
SUBSTITUTE SENATE BILL 5438

State of Washington

66th Legislature

2019 Regular Session

By Senate Labor & Commerce (originally sponsored by Senators McCoy, Saldaña, Conway, Van De Wege, Keiser, Rolfes, Wellman, Dhingra, Hasegawa, and Kuderer; by request of Employment Security Department)

READ FIRST TIME 02/15/19.

1 AN ACT Relating to establishing the office of agricultural and
2 seasonal workforce services within the employment security
3 department; adding a new chapter to Title 50 RCW; and providing an
4 effective date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the
7 agricultural industry in the state of Washington employs about one
8 hundred thousand workers per year and brings more than seven billion
9 dollars of economic activity to our state. This industry and its
10 workers are a vital part of Washington's role in the global economy.
11 The legislature further finds the number of the H-2A temporary
12 agricultural workers coming into the state of Washington to harvest
13 crops has grown by more than one thousand percent since 2007 and the
14 funding provided by the federal government is insufficient to
15 adequately ensure the protection of workers and growers. The
16 legislature also finds the need to ensure this growth does not have
17 an adverse impact on the domestic agricultural labor force.

18 The legislature declares it to be in the public interest to
19 clarify the state's role in the H-2A temporary agricultural program
20 to provide adequate protections for foreign and domestic workers and

1 provide education and outreach opportunities to help growers maintain
2 the stable workforce they need.

3 NEW SECTION. **Sec. 2.** The definitions in this section apply
4 throughout this chapter unless the context clearly requires
5 otherwise.

6 (1) "Commissioner" means the commissioner of the employment
7 security department.

8 (2) "Department" means the employment security department.

9 (3) "Employer" has the same meaning as in 20 C.F.R. Sec. 655.103.
10 "Employer" also includes a "fixed-site employer," as defined in 20
11 C.F.R. Sec. 655.103, and an employer in a "joint employment"
12 relationship, as defined in 20 C.F.R. Sec. 655.103.

13 (4) "Field check" means an unannounced inspection and audit of an
14 employer to determine and document whether the employer is providing
15 wages, hours, and working and housing conditions as specified in the
16 employer's approved H-2A application, as required by the United
17 States department of labor.

18 (5) "Field visit" means a scheduled visit to an employer's
19 premises where H-2A workers work, live, and gather to discuss
20 employment services and other employment-related programs with
21 workers, as required by the United States department of labor.

22 (6) "H-2A application" means an agricultural food processing
23 clearance order form ETA 790 that describes the material terms and
24 conditions of employment and is submitted in connection with a future
25 application for temporary employment certification for H-2A workers
26 to the United States department of labor under 20 C.F.R. Part 655, as
27 amended.

28 (7) "H-2A worker" means any temporary foreign worker who is
29 lawfully present in the United States to perform agricultural labor
30 or services of a temporary or seasonal nature pursuant to Title 8
31 U.S.C. Sec. 1101(a)(15)(H)(ii)(a) of the immigration and nationality
32 act, as amended.

33 (8) "Office" means the office of agricultural and seasonal
34 workforce services established in section 3 of this act.

35 NEW SECTION. **Sec. 3.** (1) The office of agricultural and
36 seasonal workforce services is established within the department.

37 (2) The duties of the office include, but are not limited to:

1 (a) Processing and adjudicating foreign labor certification
2 applications from employers;

3 (b) Processing and adjudicating complaints consistent with the
4 discontinuation of service process pursuant to 20 C.F.R. Part 658,
5 Subpart F;

6 (c) Conducting field checks and field visits, as required by the
7 United States department of labor. When conducting a field check, the
8 office shall coordinate, to the extent possible, with the department
9 of labor and industries, department of health, and department of
10 agriculture in order to limit disruption to agricultural employers
11 and efficiently use government resources;

12 (d) Conducting training and outreach activities to employers who
13 are using agricultural and seasonal workforce services and programs
14 within the employment security department; and

15 (e) Collecting the fee established in section 4 of this act.

16 NEW SECTION. **Sec. 4.** (1) An employer must submit an H-2A
17 application in the manner and on a form prescribed by the department.
18 The H-2A application is not subject to chapter 50.13 RCW.

19 (2) For the 2019-2021 biennium, the office will be funded by an
20 additional appropriation from the funds established in RCW 50.24.014.
21 In April 2021, the department will analyze the costs incurred by the
22 office to administer the H-2A program, and the amount of funds
23 allocated by the federal government to administer the H-2A program.
24 If the federal funds are not sufficient to meet the department's
25 obligations, the department will adopt rules to implement a fee on
26 applicants to the H-2A program to cover the cost of administering the
27 H-2A program. If the department determines a fee is necessary, they
28 will adopt rules as follows:

29 (a) Beginning July 1, 2022, an employer must pay a fee for each
30 H-2A application submitted to the department and pay an additional
31 fee per requested H-2A worker. The fee per requested H-2A worker is
32 waived for the first ten workers requested per employer each year.

