

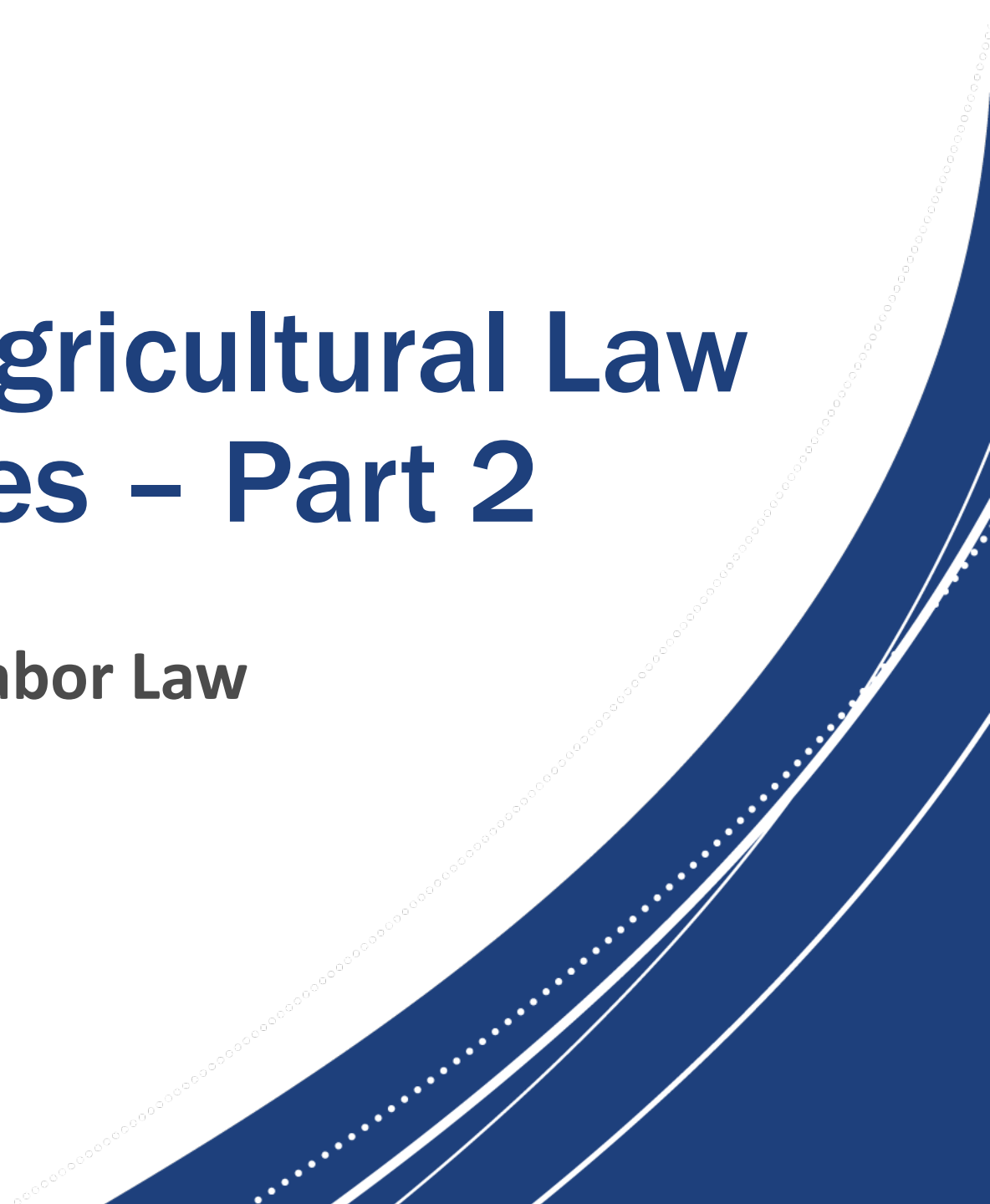


**PennState Law**

Center for Agricultural  
and Shale Law

# Understanding Agricultural Law Educational Series – Part 2

**Understanding Agricultural Labor Law**  
**April 29, 2022**





# Immigration Reform and Control Act of 1986



Employment Eligibility Verification  
Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-9  
OMB No. 1615-0047  
Expires 10/31/2022

