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# Inside Scoop: Latest H-2A Updates & Insights

Chris Schulte

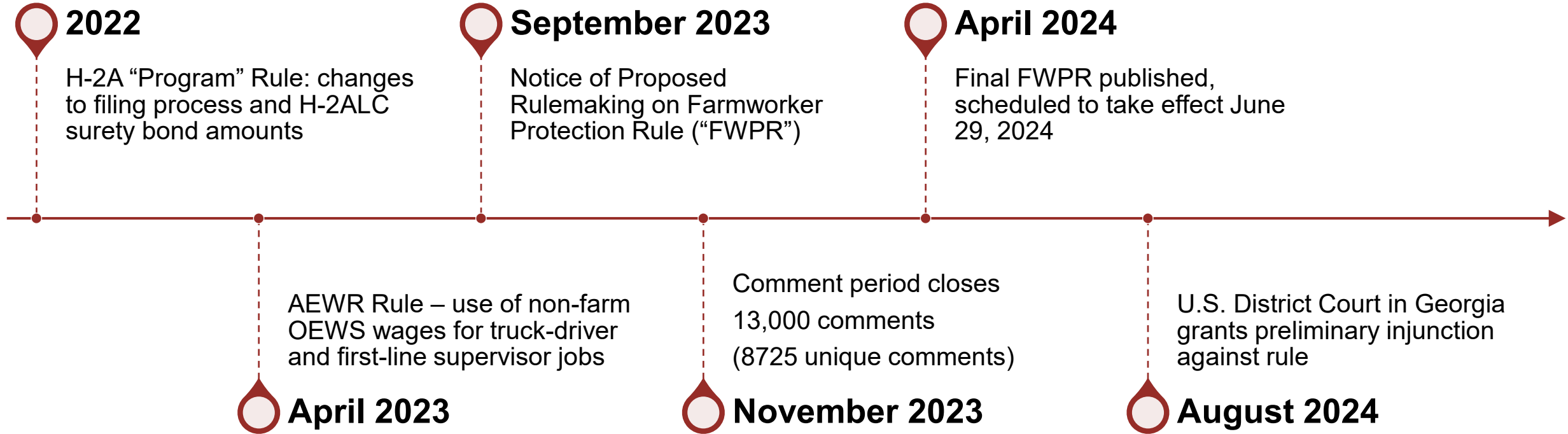




# Farmworker Protection Rule

# Farmworker Protection Rule

## Background & Timeline





# FWPR – Key Provisions

## Final Rule

- Seatbelt requirement – if DOT already requires
- Holding H-2A workers' passports or other immigration documents prohibited unless:
  - Worker “voluntarily requested” it; Employer did not direct them to request it; and will return “immediately”
- Removes two-week lead-time for hourly wage changes (range salaries still roll over on January 1<sup>st</sup>)
- Access to employee housing for non-employees if workers invite/accept guests
- SWA “discontinuation of services”
- Delayed start date notifications to SWA and workers
- “Anti-retaliation” / “worker empowerment” provisions
  - Consulting with “key service providers” and “concerted action” protections
- “Progressive discipline” and for-cause termination rules
- Disclosure requirements on new Forms 790A and 9142A

# Legal Challenges to FWPR

What's still in effect; what's blocked?

- Georgia injunction
  - All worksites in: Georgia, Kansas, South Carolina, Arkansas, Florida, **Idaho**, Indiana, Iowa, Louisiana, Missouri, **Montana**, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia
  - FWPR blocked in its entirety
- Kentucky injunction
  - Members of NCAE (including Western Growers and WAFLA members)
  - Blocked seatbelt rule, housing access, “worker voice and empowerment” and disclosure requirements
- Mississippi injunction
  - American Farm Bureau Federation – nationwide effect
  - Blocked housing access and “anti-retaliation” provisions

# FWPR – Key Provisions

## Post-Injunction for WGA/WAFLA/NCAE members

- ~~Seatbelt requirement – if DOT already requires~~
- Holding H-2A workers' passports or other immigration documents prohibited unless:
  - Worker “voluntarily requested” it; Employer did not direct them to request it; and will return “immediately”
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  - ~~Consulting with “key service providers” and “concerted action” protections~~
- “Progressive discipline” and for-cause termination rules
- ~~Disclosure requirements on new Forms 790A and 9142A~~

