

# SENATE BILL REPORT

## SB 5438

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As of February 26, 2019

**Title:** An act relating to the H-2A temporary agricultural program.

**Brief Description:** Concerning the H-2A temporary agricultural program. [**Revised for 1st Substitute:** Establishing the office of agricultural and seasonal workforce services within the employment security department.]

**Sponsors:** Senators McCoy, Saldaña, Conway, Van De Wege, Keiser, Rolfes, Wellman, Dhingra, Hasegawa and Kuderer; by request of Employment Security Department.

**Brief History:**

**Committee Activity:** Labor & Commerce: 2/07/19, 2/14/19 [DPS-WM, w/oRec].  
**Ways & Means:** 2/26/19.

**Brief Summary of Proposed Second Substitute Bill**

- Creates the Office of Agricultural and Seasonal Workforce Services within the Employment Security Department to process and adjudicate applications and complaints, conduct field checks, training, outreach, and collect fees.
- Funds the office with an appropriation for the 2019-2021 biennium.
- Requires, ESD to formulate and adopt rules to implement fees to cover the cost of administering the program, if federal funds are not sufficient to meet statutory obligations.
- Waives the fee for the first ten workers and provides a limit of \$75 for each requested worker.
- Requires an advisory committee.

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**SENATE COMMITTEE ON LABOR & COMMERCE**

**Majority Report:** That Substitute Senate Bill No. 5438 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair; King, Ranking Member; Saldaña, Walsh and Wellman.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Minority Report:** That it be referred without recommendation.

Signed by Senator Braun.

**Staff:** Susan Jones (786-7404)

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## SENATE COMMITTEE ON WAYS & MEANS

**Staff:** Sarian Scott (786-7729)

**Background:** The federal Immigration and Nationality Act provides for various classifications of non-immigrant visas. Classifications for temporary guest workers include the H-2A classification for seasonal agricultural workers. The H-2A program allows agricultural employers to bring in foreign workers temporarily when there are insufficient qualified U.S. workers. Employers using H-2A workers must pay specified rates of pay, provide the workers housing and transportation, guarantee employment for a specified period of time, and meet other requirements.

A prospective employer of H-2A workers submits a U.S. Department of Labor form ETA 790 to the Employment Security Department (ESD) and upon approval, ESD initiates recruitment of domestic workers. The employer also submits an application to the U.S. Department of Labor, which certifies the employment of H-2A workers. ESD also conducts surveys to help establish pay rates, and conduct field checks to review wages, hours, and other working conditions. The state departments of Health and Labor and Industries have regulatory responsibility over temporary farmworker housing.

ESD predicts more than 30,000 H-2A workers will be requested to work in Washington during 2019. ESD receives an average annual funding level of about \$300,000 from the U.S. Department of Labor.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Second Substitute):** The Office of Agricultural and Seasonal Workforce Services is established within ESD to:

- process and adjudicate applications and complaints;
- conduct field checks and visit, as required by the U.S. Department of Labor, in coordination with other state agencies in order to limit disruption to agricultural employers and efficiently use government resources;
- administer the discontinuation and reinstatement of services process;
- conduct training and outreach activities to employers using seasonal workforce services and ESD programs; and
- if necessary, collect fees.

For the 2019-2021 biennium, the office will be funded by an additional appropriation from the funds established in the account to provide for the financing of special programs to assist the unemployed as established in the administrative contingency fund.

Prior to June 30, 2021, ESD will analyze the costs incurred by the office to administer the program, and the amount of funds allocated by the federal government. If the federal funds

are not sufficient, ESD will formulate and adopt rules to implement fees to cover the cost of administering the program.

The ESD may establish fees for each H-2A application submitted to the department and an additional fee for each requested H-2A worker. The fee per requested H-2A worker is waived for the first ten workers requested annually for each employer. The fee for each requested worker must not exceed \$75 dollars, adjusted for inflation. There must be a process for employers to request reimbursement from ESD for fees paid for workers not federally certified.

ESD may not process an H-2A application if the:

- employer does not pay any fees;
- employer refuses to agree to be subject to field checks and field visits; or
- ESD discontinued services to the employer and that discontinuation remains in effect.

The ESD commissioner must appoint an advisory committee to review issues related to H-2A workers. The committee members will be:

- four voting members representing agricultural workers' interests in the H-2A temporary agricultural program, including one farmworker and all from a list of at least four names submitted by a recognized statewide organization of workers;
- four voting members representing agricultural employers, including one agricultural employer; and all from a list of at least four names submitted by a recognized statewide organization of agricultural employers; and
- one ex officio member, without a vote, to represent ESD and serve as the chair.

