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March 14, 2024

Sulma Guzmán Alfaro
Deputy Director of Policy, Legislation, and Regulatory Affairs
California Department of Industrial Relations
1750 Howe Avenue, Suite 130
Sacramento, CA 95825
Sent via email to: sguzman@dir.ca.gov

Dear Ms. Guzman Alfaro,

We are writing as a coalition of agricultural industry stakeholders to outline our collective objections and concerns with the Labor Commissioner's newly published "Supplemental Notice to Employee, California Rights and Protections for H-2A Agricultural Workers" (hereinafter "Supplemental Notice"). The Legislature instructed the Labor Commissioner to prepare the Supplemental Notice consistent with Assembly Bill 636, which amended Labor Code section 2810.5. The Supplemental Notice is deficient in several ways, outlined in more detail below.

We understand and appreciate the importance of disclosures to employees, but those disclosures must accurately describe the current state of the law, as to not create confusion for employees. Given employers are required to begin issuing the Supplemental Notice by March 15, 2023, we request the Labor Commissioner's immediate review of these issues.

I. The "Wage Rights" Section Contains Inaccurate Information.

a. Compensable Travel Time

Some of the Groups listed in the "Non-Governmental Organizations" Section, including California Rural Legal Assistance, have taken the position that any time spent in H-2A employer transportation from H-2A housing to the worksite should be compensated time. That position is not the current law in California. As outlined in the DLSE Policies and Interpretations Manual, in *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 575, the California Supreme Court analyzed whether the time agricultural employees spend traveling to and from the fields on employer-provided busses was compensable as hours worked. (See DLSE Manual, 46.1.1 "Illustration of Basic Definition of Hours Worked.") The test established by the Court in *Morillion*

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is one of control, which can consider whether the employee is required to report to the employer's premises before proceeding to an off-site work location.

The Supplemental Notice gives an example of compensable "other nonproductive time" as "time spent while being transported by your employer to and from the housing to worksite, if you are directly or indirectly required to use employer-provided transportation." The "indirect" standard is not outlined in *Morillion* and seemingly is an extraneous standard. The adverbs "directly or indirectly" inappropriately modify "required" and should not have been included in the template.

b. Meal Periods

The Supplemental Notice states: "You are entitled to a 30-minute duty-free and uninterrupted meal period for each 5-hour period worked." In accordance with Labor Code section 512, subdivision (a), and Industrial Welfare Commission Wage Order 14-2001, as amended (8 CCR § 11140, § 11), an agricultural employee is entitled to a meal period after working no more than five hours and a second meal period after working no more than 10 hours. No additional meal periods are required, while sometimes offered by employers anyway. During long harvest days, for example, an employee may work 15 or more hours in a workday. We request this language be updated to comport with Wage Order 14.

c. Paid Sick Leave ("PSL")

The Supplemental Notice states: "You are eligible for paid sick leave of at least 40 hours or five days, whichever is greater, each year." That statement does not apply where an employer is using the standard accrual method of one hour of PSL for every 30 hours worked that is specified in Labor Code section 246, subdivision (b)(1). As clarified recently by the DLSE updated FAQs, an employer may use a 1:30 PSL accrual system, regardless of the 120th and 200th day benchmarks. For part-time and/or seasonal employees, it is inaccurate to say they will receive 40 hours or five days of PSL, because using the DLSE guidance, they might not accrue that amount depending on their individual hours worked. We request the Labor Commissioner clarify this statement.

d. Provision of Meals

H-2A employers who provide employee housing without kitchen facilities are required to provide meals consistent with program regulations. Where the employer provides meals, the job offer and work contract must state the charge, if any, to the worker for such meals. The current version of the Supplemental Notice states an employer is prohibited from making deductions from a worker's wages for "meals not taken." The term "taken" is unclear. An employer is required to provide meals consistent with the Department of Labor's regulations which is to provide three meals a day, seven days a week where there are no kitchens. The Department of Labor's interpretation of the current regulation, and as emphasized in an upcoming rulemaking, is that employees cannot waive or opt out of employer-provided meals. It should be clear that where an employer must provide the required meals, the employer may still deduct for that meal. We included clarifying language in the annotated Supplemental Notice, enclosed with this letter.