# FWPR – Key Provisions

## What's left?

- Holding H-2A workers' passports or other immigration documents prohibited unless:
  - Worker “voluntarily requested” it; Employer did not direct them to request it; and will return “immediately”
- Removes two-week lead-time for hourly wage changes (range salaries still roll over on January 1<sup>st</sup>)
- SWA “discontinuation of services”
- Delayed start date notifications to SWA and workers
- “Progressive discipline” and for-cause termination rules

# Delayed Start Date

## Notice to SWA and Workers

- Where delay is caused by weather
- **Not** where delay is caused by U.S. Consulate abroad or travel delays
- Notify applicable SWA and workers as soon as possible (more than 10 days before start date if you can) or ASAP after learning of delay
- Failure to provide notice risks up to 14 days of pay



# Progressive Discipline / “For-cause” Termination

DOL Micromanaging HR Functions



- Termination “for cause” cancels the 3/4 guarantee and outbound travel requirement, as well as the duty to contact and invite back for next season – 655.122(n)
- FWPR modifies that exception to require specific steps to qualify as a proper “for cause” termination
- If employer cannot sufficiently document/prove compliance with these requirements, they will owe the 3/4 guarantee after the fact to terminated worker

# Progressive Discipline / “For-cause” Termination

Elements of a valid for-cause termination

1. *Workers were informed (or reasonably should have known) of policy, rule, or performance standard being enforced;*
2. Compliance was within the worker’s control;
3. Policy/rule/performance expectation was reasonable and applied consistently to other H-2As/CDWs;
4. Employer undertakes a fair and objective investigation into performance or misconduct; and
5. Employer corrects worker using “progressive discipline”

# Progressive Discipline / “For-cause” Termination

## Worker Representative



- Worker has right to have designated representative present during any “investigatory interview”
- No restrictions on who such a “representative” might be
- Includes any discussion that the worker believes might result in some form of discipline
- If representative is not reasonably nearby, they can participate by phone or videoconference

# Progressive Discipline / “For-cause” Termination

Forms of “progressive discipline” and where it isn’t required

- Series of escalating steps
  - Warning
  - Write-up
  - Suspension or retraining
  - Termination
- Each step must be documented (to file and to worker)
- Worker opportunity to respond and present evidence
- Not one-size-fits-all; punishment should match violation
- Immediate termination OK for “egregious conduct”: “intentional or reckless conduct that is plainly illegal, poses imminent danger to physical safety, or that a reasonable person would understand as being outrageous”





# Supreme Court Decisions in 2024



# Starting at the Top – U.S. Supreme Court Actions

Is the tide beginning to turn?

- *Loper Bright Enterprises v. Raimondo*
- June 28, 2024
- “Today, the Court places a tombstone on *Chevron* no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation’s founding.”
- Gorsuch, J., concurring



- Ends courts’ blanket deference to federal agencies in interpreting their authorizing statute(s).
- For example – DOL does not get the final word on what “adverse effect” means in the INA.
- Courts interpret statutes every day; their expertise will be applied to decide what Congress did or didn’t mean when enacting legislation.
- Since June, courts have already cited *Loper Bright* in granting injunctions against agency rulemaking based on interpretation of authorizing statutes.

# Starting at the Top – U.S. Supreme Court Actions

## Procedural changes

- *SEC v. Jarkesy*
  - June 27, 2024
  
  - Seventh Amendment constitutional right to a jury trial in an Article III court, rather than by ALJ
  
  - Narrow exceptions for “immigration” cases and other actions without a history of Article III courts handling as “monetary relief”
  
  - *Sun Valley Orchards* case in 3<sup>rd</sup> Circuit
  - Challenging WHD enforcement proceedings before ALJ in H-2A case
- *Corner Post, Inc. v. Board of Governors*
  - July 1, 2024
  