[Cornell Ag Workforce Dev - SOP form](#)

- ***Employment Eligibility Verification I-9***
  - [Employer](#) or [FLC](#) w/in 3 days of hire; retain 3 years (or 1 year after termination); track expiration dates on docs; re-hire rules.
  - Including [H-2A Temporary Agricultural Workers](#).
  - Keep up to date & confirm because things can change and the I-9 form expires at regular intervals.

**Cornell Agricultural Workforce Development**

agworkforce.cals.cornell.edu

## **The I-9 SOP: Verifying Employee Identity and Authorization to Work**

*This is an example Standard Operating Procedure (SOP) for a business process to properly complete U.S. Citizenship and Immigration Services Form I-9 for typical farm employers. Employers should adapt this example SOP to their specific business needs and seek qualified legal counsel as needed. All employers are required to complete and retain form I-9 for all new employees hired after November 6, 1986 to work in the U.S.*



## ICE Raids & I-9 Audits (Homeland Security)

- So-called “ICE raids” (search warrant required) are presently stayed by White House policy announcement. But that could change!
- “I-9 Audit” – Employer will receive a “Notice of Investigation” (NOI).
  - Hand-delivered, document production required w/in 3 days.
  - I-9s and payroll generally requested.
- *I-9 Non-Discrimination* = I-9s stored separately from personnel file.
- Notice of Inspection Results form will be issued. Possibility of more follow-up notices possible.
- Fines (\$1000 per; penalty matrix) and appeal process.