II. The “Housing Rights” Section Contains Inaccurate Information.

The Supplemental Notice states: “If you live in employer-provided housing, you also have rights as tenants....” Under California law, an employee who is occupying housing provided by the employer per the employment relationship is a licensee and not a tenant. *Chan v. Antepenko* (1988) 203 Cal.App.3d Supp. 21, 25. Accordingly, the bullet point in the Supplemental Notice regarding “tenants’ rights” should be deleted.

III. The “Non-Governmental Organizations” Section Should Be Deleted.

It is manifestly inappropriate and unwarranted to require that an H-2A employer provide the name and contact information of third-party non-governmental actors (as contained in the “Non-Governmental Organizations” section under “Additional Resources” on page four of the Supplemental Notice). Many of these groups refuse to engage in good faith with industry stakeholders and frankly stand in opposition to the H-2A program altogether.

The H-2A program provides California farmers and ranchers with an essential labor force when domestic workers are not available to perform the work critical to feeding our nation and our state’s economy. The program also changes the lives of H-2A employees, who earn exponentially more than they would have without the opportunity and are able to provide for their families and children back home. The industry has countless success stories to share about positive impacts of the program on H-2A employees.

Requiring employers to direct H-2A employees to third parties who stand in opposition to the program altogether and advocate for changes to the program and state law that cripple the industry is unfair. More importantly, it is not what the Legislature directed the Labor Commissioner to do. AB 636 instructed the Labor Commissioner’s office to create a notice explaining an H-2A employee’s “right ... to seek advice from collective bargaining representatives or legal assistance operations.” Lab. Code, § 2810.5, subd. (a)(4)(A). Nowhere in the instruction did the Legislature even suggest that the Labor Commissioner identify and essentially make recommendations about anti-industry groups and direct employees into their doors.

Moreover, government agencies, like DLSE, have a legal duty to be unbiased in the implementation of their government functions. Your referral to nineteen (19) specific non-governmental organizations shows your express bias against employers without regard for knowing whether these non-governmental organizations actually know and uphold the current state of the law.

We request the Labor Commissioner immediately revise the Supplemental Notice to remove the “Non-Governmental Organizations” section.

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These are some of our most pressing concerns with the Notice. We are requesting that the DIR delay the implementation of the Notice requirement until these deficiencies are addressed.

In the interest of time, we worked to prepare this response and a recommended revised notice to you immediately. We are happy to set a time for further discussion and are hopeful we can work together to resolve these issues and provide further clarity to H-2A employees. We look forward to hearing from you.

Yours,



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For FISHER & PHILLIPS LLP



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California Farm Labor Contractor Association

/s/

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President
California Fresh Fruit Association



Roger A. Isom
President/CEO
California Cotton Ginners & Growers Association
Western Agricultural Processors Association

RHS:hr

Supplemental Notice to Employee California Rights and Protections for H-2A Agricultural Workers

H-2A Employers Only: In addition to providing an H-2A worker *the above general Notice to Employee*, provide this Spanish language supplement no later than the day the H-2A worker begins work in California or on the first day that the employee begins work for another (new) H-2A employer. If your employee requests the notice in English, you must also provide the notice in English. You may also provide this supplement together with a completed general Notice to Employee to your non-H-2A workers.

In addition to federal rights and protections, agricultural workers in California, including those admitted to work under the federal H-2A agricultural visa program, are entitled to additional rights and protections under California laws. If you have questions about these rights or believe your employer is violating the law, contact the California Labor Commissioner's Office (**833-526-4636**) or any of the organizations listed at the end of this notice.