  - APA challenges to agency rulemaking are timely under the statute of limitations if they are brought within 6 years of the *plaintiff* first being affected by the rule, rather than from when the rule was issued
  
  - For example – DOL argues that the “Big 6” AEWR rule was issued in 2010, so couldn’t be challenged after February 2016
  
  - Under *Corner Post*, new H-2A employers can sue to challenge the AEWR methodology



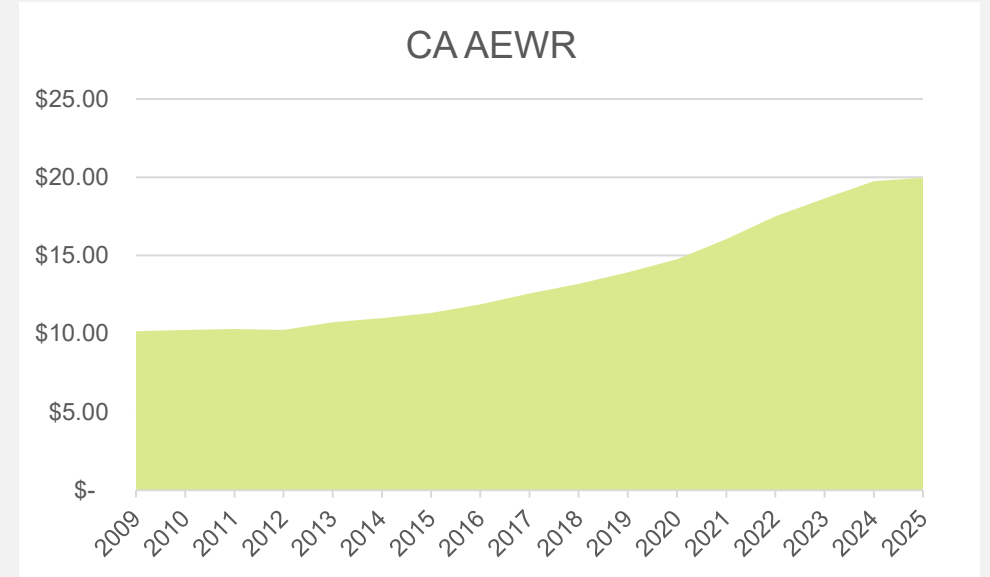


# AEWR Challenges

# More Regulations and Higher AEWRs

A one-two punch to ag employers

- From 1952-2022, the Department of Labor issued three H-2A regulations: 1987, 2008, and 2010.
- From 2022-2024, alone, DOL issued three H-2A regulations: 2022, 2023, and 2024.



- California's AEW doubled since 2009!
- (So did Washington; Arizona increased 74%)

