



FARMWORKER JUSTICE

The Farm Workforce Modernization Act: A Bipartisan Bill that Would Provide a Path to Immigration Status for Agricultural Workers and Revise the H-2A Program

On March 18, 2021, the House passed the Farm Workforce Modernization Act of 2021, H.R.1603. Introduced by Representatives Zoe Lofgren (D-CA) and Dan Newhouse (R-WA), the Farm Workforce Modernization Act (FWMA) is bipartisan immigration legislation that would provide undocumented farmworkers and their family members with a path to legal immigration status and citizenship, revise the H-2A agricultural guestworker program to address employer and worker concerns, and impose mandatory employment verification (“E-Verify”) in agriculture.

The legislation represents the culmination of difficult, months-long bipartisan negotiations that included the United Farm Workers, UFW Foundation, and Farmworker Justice, as well as agribusiness representatives. The bill passed the House this year by a vote of 247-174, with 30 Republicans voting in favor of the legislation. It will likely require 60 votes to pass in the Senate.

A path to immigration status and citizenship for undocumented farmworkers is critically important to our nation’s food and agriculture system. A majority of the nation’s roughly 2.4 million farmworkers are undocumented and living with the fear of deportation. If enacted, this legislation would alleviate that fear by providing farmworkers and their families with an opportunity to earn legal immigration status. Farmworkers would be better able to improve their wages and working conditions and challenge labor abuses. This would result in a more stable farm labor force, and greater food safety and security to the benefit of employers, workers, and consumers.

The bill also would revise the H-2A visa program. Farmworker advocates have pressed for reforms to reduce widespread abuses under this flawed program, while agricultural employers have lobbied heavily to remove most of its modest labor protections. The bill contains compromises regarding the H-2A program as well as the earned legalization program in order to gain the bipartisan support needed to pass the bill in both the House and the Senate.

Title I: Who would qualify for the earned legalization program, and what is the process?

The bill’s earned legalization program includes a two-step process whereby qualifying farmworkers could obtain “Certified Agricultural Worker” (CAW) status and later, after completing a prospective work requirement, apply for permanent resident status and eventually citizenship.

Application for “Certified Agricultural Worker” Status: Qualifying farmworkers would be able apply for CAW status—granting temporary residency—during an 18-month application period following the publication of implementing regulations. To qualify, workers must meet the following requirements:

- *Past Work Requirement* – Applicants must prove employment in U.S. agriculture for at least 180 work days over the two years prior to the bill’s introduction (the bill creates flexibility in this requirement for workers who had reduced hours due to the COVID-19 pandemic);
- *Undocumented Status* – Applicants must be undocumented and in the United States on the date of introduction of the bill;

- *Continuous Presence* – Applicants must be “continuously present” in the United States from the date of the introduction of the bill until the date on which they are granted CAW status;
- *No Criminal Bars* – Applicants must not be ineligible because of certain criminal or other inadmissibility grounds (the bill provides waivers for some grounds);
- *Background Checks* – Applicants must pass security and law enforcement background checks; and
- *Fee* – Applicants must pay an application fee, to be determined by DHS.

CAW Benefits: Farmworkers granted CAW status would have employment authorization to work in any industry, although those wishing to renew their status or seek a green card must meet an ongoing agricultural work requirement. CAW workers would also have the ability to travel outside of and return to the United States. A farmworker’s spouse and children would be eligible for CAW dependent status with the same protections, including the right to work in the United States without restriction on the type of work they could do. To qualify for CAW renewal—and for lawful permanent residency—a worker with CAW status would need to continue working in agriculture at least 100 days per year. Both CAW status and dependent status would last for five and one-half years and would be renewable indefinitely.

Optional Path to Legal Permanent Resident (“Green Card”) Status: The CAW worker who wishes to obtain lawful permanent residency (a “green card”), would be required to:

- perform agricultural work for at least 100 work days per year for each of the next:
 - 4 years—for those who have worked in agriculture for 10 years or more prior to enactment; or
 - 8 years—for those who have worked in agriculture for fewer than 10 years prior to enactment of the bill;
- pay an application fee and a \$1,000 fine;
- pay any applicable federal taxes; and
- continue to meet other admissibility requirements.