# H-2A Agricultural Guestworker Program

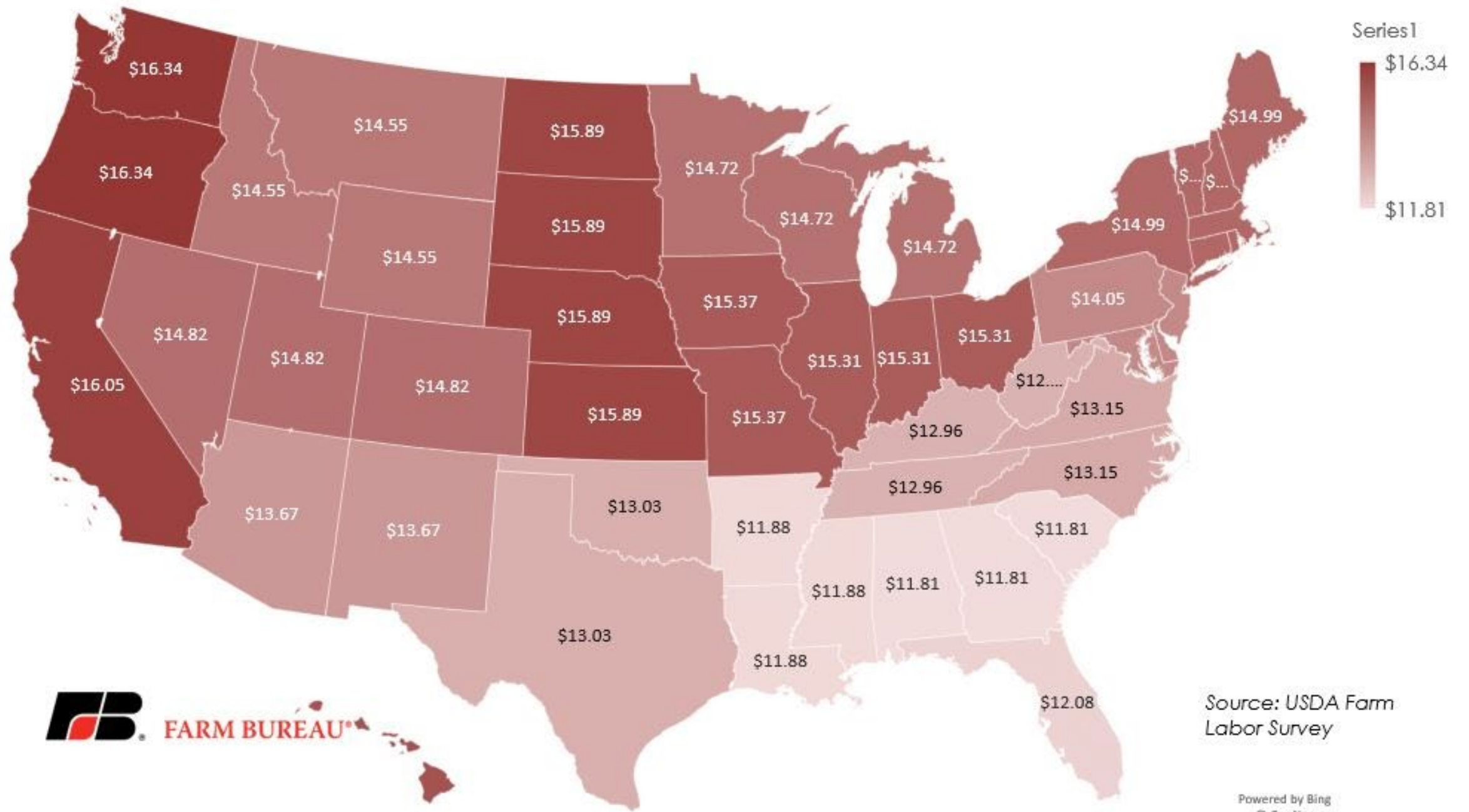
- Special program to obtain foreign workers for agricultural labor needs; exception to basics of Immigration Reform and Control Act of 1986. (aka “non-immigrant worker”)
  - **Step 1:** *Petitioner submits **temporary labor certification** application to the U.S. Department of Labor (DOL).* Before requesting H-2A classification from USCIS, the petitioner must apply for and receive a [temporary labor certification](#) for H-2A workers from DOL.
  - **Step 2:** *Petitioner submits **Form I-129** to USCIS.* After receiving a temporary labor certification for H-2A employment from DOL, the petitioner must file Form I-129 with USCIS.
  - **Step 3:** *Prospective workers outside the United States **apply for visa and/or admission.*** After USCIS approves Form I-129, prospective H-2A workers who are outside the United States must:
    - Apply for an H-2A visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad & seek admission to U.S. with U.S. Customs and Border Protection (CBP) at a U.S. port of entry.
- U.S. Citizenship and Immigration Services (USCIS) is the entity in charge and the [primary resource](#).



# H-2A Agricultural Guestworker Program

- H-2A Online Filing via [FLAG System](#); [H-2A Employer Handbook](#).
- Also: [H-2B Temporary Non-Agricultural Program](#) – used by “green industry.”
- Basics: list of eligible countries; DOL certification controls the period of stay but an initial 1-year visa, with annual extensions available subject to 3-year max. before a “tag up” in home country required for 3 months; USCIS must be notified of any status changes; “75% or  $\frac{3}{4}$  guarantee” (if terminate emp. term early).
- Must pay 2x month; minimum of *Adverse Effect Wage Rate (AEWR)*, published every year by DOL for each state, or higher of a specified list of potential sources. AEWR is generally much higher than any of those.
- Pay for travel to and from U.S. and provide no-cost [housing](#) to all workers with transport to and from work site.
- File [U.S. tax return](#).

