

HOUSE BILL REPORT

E2SSB 5438

As Reported by House Committee On:
Labor & Workplace Standards
Appropriations

Title: An act relating to establishing the office of agricultural and seasonal workforce services within the employment security department.

Brief Description: Establishing the office of agricultural and seasonal workforce services within the employment security department.

Sponsors: Senate Committee on 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).

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/28/19, 4/2/19 [DP];

Appropriations: 4/6/19, 4/8/19 [DPA].

**Brief Summary of Engrossed Second Substitute Bill
(As Amended by Committee)**

- Creates the Office of Agricultural and Seasonal Workforce Services within the Employment Security Department (ESD) to, among other tasks, process and adjudicate foreign labor applications and complaints, and conduct field checks, training, and outreach.
- Requires the Commissioner of the ESD to create an advisory committee to review issues related to the H-2A program.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass. Signed by 4 members: Representatives Sells, Chair; Chapman, Vice Chair; Gregerson and Ormsby.

Minority Report: Do not pass. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Hoff.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Joan Elgee (786-7106).

Background:

The federal Immigration and Nationality Act provides for various classifications of nonimmigrant visas. Classifications for temporary guest workers include the H-2A classification for seasonal agricultural workers. The H-2A program allows agricultural employers to bring in foreign workers temporarily when there are insufficient qualified domestic workers. Employers using H-2A workers must pay specified rates of pay, provide the workers housing and transportation, guarantee employment for a specified period of time, and meet other requirements.

A prospective employer of H-2A workers first submits a United States (U.S.) Department of Labor form ETA 790 to the Employment Security Department (ESD) and, upon approval, the ESD initiates the recruitment of domestic workers. The employer must submit an application, including the accepted ETA 790, to the U.S. Department of Labor, which then certifies the employment of H-2A workers. The ESD also conducts surveys to help establish pay rates; conducts field checks to review wages, hours, and other working conditions; and administers processes to discontinue services to employers. The state departments of Health and Labor and Industries have regulatory responsibility over temporary farmworker housing.

The ESD predicts employers will request more than 30,000 H-2A workers to work in Washington during 2019. The ESD receives an average annual funding level of about \$300,000 from the U.S. Department of Labor.

The ESD's administrative contingency fund provides for the financing of special programs to assist the unemployed and for ESD's administrative expenses.

Summary of Bill:

Office of Agricultural and Seasonal Workforce Services.

The Office of Agricultural and Seasonal Workforce Services (Office) is established within the ESD to:

- process and adjudicate foreign labor applications and process complaints;
- conduct field checks and visits, as required by the U.S. Department of Labor, in coordination with other state agencies in order to limit disruption to agricultural employers and efficiently use government resources;
- administer the discontinuation and reinstatement of services process;
- conduct training and outreach activities to employers using agricultural and seasonal workforce services within the ESD; and
- if necessary, collect fees.

For the 2019–2021 biennium, the Office will be funded by an additional appropriation from the funds established in the administrative contingency fund. Prior to June 30, 2021, the ESD will analyze the costs incurred by the Office to administer the H-2A program, and the amount of funds allocated by the federal government. If the federal funds are not sufficient,

the ESD will adopt rules to implement fees to cover the cost of administering the H-2A program.

The ESD may establish fees for each H-2A application submitted to the ESD and an additional fee for each requested H-2A worker. The fee per requested H-2A worker is waived for the first 10 workers an employer requests annually, and the fee for each requested worker must not exceed \$75. Any flat fee established per application must not exceed \$500. These fee caps are adjusted annually for inflation. There must be a process for employers to request reimbursement from the ESD for fees paid for workers not federally certified. The ESD may not use fees to pay for any activity that is not specified in the U.S. Department of Labor annual H-2A funding grant.

The ESD may not process an H-2A application if the:

- employer does not pay established fees;
- employer refuses to agree to be subject to field checks and field visits; or
- ESD discontinued services to the employer and that discontinuation remains in effect.

Advisory Committee.

The ESD Commissioner must appoint an advisory committee (Committee) to review issues related to the H-2A program. The membership consists of:

- four voting members representing agricultural workers' interests, including one farmworker, and all from a list of at least four names submitted by a recognized statewide organization of workers;
- four voting members representing agricultural employers, including one agricultural employer, and all from a list of at least four names submitted by a recognized statewide organization of agricultural employers; and
- one ex officio member, without a vote, to represent the ESD and serve as the chair.

The departments of Labor and Industries, Health, and Agriculture each have one nonvoting ex officio member on the Committee.

The Committee must provide comment on rulemaking, policies, implementation of the provisions, and initiatives; and study other issues. Specifically, the Committee may provide comment on the ESD's assessment of administrative costs.

The Committee must submit a report by October 31, in even-numbered years, to the Governor and the Legislature. The report must:

- identify and recommend approaches to increase the effectiveness of the ESD's recruitment process as part of the H-2A application, which may include changes to state law; and
- analyze the costs incurred by the Office to administer the H-2A program, the funds to administer other ESD programs for farmworkers, and the amount of funds allocated by the federal government to administer the H-2A and other agricultural programs within the ESD.

Committee members serve without compensation, but are entitled to reimbursement for travel expenses.