The bill provides for crediting work days lost due to illness, pregnancy, severe weather and other causes. It also establishes partial waivers for CAW workers who have to stop working due to certain physical disabilities or advanced age.

Title II: How would the bill modify the current H-2A agricultural worker visa program?

The bill maintains many of the existing components of the current H-2A program, including preserving the Department of Labor’s (DOL’s) role as the administrator of the program, as opposed to previous compromises that moved its administration to the Department of Agriculture (USDA). The bill also maintains the fundamental premise that DOL cannot approve a labor certification for H-2A workers if there are available, willing, and qualified U.S. workers or if doing so would adversely affect the wages and working conditions of U.S. workers. Many of the current key H-2A worker protections only exist in regulations. The legislation moves these protections into the statute where they would be protected against a hostile Administration’s rulemaking.

Existing Protections: Existing regulatory protections that would be codified in statute include:

- Workers’ compensation coverage for H-2A and U.S. workers (even if a state law excludes farmworkers);

- “¾ minimum work guarantee”;
- Employer-provided housing at no cost to workers;
- Transportation cost reimbursement from home community to place of employment (for those living within 50 miles of a U.S. consulate, the reimbursement would be limited to travel from the consulate);
- Employers petitioning for H-2A workers must conduct various types of positive recruitment of U.S. workers, including posting the job opportunity on an online registry, contacting former workers, and maintaining a recruitment report.
 - The “50% rule” requiring the hiring of qualified U.S. workers during the first half of the season would be reduced to the greater of 33% of the season or 30 days after the season begins for all employers except H-2A labor contractors, who must continue to offer jobs to U.S. workers through 50% of the contract; and
- The H-2A Labor Contractor bond requirement. (The requirement would be strengthened by requiring that the bond be annually updated based on the number of workers and required wages.)

New Modifications: The bill would also modify the current H-2A program in significant ways, including by adding many important new worker protections and making changes sought by employers and their allies in Congress.

- **AWPA/MSPA Coverage:** For the first time, H-2A visa workers and their employers would be covered by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), the principal federal employment law for farmworkers, which grants farmworkers the right to file a lawsuit in federal court to enforce their job terms and regulates growers’ use of farm labor contractors.
- **Heat Stress Protections:** To address the dangers of heat stress, H-2A employers would be required to maintain a heat illness plan, including appropriate training, access to water and shade, and emergency response plans. This occupational safety protection, which federal OSHA has been unwilling to adopt, is vitally important to reduce deaths and injuries in the fields.
- **Green Cards for Foreign Agricultural Workers:** The bill would provide a path to immigration status and citizenship for a limited number of H-2A workers, something that does not exist now. Every year, a total of 40,000 green cards would be available for agricultural workers. Employers could sponsor agricultural workers for green cards in year-round work at any time. H-2A workers could self-petition upon showing that they had worked as H-2A workers for 10 years.
- **Increased Visa Flexibility:** New rules would provide H-2A workers some increased flexibility for their work arrangements. Most H-2A jobs would still be seasonal or temporary, but H-2A workers would receive 3-year visas. Workers would have the option of a 45-day period to seek new H-2A employment at the end of their contracts. Further, H-2A workers would have the ability to access information about their own visa at DHS, which is currently not possible, leaving workers dependent on their employers for that information.
- **Preventing Abuse in Foreign Labor Recruitment:** The bill includes protections against foreign labor recruitment fees, fraud and misrepresentation; a mechanism for oversight and transparency; and enforcement provisions. The provisions would require foreign labor contractors to register with the U.S. government, creating a national registry of registered foreign labor recruiters and debarred recruiters that would be publicly available in the U.S. and abroad for both workers and employers to access.