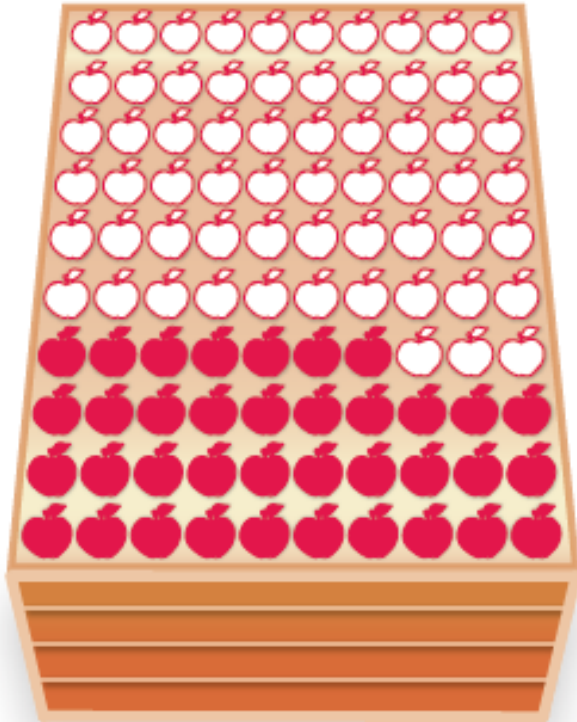


# Northwest Horticultural Council Survey

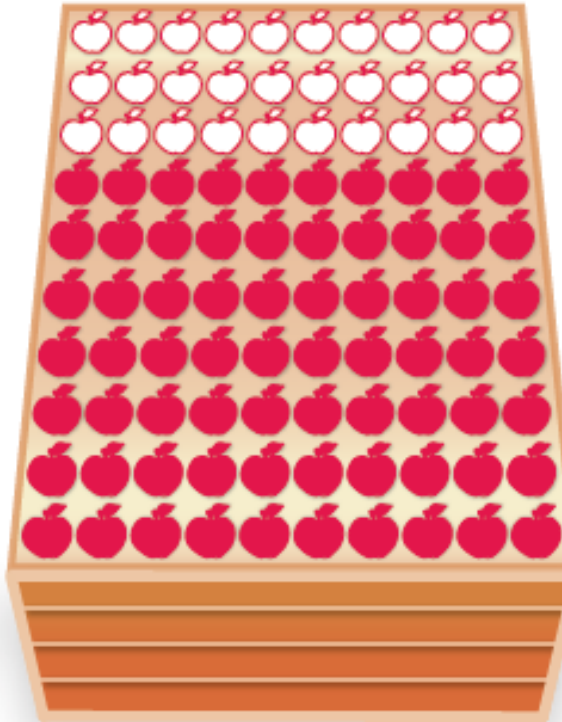
Labor Costs = 99% of Net Revenue Per Bin for Washington Growers

## Labor is growers' largest input cost, but it's not the only one

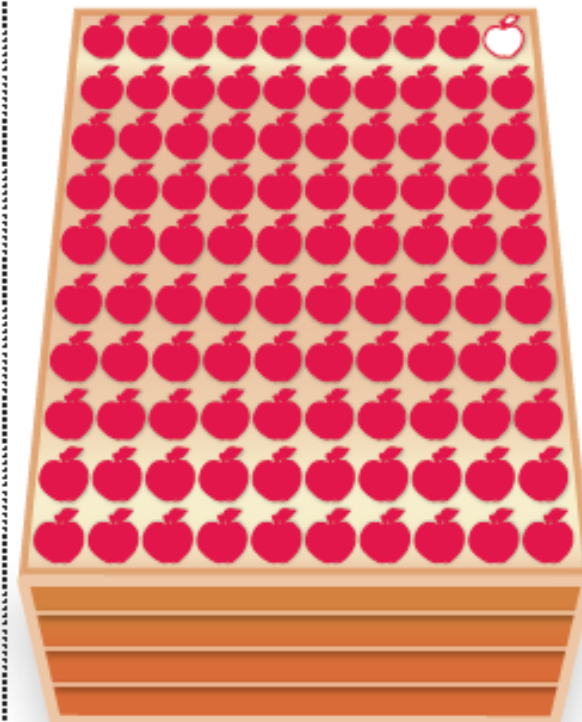
In **2013**, as use of the H-2A program began to grow in Washington, growers spent **37%** of their returns per bin on labor.



By **2022**, labor consumed **70%** of grower returns per bin. Considering all the other input costs, including chemicals and fuel, there is little to no margin left to sustain a business.



Price volatility is part of agriculture, but labor costs threaten growers' ability to weather a downturn in the market. For the **2023** crop, labor consumed **99%** of grower net returns per bin.



SOURCES: NORTHWEST HORTICULTURAL COUNCIL AND THE USDA NATIONAL AGRICULTURAL STATISTICS SERVICE JARED JOHNSON, KATE PRENGAMAN/GOOD FRUIT GROWER



# Court Challenges to H-2A Regulations

## H-2ALC Surety Bond and AEWR Lawsuits

- 2022 Program Rule Challenge
  - 2023 AEWR Challenges
    - Asheville, NC
    - Lafayette, LA
  - 2023 AND Big-6 AEWR Challenge
    - Tampa, FL
- Mandamus action to compel response to NCAE's Section 553(e) rulemaking petition on AEWR methodology
  - FOIA requests and potential litigation as to USDA wage surveys and handling of FFWR
  - DOJ "pause" on court challenges
  - Oral arguments in Tampa case 2/27/25



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