The H-2A Enforcement Account (account) is created. All receipts from any fees must be deposited into the account. Expenditures from the account may be used only for the purposes of the provisions and for surveying employers and workers using the agricultural prevailing wage survey and agricultural employment practice survey.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) H-2A farm workers experience problems with wages and working conditions, including sexual harassment. While H-2A workers may have better housing than domestic workers, there is little oversight and workers suffer. These workers are vulnerable, as many work in isolated places and are afraid to speak up. There is a lack of medical care. Some workers are threatened with deportation. Workers have been fired without being paid or having their visas returned. Organizations receive many calls from H-2A workers. Local economies and communities are better off if these workers are treated well. There are problems in the recruitment of domestic workers.

The federal government is not funding the H-2A program as it should, and the H-2A program at the ESD runs a deficit. Other employers are paying the cost. The number of workers has grown by 32 percent in each of the last five years. The ESD is unable to oversee and administer the federal requirements. These requirements place a significant burden on the state. Wagner-Peyser funds are for domestic workers. The ESD will continue seeking federal money. At the federal level the entire H-2A program is in jeopardy.

The bill would delay a fee for at least two years, and there are many sideboards on any fee. Part of the farmers' cost is the high cost of the farm labor contractor. A stakeholder group has been working on the issues and should continue. The bill has been improved with the negotiations. The bill takes into consideration small farmers. The advisory Committee would determine how much the H-2A program costs, and the farmers would pay the difference that the federal government does not pay. The bill also sets up a process to coordinate oversight.

(Opposed) Growers are supportive of workers. Many have human resources departments and go above and beyond to treat H-2A workers like family. The Department of Labor and Industries has found that H-2A worksites are safer than other farms. Farmers cannot afford a fee. No other state has a fee. The minimum H-2A wage is the highest in the nation. A fee would make the H-2A program unavailable to some farmers and put Washington at a disadvantage with other states. There will be fewer pear orchards, which means pears will come from other countries with lower wage and environmental standards. If using H-2A

workers is not an option, farmers will compete for domestic workers. The domestic recruiting by the ESD does not work well.

Additional regulation is not needed. Agriculture is highly regulated. The services would be an unnecessary duplication of oversight. The ESD and the U.S. Department of Labor visit farms. Pro bono lawyers also provide oversight. Wagner-Peyser funds should pay for the program. Agriculture is the only industry that has to pay for Wagner-Peyser programs.

Dairy farmers are not currently authorized to use H-2A workers because the work is not seasonal, but there is a proposal to change this. Creating the Office and a Committee are supported. Mentioning fees in the bill jeopardizes efforts to get more federal funding.

(Other) There are unintended consequences, as food banks will not have the quality of food to offer clients.

Persons Testifying: (In support) Senator McCoy, prime sponsor; Jeff Johnson; Joe Kendo, Washington State Labor Council; Edgar Franks; Marciano Sanchez; Rosalinda Guillen; Michele Besso, Northwest Justice Project; Andrea Schmitt; Paul Benz; Brenda Bentley; Liz Darrow; Carla Shafer, Farmworker Ministry Northwest; Nick Streuli, Employment Security Department; Orlando Gonzalez; Tsvi Silver; and Kim Powe, National Domestic Fair Trade Association.

(Opposed) Delia Pena and Courtney Lane, Zirkle Fruit Company; Jeff Perrault, Perrault Farms Incorporated; Heri Chapula, Finley Cherries; Diana Fernandez and Ryan Ogburn, Washington Farm Labor Association; John Huijbregtse, Sundquist Fruit; Chafeka Abdellatif, Kershaw Companies; Jim Johnson, M.S.J. Orchards; April Clayton, Red Apple Orchards; Rosella Mosby, Mosby Farms; and Scott Dilley, Washington State Dairy Federation.

(Other) Debbie Christian, Auburn Food Bank.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended. Signed by 32 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Hudgins, Jinkins, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Schmick, Senn, Springer, Stanford, Steele, Sullivan, Sutherland, Tarleton, Tharinger and Ybarra.

Staff: Jessica Van Horne (786-7288).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Labor & Workplace Standards:

The Appropriations Committee recommended the following changes:

- provides that the duties of the Office of Agricultural and Seasonal Workforce Services (Office) "are," rather than "include," those listed in the bill;
- removes the provision that the Employment Security Department will adopt fees if federal funding is insufficient;
- removes references to fees throughout the bill;
- removes the provision establishing the H-2A enforcement account; and
- removes provisions pertaining to funding for the Office.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is a response to a lack of adequate federal funding for oversight of H-2A compliance. Worker safety and wages should not be compromised by federal underfunding of the H-2A system. The bill creates a framework for funding compliance activities. The bill has been improved throughout the process, including an exemption from fees for small growers who have fewer H-2A workers, provisions to cap fees, and a later implementation date for fee assessment and collection to allow for stakeholders to advocate for more funding at the federal level.

(Opposed) None.

(Other) The current bill has a fee trigger, which farmers and growers oppose. However, a proposed amendment would remove the fee trigger, which the agricultural community supports. Removing the fee trigger is important because Washington consistently ranks high among states for usage of the H-2A program, but receives one of the lowest per capita allocations from the federal government. The proposed amendment would allow stakeholders time to petition the federal government to receive appropriate funding rather than backfill the H-2A program with state funds.

Persons Testifying: (In support) Antonio Ginatta, Columbia Legal Services.

(Other) Bre Elsey, Washington Farm Bureau.

Persons Signed In To Testify But Not Testifying: None.