- **Oversight of H-2A Labor Contractors:** The bill would ensure greater oversight of H-2A labor contractors (H2ALCs) by creating statutory language for a bond that would be annually updated based on the number of workers and required wages and by amending AWPA to put into place stronger protections to prevent debarred H2ALCs from continuing to operate through third parties.
- **H-2A Wages:** The wage system would be revised as follows:
 - H-2A employers would still be required to pay the highest of the (1) “Adverse Effect Wage Rate” (AEWR), (2) the local prevailing wage for the particular job, (3) the agreed upon collective bargaining wage, or (4) the federal or state minimum wage.
 - *2022 AEWR Freeze:* The bill would temporarily freeze the AEWR at 2021 wage levels for a one-time, one- year period. DOL sets the annual AEWR for each state based on USDA farm labor surveys of field and livestock workers combined. For 2021, they range from \$11.81 per hour to \$16.34 per hour.
 - *Limits on Annual Wage Changes:* The bill includes limits on both potential increases (generally 3.25%) and potential decreases (-1.5%) for the AEWR in a single year, starting with the 2023 AEWR.
 - *Job Categories:* After the first year, the AEWRs would be based on more specific job categories rather than the average hourly wage for field and livestock workers combined. The consequences of this change vary because some job categories’ wages are higher and some are lower than the current average.
 - *10-year Rulemaking:* After the first ten years, the Secretaries of Labor and Agriculture would engage in rulemaking, based on a study and report on the impact and need for the AEWR, to set the wage rate for 2031 and beyond.
- **Application Streamlining:** The bill addresses employer interest in “streamlining” the H-2A program in several ways: by creating a single point-of-access online portal for employers to file all petition information and to improve communication; by allowing 3-year visas in order to reduce the employer cost of obtaining visas (employers would still need to file a petition for labor certification); and by allowing staggered entry for no more than 10 start dates in a 120 day window in the same area of intended employment (note that recruitment requirements and protections for U.S. workers would apply at each start date and with additional requirements for FLCs).
- **Limited Year-round H-2A Visas:** The bill would also allow a limited number of H-2A visas for year-round jobs—up to 20,000 per year in the first three years—with adjustments to the cap through ten years, followed by an assessment each year thereafter of whether there should be a cap and what it should be, based on specified factors. Employers seeking to access the H-2A program for year-round employment, however, would be required to provide additional protections, including family housing and an annual paid trip home. In addition, dairy farms—where year-round jobs are common—would be required to report injuries and deaths to OSHA, regardless of the current exemption for small farms, and to establish a workplace safety plan, including protections against sexual harassment.
- **Portable H-2A Visa Pilot:** The bill would create a 6-year pilot program of up to 10,000 “portable” H-2A visas, allowing workers to move freely between registered agricultural employers. At the end of the 6-year period, DOL, USDA, and DHS would be required to issue a report and decide whether to extend, expand, or discontinue the program.

Provisions regarding housing supply: The bill also seeks to address the lack of affordable housing for farmworkers in rural communities. It takes steps to increase government funding for the USDA Section 514 and 516 farm labor housing development programs. The bill would allow some owners

of farmworker housing to receive operating assistance for properties whose occupants include H-2A workers; however, the bill would limit the amount and would strengthen requirements to ensure domestic workers are not displaced by H-2A workers. Moreover, the bill contains requirements to ensure that the new housing built is suitable for families.

Title III: How would the bill's E-Verify provisions apply to agricultural employers?

E-Verify is a program in which employers electronically verify the employment eligibility of workers through DHS and the Social Security Administration. The bill would institute mandatory E-Verify for agricultural employers (but not other sectors) after the legalization program for undocumented farmworkers has been implemented. The E-verify provisions in the bill address some of the current flaws in the system and strengthen protections against discrimination; however, there continues to be a need for greater worker protections.

Conclusion

The essential work of farmworkers for our nation's agriculture and food systems was recognized formally by the federal and state governments in the response to the COVID-19 pandemic. Our broken immigration system for many years has been harming farmworker families, agricultural businesses, rural communities, and the economy. Achieving immigration reform in Congress is fundamental to the ability of farmworkers to improve their living and working conditions and to the health and well-being of their families.

The Farm Workforce Modernization Act is a realistic effort at overcoming the longstanding obstacles to winning needed immigration reform. The bill is a compromise, the product of contentious negotiations among Democrats, Republicans, farmworker organizations, and employer associations. If enacted, the legislation would enable hundreds of thousands of farmworkers and their family members to obtain a lawful immigration status, maintain important protections under the H-2A agricultural guestworker program, help provide a stable workforce for agricultural employers, and support our nation's food security. Because the bill, if passed, would significantly improve the lives of hundreds of thousands of farmworkers and their family members, Farmworker Justice supports H.R.1603, the Farm Workforce Modernization Act of 2021.