# Figure 2. 2021 AEWR



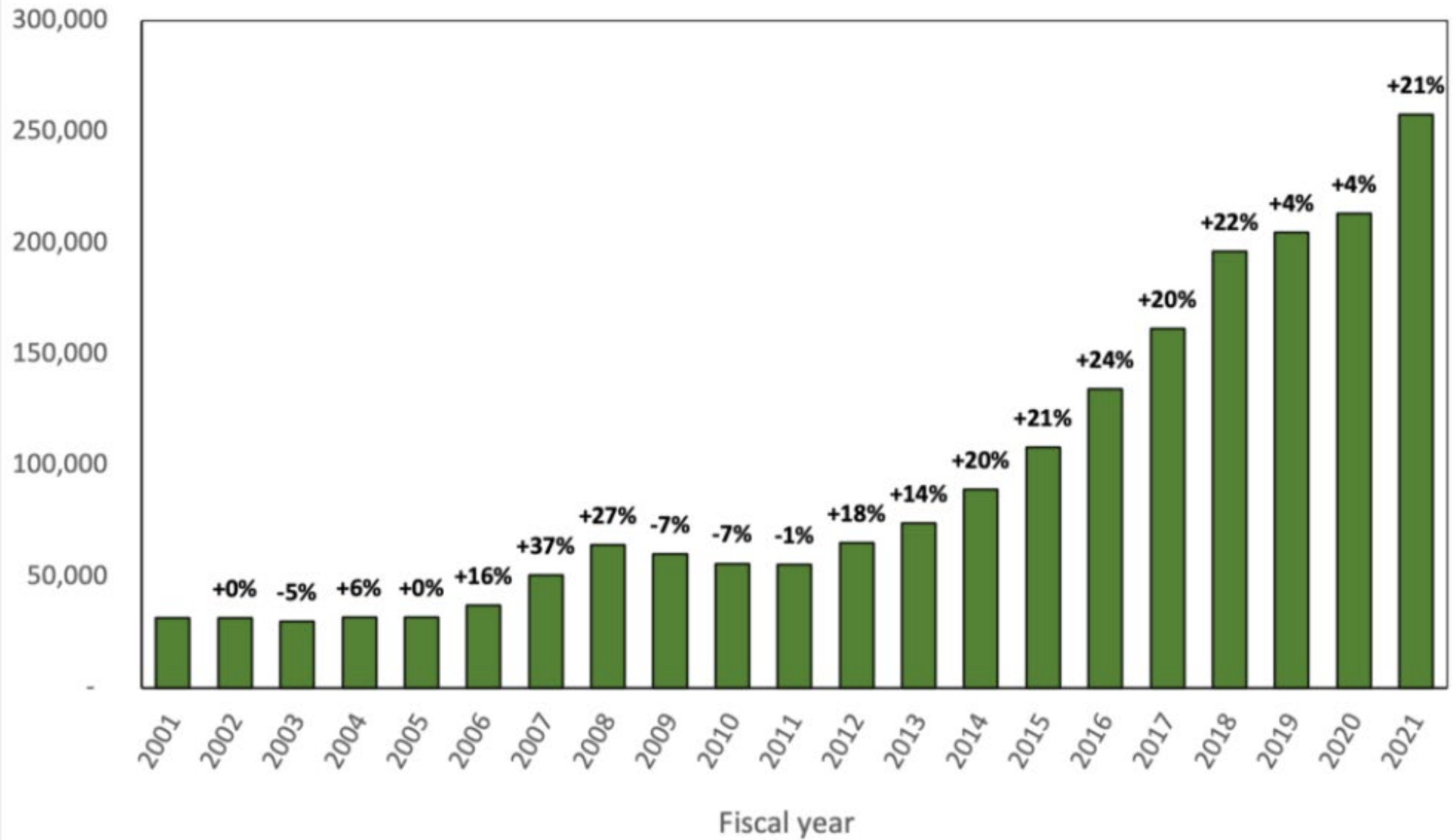
Source: USDA Farm Labor Survey



# H-2A Agricultural Guestworker Program

- Criticisms:
  - Claims that it harms domestic workers.
  - Cumbersome and expensive process for agricultural employers.
  - Doesn't encompass non-seasonal agricultural labor needs.
- Trends:
  - Greater utilization in recent years.
  - Congressional enthusiasm for reform in fits and starts. HR 1603, *Farm Workforce Modernization Act of 2021*, passed the House on 3/21/21. Died in Senate Judiciary Committee.

