NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave, NW.
Washington, DC, 20224

Dear Commissioner Rettig,

The National Council of Agricultural Employers (NCAE) is the only national association focusing exclusively on agricultural labor issues from the Agricultural Employer's viewpoint. We represent the interests of agricultural employers, growers, associations and others whose business interests revolve around labor-intensive agriculture.

We write you today to express concern from the thousands of agricultural employers NCAE represents across the United States with the Internal Revenue Service (IRS) Frequently Asked Questions (FAQs) updated on November 25, 2020. Specifically, FAQ 19f and the IRS explanation that employers of "essential" H-2A workers are not eligible for Families First Coronavirus Relief Act (FFCRA) tax credits. This issue is timely as agricultural employers are quickly approaching the deadline, by February 1, 2021, to file their Form 943.

Question 19f of the IRS FAQs, updated on November 25, 2020, specifically states that "[e]mployers of H-2A workers are not eligible for the FFCRA credits with regard to such workers because they do not pay wages subject to FICA." Though it is true that H-2A workers are exempt from FICA withholdings, paying FICA was not a required element for the requirement to provide sick leave under the Emergency Paid Sick Leave Act section of the FFCRA. In fact, the FFCRA simply states that "[a]n employer shall provide each employee employed by the employer paid sick time . . .." *See* Section 5102(a) of the FFCRA. Section 5110 of the FFCRA further defines employee as section 3(e) of the Fair Labor Standards Act defines the term, which provides no exemption for H-2A workers.

Sections 7001(a) and 7003(a) provide a 100 percent credit for the amount of wages paid under these sections. Though the FFCRA clearly intended to allow employers to pay for the

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newly required sick and family leave by allowing the employer to retain the amount of FICA tax to be paid to the IRS, that was not the only method of credit the FFCRA allowed.

These sections further state that if the 100 percent credit for the amount of "qualified sick leave wages" paid under the Sections exceeds the tax imposed by section 3111(a) or 3221(a) of the Internal Revenue Code (IRC) that the amount of wages paid shall be treated as an overpayment and refunded to the employer. *See* Section 7001(b)(4)(A) and Section 7003(b)(3) of the FFCRA.

It is further clear, that Congress' intent was not to limit the applicability of the FFCRA provisions when it endeavored to define "qualified sick leave wages" and "qualified family leave wages" as wages defined under the IRC at section 3121(a). If Congress intended to further limit the applicability of the FFCRA to H-2A workers, it could have pointed to section 3121(b)(1), which explicitly excludes foreign agriculture workers from the definition of employment.

Since agricultural employers employing H-2A workers have no tax imposed under sections 3111(a) or 3221(a) of the IRC, the "qualified sick leave wages" paid under the FFCRA should be treated as an overpayment and refunded to the employer in their entirety, up to the daily and total amount allowed under Section 7001(b)(4)(A) and Section 7003(b)(3) of the FFCRA. Holding otherwise would be a gross miscarriage of the purposes of the FFCRA and cause great harm to the many agricultural employers that were simply complying with the law enacted by Congress and the regulations and guidance implemented by the Departments of Labor and Treasury. If Congress intended to exclude these workers, these workers would have been forced to take unpaid sick leave or risk spreading the virus to other co-workers and the community. This clearly was not the intent of Congress.

We are asking that the IRS immediately rescind question 19f of the IRS FAQs issued on November 25, 2020 and replace it with an FAQ that outlines how employers who have an overpayment as outlined in Section 7001(b)(4)(A) and Section 7003(b)(3) of the FFCRA should report that to the IRS and how the IRS intends to refund that overpayment to employers.

We thank you for your immediate consideration of this matter and look forward to forthcoming guidance on how employers may obtain their refund under Section 7001(b)(4)(A) and Section 7003(b)(3) of the FFCRA.

Very truly yours,

Michael Marsh
President and CEO

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CC Terry Lemons, Chief of Public Liaison, Internal Revenue Service
Janis Reyes, SBA Ombudsman