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ENGROSSED SECOND SUBSTITUTE SENATE BILL 5438

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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 any activity  
25 that is not specified in the United States department of labor annual  
26 H-2A funding grant.

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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