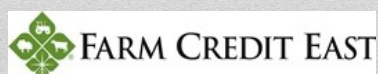


Managing Your Ag Labor Workforce

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- This information is intended for general educational purposes. It does not and cannot replace legal advice tailored to your specific facts and situation. These are evolving areas of law, and we strongly recommend that you obtain professional counsel with expertise in these areas to provide you specific advice and direction.

Disclaimer

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- Donald Trump has been President for less than a month.
- Congress is beginning the process of issuing new laws.
- What will his Administration mean for agricultural employers in the coming years?
 - On labor/employment rules?
 - On immigration enforcement?
 - On H-2A and H-2B?
 - On healthcare?

Where are we now?

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Who knows?

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- President Trump won the rural vote by a 3-1 margin, with strong support from agriculture.
- On the campaign trail, he promised to roll-back the DOL overtime rule, OSHA and other worksite rules, and the Affordable Care Act.
- The day after the election, President Trump put out a YouTube video calling for DOL to “investigate all abuses of visa programs that undercut the American worker.”
- The inaugural address announced that the new Administration will follow two rules:
“Buy American and hire American.”
- The Attorney-General and West Wing staff are strong opponents of foreign-born workers, particularly H-2A and H-2B.

Good news/**Bad news?**

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What ag employers need to keep on their radar...

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- Most employment and immigration-related laws have been on the books for decades.
- They do not change easily or often.
- Employer best-practices will always be your best friend.
 - Record-keeping
 - Attention to detail
 - Knowing your rights and knowing your responsibilities

Introduction

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- Employers must meet highest applicable wage rate
- Fair Labor Standards Act of 1938
 - Federal minimum wage (\$7.25/hour)
 - Overtime (time-and-a-half) for hours >40/week
- State laws
 - Minimum wage (\$8.44 NJ; \$9.70 NY; \$10.10 CT; \$9.60 RI; \$11 MA; increases coming in 2018 and beyond)
- H-2A – Adverse Effect Wage Rate (AEWR) for 2017
 - \$12.19 in NJ; \$12.38 everywhere in New England/NY

Wage Laws and Regulations

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- Agricultural
 - “Primary” ag
 - “Secondary” ag
- Executive/Administrative/Professional (EAP)
 - *The rule scheduled for 12/1/16 has been blocked in court.*
 - *Old salary threshold of \$23,660 or \$455/wk remains in place.*
- Computer Professionals
- Commissioned Sales Employees
- Tipped wait staff
- Truck drivers

FLSA Overtime Exemptions

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- More than one exemption may apply
 - For example: agricultural supervisor = Ag + EAP
 - If one exemption is lost, the other may still apply
- The exemptions are specific to the work performed at that time and may not last forever
 - Generally, if an exemption is lost for part of a pay period, it is lost for the entire pay period
 - However, it could apply for the next pay period

Applying the Exemptions

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- “Primary” ag:
 - “Farming in all its branches” – “cultivation, growing and harvesting of any agricultural or horticultural commodities” as well as “preparation for market, delivery to storage or to market or to carriers for transportation to market”; cider house rule
- “Secondary” ag:
 - “Any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with ‘such’ farming operations.”

Ag OT Exemption

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Exempt

- Handling of crop in “unfinished state” before it is stored or loaded onto third-party’s truck
- Kitchen staff; on-farm transportation; mechanics

Not Exempt

- “Processing” crops – except cider
- Handling other growers’ crops
 - Small exceptions – contract fulfillment/de minimis rule
- Not all “essential” work = exempt: off-site irrigation, etc.

Scope of Ag OT Exemption

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- Visa program for employing foreign agricultural workers on a temporary/seasonal basis
- Up to 10 months; single employer; specific location; clearly-defined set of job activities
- Recruitment of U.S. workers
- Corresponding employment
- Transportation/housing/three-fourths guarantee
- Notify DOL and USCIS if a worker terminates early

H-2A Visa Program

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- Switch from “provide housing” to housing allowance?
- Clarification of “corresponding employment”?
- Repeal “*Arriaga*” re: travel & visa expenses?
- Streamline processing at DOL and USCIS
 - Switch to all e-mail notices
 - Enhanced role for USDA or removal of DOL?
- Expansion of “temporary or seasonal” to cover dairies and/or processors?

Possible changes to H-2A

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- Patient Protection and Affordable Care Act
 - “Obamacare”
 - H-2A workers are “lawfully present” and must be treated just like U.S. workers
 - Definitions of “seasonal” workers – 120 vs 180 days
 - Give exchange notice at beginning of each season
 - Reporting requirements
- *Repeal process is underway, but could take months/years*

ACA Repeal/Replace

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- Immigration Reform and Control Act of 1986
 - I-9 audits and compliance – *new form January 22, 2017*
 - Pattern-or-practice criminal sanctions from DOJ
- DOJ Immigrant and Employee Rights Section
 - “Unfair immigration-related” practices in hiring/I-9
- Deferred Action for Childhood Arrivals (DACA)
 - Work authorization – changes in store...

Immigration Enforcement

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- Immigration hardliners in President Trump's inner circle
 - Jeff Sessions, Steve Bannon, Stephen Miller, Kris Kobach
 - New ICE Director – Thomas “The Hammer” Homan
- **Mandatory E-Verify**
 - Senate Judiciary Committee Chairman Chuck Grassley
 - Within 1 year of enactment; significant increase in penalties
- Deportation priorities include those charged with a crime, including illegal entry to the U.S.

Immigration Enforcement

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- Occupational Safety & Health Administration
 - May 12, 2016 – final rule
 - “Improve Tracking of Workplace Injuries and Illnesses”
 - Electronic reporting / searchable OSHA database
 - Phased in over next several years
 - 250+ employees
 - 2016 summary report filed by 7/1/17
 - 2017 log, summary, and reports filed by 7/1/18
 - Beginning 2019, filed annually March 2
 - 20-249 employees in “high-risk industry” (includes ag)
 - Summary reports only, 7/1/17 and 7/1/18, then 3/2/19-
 - Anti-retaliation provisions took effect 8/10/16 (poster)
 - Possibility that Trump DOL issues new rules to undo this rule

OSHA

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- Have a plan and be prepared
 - Start the process months before you get ready to plant
 - Housing can still be the hardest to arrange
 - H-2A timeline
- These statutes and regulations are extremely complicated and you will not comply with them by accident.
- Record-keeping / document-retention requirements

General Compliance Advice for Employers

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Questions?

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