Wage Rights

- Your contract rate, contained in the approved job order must be *the highest rate* of the following: Adverse Effect Wage Rate (AEWR), the prevailing hourly rate or piece rate, the agreed-upon collective bargaining wage, or the applicable federal, state, or local minimum wage. In 2024, the AEWR in California (for all occupations except herders) is \$19.75 per hour.¹
- You have the right to premium pay for all overtime hours worked. In 2024, California overtime law requires:
 - If your employer has more than 25 employees, you must be paid overtime wages (1½ times the regular rate of pay) for all hours worked over 8 hours and up to and including 12 hours in any one workday, more than 40 hours in any one workweek, or for the first 8 hours on the seventh consecutive day of work in a workweek. You must be paid overtime at double (2 times the regular rate of pay) for all hours worked over 12 in any one workday and after 8 hours on the seventh consecutive day of work in a workweek.
 - If your employer has 25 or fewer employees, you must be paid overtime wages (1½ times the regular rate of pay) for all hours worked over 8.5 hours in any one workday, more than 45 hours in any one workweek, or for the first 8 hours on the seventh consecutive day of work in a workweek. You must be paid overtime at double (2 times the regular rate of pay) after 8 hours on the seventh consecutive day of work in a workweek.
- You may be paid an hourly rate or by piece rate compensation. Piece-rate compensation is when you are paid a specific amount for completing a particular task or making a particular item. If you are paid a piece rate, it must be properly disclosed in the contract. If you are paid a piece rate, your average hourly piece rate earnings must be an amount at least equal to the required hourly wage rate (\$19.75/hour for most H-2A workers).
- If you are a piece rate employee, you must be paid for all hours worked including for all recovery periods (rest or cool down time) and other nonproductive time. This includes time under your employer's control that is not directly related to the activity being paid on a piece rate basis. Examples include time spent participating in the sexual harassment prevention training or time spent while being transported by your employer to and from the housing to the worksite, if you are ~~directly or indirectly~~ required to use employer-provided transportation.
- You must be paid at least once each week if employed by a farm labor contractor, or at least twice each month if your employer is not a farm labor contractor.
- If your employer is a farm labor contractor, they are required to post their name, license number, and the name and working phone number of their field supervisor.
- You are entitled to a paid 10-minute rest period for each 4 hours worked.
- You are entitled to a 30-minute duty-free and uninterrupted meal period ~~for each 5-hour period worked.~~ **After working no more than five hours and a second meal period after working no more than 10 hours.**
- You are eligible ~~for paid sick leave of at least~~ 40 hours or 5 days, whichever is greater, each year.

¹ Sheep and goat herders working 24/7 on-call shifts may be paid a special monthly minimum wage as an alternative to this minimum wage. See [What amount are Shepherders owed as a result of AB 1066's Overtime Phase-In? \(ca.gov\)](#).

- You must be provided with an itemized wage statement that states all wages paid during a pay period. If you are paid by piece rate, wage statements must also include the number of piece rate units earned daily and any applicable piece rates and must state the total hours of compensable rest and recovery periods, including the gross wages paid for those periods.
- Your employer is *prohibited* from making charges to you or deductions from your wages for:
 - Necessary expenses or losses as a result of performing your duties.
 - Necessary tools, supplies, or equipment, including safety items.
 - Deductions that are not disclosed in your job offer and work contract.
 - Meals not taken, [except where an employer is required to provide meals consistent with the work contract.](#)
 - Transportation from the housing site to the worksite.

Sexual Harassment Prevention

- Your employer must ensure that you are not subjected to sexual harassment in the workplace. Your employer must provide you training on identifying, preventing, and reporting sexual harassment in the workplace.
 - If your employer is a farm labor contractor, all employees must be trained at the time of hire and at least once every two years. For further assistance regarding these requirements, please visit <https://www.dir.ca.gov/DLSE/FLC.htm>, email FLC@dir.ca.gov, or call 559-248-1893.
 - If your employer is not a farm labor contractor, they must provide one hour of sexual harassment and abusive conduct prevention training to nonsupervisory employees, and two hours of such training to supervisors every two years. For more information regarding this training requirement, please contact the California Civil Rights Department at 800-884-1684 or email contact.center@calcivilrights.ca.gov.

