

# SENATE BILL REPORT

## SB 5438

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As Reported by Senate Committee On:  
Labor & Commerce, February 14, 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].

### Brief Summary of First 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, beginning July 1, 2022, two types of fees, to be set by rule, to be paid by agriculture employers using the H-2A program—an application fee and a per-employee request fee.
- 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)

**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 (First 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;
- conduct training and outreach activities to employers using seasonal workforce services and ESD programs; and
- 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 is established in the administrative contingency fund. In April 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 adopt rules to implement a fee on applicants to the H-2A program to cover the program's administration cost.

Beginning July 1, 2022, an employer must submit an H-2A application on ESD forms, pay an application fee for each H-2A application submitted and pay 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. ESD must adopt rules related to the fees and annually through formal rule-making, readjust the fees based on the costs, and federal funds

allocated to the program. There is also consideration for the structure of the fee. 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 must submit a report to the Governor and the Legislature by October 31, 2021, that identifies and recommends approaches to increase the effectiveness of ESD's process as part of the H-2A application; and may include recommended changes to state law. Committee members serve without compensation, but are entitled to reimbursement for travel expenses. The committee may utilize ESD staff and facilities, without charge.

All committee expenses must be paid by the newly created H-2A Enforcement Account. 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:** *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:** 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:** CON: Ryan Ogburn, WAFLA; Anita Panko, WAFLA; Tim Curtis, Sterino Farms.