
SECOND SUBSTITUTE SENATE BILL 5438

State of Washington

66th Legislature

2019 Regular Session

By Senate Ways & Means (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 03/01/19.

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

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

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

17 The legislature declares it to be in the public interest to
18 clarify the state's role in the H-2A temporary agricultural program
19 to provide adequate protections for foreign and domestic workers and
20 provide education and outreach opportunities to help growers maintain
21 the stable workforce they need.

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

4 (1) "Commissioner" means the commissioner of the employment
5 security department.

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

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

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

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

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

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

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

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

35 (2) The duties of the office include:

36 (a) Processing and adjudicating foreign labor certification
37 applications from employers;

38 (b) Processing complaints consistent with 20 C.F.R. Part 658,
39 Subpart E;

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

7 (d) Administering the discontinuation and reinstatement of
8 services process pursuant to 20 C.F.R. Part 658, Subpart F;

9 (e) Conducting training and outreach activities to employers who
10 are using agricultural and seasonal workforce services and programs
11 within the employment security department; and

12 (f) If necessary, collecting money in accordance with section 4
13 of this act.

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

17 (2)(a) For the 2019-2021 biennium, the office will be funded by
18 an additional appropriation from the funds established in RCW
19 50.24.014.

20 (b) Prior to the end of the 2019-2021 biennium, the department
21 will analyze the costs incurred by the office to administer the H-2A
22 program, and the amount of funds allocated by the federal government
23 to administer the H-2A program. If the federal funds are not
24 sufficient to meet the department's statutory obligations, the
25 department will formulate and adopt rules to implement fees to cover
26 the cost of administering the H-2A program.

27 (c) The department may establish fees for each H-2A application
28 submitted to the department and an additional fee per requested H-2A
29 worker. Any fee per requested H-2A worker must be waived for the
30 first ten workers requested per employer each year. Any fee
31 established per requested H-2A worker shall not exceed seventy-five
32 dollars per requested H-2A worker. Any flat fee established per
33 application submitted to the department shall not exceed five hundred
34 dollars. The dollar amounts specified in this subsection shall be
35 annually adjusted for inflation.

36 (3) If the department establishes a fee, then the department
37 must:

38 (a) Consider the input of the advisory committee established in
39 section 6 of this act;

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

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

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

7 (c) Adopt the rule setting the annual fees by April 30th of each
8 year, and the rule must stay in effect for the whole next fiscal
9 year;

10 (d) Structure any fee to include:

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

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

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

18 (iv) Other factors as determined by the department;

19 (e) Not set fees that are expected to result in revenues in any
20 year in excess of the projected difference between the federal funds
21 allocated and the costs to administer the H-2A program.

22 (4) If a fee is collected under this section, the department will
23 make the most effective and efficient use of the fees. The department
24 may not use fees collected under this section to pay for activities
25 that are not required to meet the department's statutory obligations
26 to administer the H-2A program.

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) On issues and topics of interest related to this chapter,
16 including the department's assessment of their administrative costs
17 in section 4 of this act, the committee shall provide comment on
18 department rule making, policies, implementation of this chapter, and
19 initiatives, and study issues the committee determines require
20 consideration.
21 (4) In even years, the committee shall submit a report to the
22 governor and the legislature by October 31st that:
23 (a) Identifies and recommends approaches to increase the
24 effectiveness of the employment security department's recruitment
25 process as part of the H-2A application. If deemed advisable by the
26 committee, the report may include recommended changes to state law
27 that would lead to increased recruitment and hiring of domestic
28 workers in agricultural employment in Washington; and
29 (b) Analyzes the costs incurred by the office to administer the
30 H-2A program, the funds to administer other department programs for
31 farmworkers, and the amount of funds allocated by the federal
32 government to administer the H-2A program and all other agricultural
33 programs within the department.
34 (5) The committee members shall serve without compensation, but
35 are entitled to reimbursement for travel expenses as provided in RCW
36 43.03.050 and 43.03.060. The committee may utilize department
37 personnel and facilities as it needs, without charge. All committee
38 expenses must be paid by the H-2A enforcement account.

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

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

21 NEW SECTION. **Sec. 9.** If any provision of this act or its
22 application to any person or circumstance is held invalid, the
23 remainder of the act or the application of the provision to other
24 persons or circumstances is not affected.

25 NEW SECTION. **Sec. 10.** Sections 1 through 8 of this act
26 constitute a new chapter in Title 50 RCW.

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