Retaliation Protections

- You have the right to contact state or federal agencies, file a complaint, or seek assistance from a labor union or legal assistance organization if your employer is violating your rights. For a list of organizations, see the last page of this notice.
- It is illegal for your employer to punish you because you complain about working conditions or organize with co-workers collectively.
- It is also illegal for your employer to threaten you because of your immigration status because you have exercised your labor rights. If you are threatened or have survived a crime, including labor trafficking, you should consult with an immigration attorney to see if you qualify for a U visa, T visa, or deferred action.

Workplace Safety and Health

- You have a right to a safe workplace.
 - Your employer must have a written health and safety plan and give you a copy of the plan if you ask for it.
 - As part of their health and safety plan, your employer must have procedures for identifying and correcting hazards at worksites.
 - Your employer must provide pesticide exposure protections and safety training for employees when pesticides have been or will be applied to crops. Pesticides are chemicals used to control pests.
 - Your employer must provide prompt medical transportation if pesticide illness is reasonably suspected.
 - Your employer must keep a log of all workplace injuries and illnesses that require more than first aid treatment and post a summary of the log from February to April.
- Your employer must train you about workplace safety and health hazards and how to do your work in a safe and healthy manner.
 - Your employer must train and provide you with any necessary protective equipment in the correct type and size such as gloves, safety shoes, eye protection, and head protection.

- Beginning July 1, 2024, your employer must prepare and train you on their workplace violence prevention plans, including how you can report a violent incident, threat, or other workplace violence concern to your employer or law enforcement without fear of reprisal.
- With limited exceptions, it is illegal for your employer to threaten to punish you for refusing to report to, or leaving work if you have a reasonable belief that the workplace or worksite is unsafe.
- In the event of an emergency condition, it is illegal for your employer to prevent you from accessing your mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify your safety.
- You must be trained and provided with the necessary lighting, special high-visibility clothing, and other equipment to ensure safe working conditions for outdoor agricultural work when it is dark.
- Weeding, thinning, or hot-capping with short-handled hoes is prohibited when the hoe is used in a stooped, kneeling or squatting position.
- Hand weeding, hand thinning, and hand hot-capping is not permitted except in limited circumstances requiring additional special procedures, including increased rest periods, personal protective equipment, and training, when performing those activities.
- Your employer must provide access to toilets, handwashing facilities, and clean drinking water at all worksites.
- Your employer must provide water, shade and cool-down rests, and other protections when working outdoors.
 - Your employer must provide you with fresh, pure, suitably cool drinking water (at least one quart per hour) free of charge as close as practicable to where you are working.
 - When the outdoor temperature exceeds 80° Fahrenheit, you must have access to shade as close as practicable to where you are working. Regardless of temperature, your employer must provide and encourage you to take a preventative cool-down rest to protect yourself from overheating.
 - When the outdoor temperature exceeds 95° Fahrenheit, your employer must use additional high-heat procedures to protect workers, including requiring you to take a minimum 10-minute cool-down rest every 2 hours to prevent overheating.
- Your employer must protect you from wildfire smoke by providing you with training and a respirator when the air quality is unhealthy.
- You have the right to safe transportation. Vehicles designed or used to transport nine or more workers and a driver must be equipped with seatbelts and be inspected, certified, and insured. Seatbelts must be used when the vehicle is in operation.

