



Memorandum

November 8, 2022

From: Michael Marsh, President and CEO

To: H-2A Committee and interested parties

The National Council of Agricultural Employers (NCAE) will challenge the Biden Administration's H-2A rule ("Biden Rule") before it goes into effect this month and harms hardworking farmers and ranchers who utilize the Federal H-2A program.

We plan to quickly seek an order temporarily enjoining the Biden Rule. No matter what happens, we expect the temporary injunction to be appealed to the D.C. Circuit. The primary legal theory is that the Trump Administration's H-2A rule ("Trump Rule") was final when it was published on the Department of Labor website in 2021.

This theory extends new case law that the D.C. Circuit handed down just three months ago, holding that a rule is promulgated for purposes of notice and comment when the public has actual notice. This means that the Biden Administration violated the Administrative Procedure Act (APA) when it rescinded the Trump Rule and published the Biden Rule without notice and comment.

In addition to challenging the Biden Administration's failure to follow the required notice and comment rulemaking procedures, NCAE will challenge the implementation of new and increased surety bond requirements for Farm Labor Contractors and relaxed standards for State Agencies to produce statistically invalid prevailing wage determinations as arbitrary and capricious in violation of the APA. The ultimate goal is to maintain status quo and have the Labor Department go back to the 2010 Rule ("Obama Rule") for the foreseeable future.

Accomplishing this challenge will require resources beyond those presently maintained in NCAE's Litigation Fund. If you can assist us in this effort, please do. Consistent with NCAE's practice, any monies collected but unspent at the conclusion of the litigation will, at the contributor's direction, be returned to the contributor on a pro rata basis to all contributions received. The contributor will also have the option to have any refund owed to be segregated in NCAE's Litigation Fund in anticipation of our next challenge.

You may send any checks in support of this effort to our office.

Thank you for your support!