +1 415 243 1000 ■ Fax: +1 415 243 1001
SILICON VALLEY: 755 Page Mill Road ■ Building C - Suite 200 ■ Palo Alto, California, USA 94304-1012 ■ +1 650 838 2000 ■ Fax: +1 650 838 2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ +1 202 239 3300 ■ Fax: +1 202 239 3333