Housing Rights

- As an H-2A worker, your employer must provide housing at no cost to you. Housing must be safe and sanitary, in good repair, supply hot and cold water, and be free of vermin, among other requirements.
- ~~If you live in employer-provided housing, you also have rights as tenants, including the right to live there without unreasonable interference by your employer. For example, your employer cannot enter your housing space without prior notice, except in an emergency.~~
- You have the right to be free from discrimination and harassment based on protected characteristics such as national origin, disability, gender identity, race, or color, among other protected characteristics.

Workers' Compensation and Health Insurance

- You have the right to workers' compensation benefits, including disability pay and medical care, for work-related injuries or illness. For additional information, visit www.dir.ca.gov/dwc/ or call 1-800-736-7401.
- H-2A workers are eligible to apply for Employee-Paid Health Insurance under the Covered California program. For further information, visit www.coveredca.com or call 1-800-300-1506.

ADDITIONAL RESOURCES

Enforcement agencies. For more information about your legal rights or to file a complaint, contact:

California Labor Commissioner
833-526-4636
www.wagetheftisacrime.com

Cal/OSHA
833-579-0927
www.dir.ca.gov/dosh

Agricultural Labor Relations Bd.
[800-449-3699](tel:800-449-3699)
WhatsApp: [+1 \(647\) 496-0508](tel:+1(647)496-0508)
info@alrb.ca.gov

**EDD Migrant and Seasonal
Farmworker Outreach**
monitoradvocate@edd.ca.gov
1-877-872-5627

**California Department of Housing
and Community Development**
EH@hcd.ca.gov
1-800-952-8356

**U.S. Department of Labor
Wage & Hour Division**
1-866-487-9243
www.dol.gov/agencies/whd

~~**Non-governmental organizations.** You may also contact the following organizations for assistance:~~

~~**Ayudando Latinos a Soñar
(ALAS) (SF Bay Area)**
650-560-8947
www.alasdreams.com~~

~~**Bay Area Legal Aid
(SF Bay Area)**
800-551-5554
www.baylegal.org~~

~~**California Rural Legal
Assistance (Sacramento, San
Diego, Orange)**
crla.org
530-742-5191
760-966-0511~~

~~**CRLA Foundation
(Fresno, Sacramento)**
559-486-6278
916-446-7904
crlaf.org~~

~~**Center for Workers' Rights
(Sacramento)**
916-905-5857
www.rightscenter.org~~

~~**Central California Legal Services
(Fresno)**
559-570-1200
<https://centralcallegal.org/>~~

~~**CAUSE - Central Coast
Alliance United for a
Sustainable Economy
(Central Coast)**
805-658-0810
causenow.org~~

~~**Centro Binacional para el
Desarrollo Indígena
Oaxaqueño (CBDIO) (Central
Coast, San Joaquin Valley)**
559-499-1178
[www.facebook.com/CentroBi
nacional](http://www.facebook.com/CentroBinacional)~~

~~**Comite Civico del Valle
(Imperial County)**
760-351-8761
www.ccvhealth.org~~

~~**Community Action Board of
Santa Cruz (Central Coast)**
831-763-2147
cabinc.org~~

~~**Law Foundation of Silicon
Valley (SF Bay Area)**
408-293-4790
lawfoundation.org~~

~~**Lideres Campesinas (San
Joaquin Valley, Central Coast,
Imperial, Sacramento)**
805-486-7776~~

~~**Mixteco Indígena Community
Organizing Project (MICOP)
(Central Coast)**
805-483-1166
mixteco.org~~

~~**North Bay Jobs with Justice
(SF Bay Area)**
707-582-5634
northbayjobswithjustice.org~~

~~**TODEC Legal Center
(Riverside County)**
951-943-1955
todec.org~~

~~**United Farmworkers of
America (San Joaquin Valley,
Central Coast)**
661-823-6105
uflw.org~~

~~**UFW Foundation**
877-881-8281
uflwfoundation.org~~

~~**Universidad Popular (San
Diego)**
760-659-0109
unipopular.org~~

~~**Watsonville Law Center
(Central Coast)**
831-722-2845
watsonvillelawcenter.org~~