33 (b) The department will:

34 (i) Formulate and adopt rules setting forth the amount of the
35 fees it charges. The fee per requested H-2A worker shall not exceed
36 seventy-five dollars per requested H-2A worker. The dollar amounts
37 specified in this subsection shall be annually adjusted for
38 inflation;

1 (ii) Annually readjust the fees through the formal rule-making
2 process based on:

3 (A) An analysis of the costs incurred by the office to administer
4 the H-2A program; and

5 (B) The amount of funds allocated by the federal government to
6 administer the H-2A program;

7 (iii) Adopt the rule setting the annual fees by October 31st of
8 each year, and the rule must stay in effect for the whole next
9 calendar year.

10 (c) The fees for fiscal year 2022 will be set during the month of
11 April 2021.

12 (d) The structure of the fee must include:

13 (i) A scale with varied fees per worker at certain breakpoints to
14 show consideration for economics of scale for larger requests;

15 (ii) Provisions for discounted rates for employers who have a
16 track record of compliance with the requirements of the H-2A program;

17 (iii) A process for employers to request reimbursement from the
18 department for any requested H-2A worker fees paid for workers that
19 were not federally certified; and

20 (iv) Other factors as determined by the department.

21 (e) The department may not set fees that are expected to result
22 in revenues in any year in excess of the projected difference between
23 the federal funds allocated and the costs to administer the H-2A
24 program.

25 (3) If a fee is collected under this section, the department will
26 make the most effective and efficient use of the fees.

27 NEW SECTION. **Sec. 5.** The department may not process an H-2A
28 application if the:

29 (1) Employer does not pay any fees established in section 4 of
30 this act;

31 (2) Employer refuses to agree to be subject to field checks and
32 field visits; or

33 (3) Department discontinued services to the employer pursuant to
34 20 C.F.R. Part 658, Subpart F and that discontinuation remains in
35 effect.

36 NEW SECTION. **Sec. 6.** (1) The commissioner shall appoint an
37 advisory committee to review issues and topics of interest related to
38 this chapter.

1 (2) (a) The committee is composed of eight voting members:

2 (i) Four voting members representing agricultural workers'
3 interests: One of whom shall be a farmworker; and all of whom shall
4 be appointed from a list of at least four names submitted by a
5 recognized statewide organization of workers;

6 (ii) Four voting members representing agricultural employers: One
7 of whom shall be an agricultural employer; and all of whom shall be
8 appointed from a list of at least four names submitted by a
9 recognized statewide organization of agricultural employers; and

10 (iii) One ex officio member, without a vote, shall represent the
11 department and serve as the chair.

12 (b) The department of labor and industries, department of health,
13 and department of agriculture shall each have one nonvoting ex
14 officio member serve on the advisory committee.

15 (3) The committee shall provide comment on department rule
16 making, policies, implementation of this chapter, and initiatives,
17 and study issues the committee determines require consideration.

18 (4) The committee shall submit a report to the governor and the
19 legislature by October 31, 2021, that identifies and recommends
20 approaches to increase the effectiveness of the employment security
21 department's recruitment process as part of the H-2A application. If
22 deemed advisable by the committee, the report may include recommended
23 changes to state law that would lead to increased recruitment and
24 hiring of domestic workers in agricultural employment in Washington.

25 (5) The committee members shall serve without compensation, but
26 are entitled to reimbursement for travel expenses as provided in RCW
27 43.03.050 and 43.03.060. The committee may utilize department
28 personnel and facilities as it needs, without charge. All committee
29 expenses must be paid by the H-2A enforcement account.

30 NEW SECTION. **Sec. 7.** The H-2A enforcement account is created in
31 the custody of the state treasurer. All receipts from section 4(2) of
32 this act must be deposited into the account. Expenditures from the
33 account may be used only for the purposes of this act and for
34 purposes of surveying employers and workers using the agricultural
35 prevailing wage survey and agricultural employment practice survey.
36 Only the commissioner or the commissioner's designee may authorize
37 expenditures from the account. The account is subject to allotment
38 procedures under chapter 43.88 RCW, but an appropriation is not
39 required for expenditures.

1 NEW SECTION. **Sec. 8.** Sections 4, 5, and 7 of this act take
2 effect January 1, 2020.

3 NEW SECTION. **Sec. 9.** If any part of this act is found to be in
4 conflict with federal requirements that are a prescribed condition to
5 the allocation of federal funds to the state or the eligibility of
6 employers in this state for federal unemployment tax credits, the
7 conflicting part of this act is inoperative solely to the extent of
8 the conflict, and the finding or determination does not affect the
9 operation of the remainder of this act. Rules adopted under this act
10 must meet federal requirements that are a necessary condition to the
11 receipt of federal funds by the state or the granting of federal
12 unemployment tax credits to employers in this state.

13 NEW SECTION. **Sec. 10.** If any provision of this act or its
14 application to any person or circumstance is held invalid, the
15 remainder of the act or the application of the provision to other
16 persons or circumstances is not affected.

17 NEW SECTION. **Sec. 11.** Sections 1 through 9 of this act
18 constitute a new chapter in Title 50 RCW.

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