The departments of Labor and Industries, Health, and Agriculture each have one nonvoting ex officio member on the committee.

The committee will provide comment on rule making, policies, implementation of this act, and initiatives, and study other issues. The committee may also provide comment on the department's assessment of their administrative costs.

The committee must submit a report, in even years, to the Governor and the Legislature by October 31st. The report must:

- identify and recommend approaches to increase the effectiveness of ESD's process as part of the H-2A application, and if necessary include recommended changes to state law; and
- analyze the costs incurred by the office to administer the H-2A program, the funds to administer other department programs for farmworkers, and the amount of funds allocated by the federal government to administer the H-2A program and all other agricultural programs within the department.

Committee members serve without compensation, but are entitled to reimbursement for travel expenses. The committee may utilize ESD staff and facilities, without charge.

The H-2A Enforcement Account is created. All receipts must be deposited into the account. Expenditures from the account may be used only for the purposes of this act and surveying

employers and workers using the agricultural prevailing wage survey and agricultural employment practice survey.

**EFFECT OF CHANGES MADE BY LABOR & COMMERCE COMMITTEE (First Substitute):**

- Modifies the definitions for field checks and visits to those required by the U.S. Department of Labor.
- Changes the title of the office to the Office of Agricultural and Seasonal Workforce Services and modifies its duties.
- Funds the office by an appropriation for the 2019-21 biennium.
- Provides that in 2021 ESD will analyze the costs and determine if fees are necessary, which will be waived for the first ten workers requested for each employer each year and are limited to \$75 per requested worker, adjusted for inflation.
- Provides that there must be a process to allow for reimbursement if a worker is not federally certified.
- Modifies the advisory committee structure to eight members and adds L&I, DOH, and WSDA as nonvoting ex officio members.
- Modifies the title.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony on Original Bill (Labor & Commerce):** *The committee recommended a different version of the bill than what was heard.* PRO: There were two stakeholder meetings. The issues raised have been issues for years. We have not moved forward enough. Although this is a program funded by the federal government, it is dramatically underfunded. As a state, we are still responsible for the health, safety, and welfare of the workers. The state needs to come up with something while we wait for the federal government to provide additional funding. Also, the reliance on WorkSource to find farmworkers is a problem because it relies on the Internet and not all workers have access to the internet.

The U.S. Department of Labor provides ESD with approximately \$300,000 to administer the program with a long list of required activities costing far more than is allotted. Many applications have deficiencies requiring additional work by ESD. The federal government collects a fee from the employers but does not increase the amount to ESD based on the use of the program. Washington is the third largest user of the program but is twentieth in the amount of funds received to administer the program. ESD has advocated for the state to no avail. Coordinating with other agencies is important so the employer does not get too many days of inspections.

The H2A program leaves workers uniquely vulnerable to abuse and that is why the bill is needed. These workers are exempt from certain federal protections. They are more likely to be subject to harassment because they are tied to a single employer and cannot leave if conditions are bad. Employers have control over who gets jobs and workers can be blacklisted. Proper oversight is critical to stopping abuses and preventing harm to workers. Employers who have a captive and compliant workforce should pay the cost.

ESD has failed to recruit domestic farmworkers. The names of the farms using the program are not released. Many of the largest farms are using this program. This is a profitable industry.

An office of H2A is a necessity. The H2A program was started for emergencies when there were not enough farmworkers. The program displaces domestic farmworkers and the recruiting program does not work for domestic workers because they do not have access to or understanding of the Internet.

CON: There is not enough labor to get fruit off the trees. H2A housing cost is expensive. Adding costs will make the program less desirable and make it harder on small farms. If the state makes the program more expensive, larger farms will use more domestic workers with the unintended consequences of leaving small farms with no labor and putting them out of business.

Adequate oversight and monitoring should take place to make sure the state program is run with integrity. However, it is a federal program and it should fund the program. This will make the program unaffordable. This is the only program to get supplemental labor. The fees are too much with the other costs, like housing and travel. There is no understanding of where this money will go. This would be like signing a blank check. ESD has referred very few workers and many have not showed up to work. Additional funding and an office will not solve the problem.

