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**SUBSTITUTE SENATE BILL 5438**

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**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)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The department will:

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

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

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

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

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

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

(d) The structure of the fee must include:

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

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

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

(iv) Other factors as determined by the department.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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