## Number of H-2A visas issued and year-over-year change



Data source: US Department of State. Nonimmigrant Visa Statistics. Available at: <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html/>





# Workers' Compensation

- Some type exemption in agricultural context for some defined employees (provisions vary greatly) in 16 states:
  - Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, Tennessee and Texas.
- What happens to WC immunity?
- No exemption in PA.



# Occupational Safety and Health Act

- “Small Farm Exemption” -  $\leq 10$  employees and no employer-supplied housing. (immediate family  $\neq$  “employee”)
  - Since 1977, Congress’ OSHA budget stipulates that OSHA can not use annual funding to enforce OSHA regulations against this category of employers but does not technically grant an exemption from applicability of OSHA regs.
- **Record keeping requirements** apply to non-exempt agricultural operations.
- **OSHA Standards for non-exempt ag:** The slow-moving vehicle (SMV) emblem; Anhydrous ammonia; Pulpwood logging; Temporary labor camp housing; Rollover protective structures; Agricultural machinery guarding; Cotton dust; Cadmium.
- **General standards that apply to non-exempt ag:** hazard communication (1910.1200) and the retention of Department of Transportation (DOT) markings, placards and labels (1910.1201).
- The **general duty clause** states that every employer must furnish each employee a place of employment free from all recognized hazards causing, or likely to cause, death or serious injury. The general duty clause will be used only in situations where no specific standard has been adopted.



# OSHA: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings

- [Advance Notice of Proposed Rulemaking](#) (ANPRM); published 10/27/21; comment period closed 1/26/22.
- Note: the failed emergency temporary standard re: COVID in the workplace (“shot or test” rule) was accompanied by a White House request to address “those not covered by OSHA” but in the end that did not happen. Will this initiative be accompanied by an attempt to apply it to OSHA-exempt agricultural employers/workplaces?



# **FIFRA** (Federal Insecticide, Fungicide, and Rodenticide Act)

- Generally: A series of risk/benefit standards for products and application to ensure that pesticides perform their intended function without posing unreasonable risk to human health or the environment.
- Certification of pesticide applicators.
  - Certification program administered by state.
  - Differing standards for private and commercial applicators.
  - Require knowledge of use, handling, labeling, disposal.



# FIFRA – Worker Protection Standard

- Implemented by rulemaking authority.
- Protects workers from pesticide exposure.
- Has very broad application.
  - No exemption for small operations.
  - Exemptions: Owner/immediate family members, crop advisors, list of specific apps.
- Addresses workers when:
  - Preparing pesticides for use.
  - Applying pesticides.
  - Entering area where pesticides have been applied.



# FIFRA – Worker Protection Standard Provisions

- Protection during application.
  - “Application Exclusion Zone” - [2020 final rule](#) stayed by USDC S.D.N.Y.
- Restricted-entry intervals.
- Personal protective equipment.
- Notification of workers.
- Decontamination supplies.
- Emergency assistance.
- Safety training and safety posters.



# Recent State Actions on Min. Wage & OT

As of April 2022, 8 states have farmworker minimum wage standards and/or overtime pay standards.

- CA – roll out for all sizes of employers to CA state law’s \$15/hr by 2023; OT under CA law.
- NY – min wage under NY state law; no OT eligibility.
- WA – dairy workers covered by OT laws by court order; OT for all ag workers later adopted.
- OR – min wage under OR law subject to FLSA “500 man-days”; OT bill pending.
- CO – min wage under CO state law; OT under CO law.
- MN – min wage under MN law; OT under MN law if under a certain income threshold.
- MD – min wage and OT under MD law but many exceptions (FLSA “500-man days”; certain processing, range production of livestock, hand-harvest piece-rate).
- HI - min wage under HI law but many exceptions (coffee harvesting,  $\leq 20$  employees,  $>2K$  month guarantee; OT under HI law except each employers gets 20 weeks exempt).



# THANK YOU!

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