**Persons Testifying (Labor & Commerce):** PRO: Senator John McCoy, Prime Sponsor; Nick Streuli, Legislative Director, ESD; Andrea Schmitt, Colombia Legal Services; Rosalinda Guillen, Community to Community Development; Tomas Madrigal, citizen; Ramon Torres, citizen.

CON: Dave Ducharme, Washington State Tree Fruit Association; John Huibregtse, Chief Financial Officer/Owner, Sundquist Fruit; Bre Elsey, Washington Farm Bureau; April Clayton, Red Apple Orchards; Burr Mosby, Mosby Farms; Michael Gempler, Washington Growers League.

**Persons Signed In To Testify But Not Testifying (Labor & Commerce):** CON: Ryan Ogburn, WAFLA; Anita Panko, WAFLA; Tim Curtis, Sterino Farms.

**Staff Summary of Public Testimony on Proposed Second Substitute (Ways & Means):** PRO: ESD's workload for the H-2A program has grown 1000 percent since 2009. Currently, ESD is unable to do all the tasks required under federal law. ESD receives an average of \$300,000 per year in federal funding. They may supplement with workforce funds, but there are no funds available. The prevailing wage studies alone take more than the \$300,000

received. The bill gives a couple of years to attempt to get additional federal funding and provides a transparent process after 2019-21. The additional 14 FTEs allow ESD to make sure they can meet the requirements, provide direct assistance to growers, and make sure workers' needs are met. The employers do not currently pay ESD H-2A fees. The appropriated funds would come from all employers paying UI taxes. If not funded, ESD cannot conduct field checks or discontinue services for employers who violate the program.

This is a common sense approach. There needs to be funding to deal with the complexity of the H-2A program and to make sure workers are treated fairly. Many workers are calling the union asking for help. Their food is not good; there is not water; and they are not getting paid. There is a communication breakdown at the agency. They reach out to the union by social media. Since 2017, the union has received hundreds if not 1000s of contacts. With the \$4 million, it will benefit the H2A workers so they can get a better working environment. The third party recruiters spend thousands on reports to make employers think that the H-2A program is the only option. Many farm workers suffer injustices. Some workers fear deportation for speaking up about the conditions. The state needs to step up.

CON: Small and family farmers cannot provide H-2A worker housing. There is a shortage of workers. If the H-2A fees increase, there will be a bigger shortage of workers and it will impact the ability to get domestic workers. The markets are depressed because of products coming from out of state. H2A is continually changing the goal post. This hurts family farmers. Tree fruit farms lack workers. Additional fees will weaken the farms. If there are not Washington or U.S. tree fruit farms, we will get fruit from countries paying workers less.

The H-2A program is extremely expensive. The growers have to use it to find adequate labor. Farms that use H-2A workers get few referrals of domestic workers from ESD. The average cost to run the program is \$2,500 per worker per year. Farmers are investing in the H-2A program. A farm in Fife pays \$443,000 to participate, including paying higher wages and providing housing.

The growers only learned that ESD was not receiving enough money last summer. They began working to increase federal funding. The bill gives ESD a blank check on application fees. The application fee is not capped per worker. It is unfair to backstop the federal requirements. Farmers already pay duplicative fees. The bill has a regressive fee structure.

ESD receives \$2 million for migrant farm worker outreach, including field visits. They receive \$14.7 million for no-fee employment services and labor exchange. Field checks are required for 25 percent of the cases where a U.S. worker is referred to a job site. We estimate the need for about seven field checks. ESD may subcontract the field checks to another agency. A subcontract to L&I is allowable. L&I's DOSH recently targeted the H-2A program and found H-2A jobsites to be safer with fewer issues than other agricultural employers or employers in general. The housing and water are inspected by the Department of Health. They treat the H-2A workers well. Workers are not restricted. They come back every year and refer their friends and family.

**Persons Testifying (Ways & Means):** PRO: Rob Van Tassell, Vice-President, Catholic Community Services of Western Washington; Nick Streuli, Employment Security Department, Legislative Director; Edgar Franks, Community to Community Development;

Benito Lopez, Familias Unidas Por La Justicia; Tomas Madrigal, Community to Community Development.

CON: James Johnson, MSJ, Pear Orchards; April Clayton, Red Apple Orchards; Jon DeVaney, Washington State Tree Fruit Association; Rosella Mosby, Mosby Farms; John Huijbregtse, Sundquist Fruit; Frank Lyall, Lyall Farms; Dan Fazio, Director, WAFLA; Adrian Roozen, General Manager, Lawrence Enterprises.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** No one.