NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

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For Immediate Release

Contact: Michael Marsh, President and CEO
(202) 629-9320

National Council of Agricultural Employers' (NCAE) Statement on Publication of Department of Labor's "Worker Protection" Rule

(Arlington, VA) Earlier today, the Department of Labor (Department) published 600 pages of new regulations ironically titled, "Improving Protections for Workers in Temporary Agriculture Employment in the United States." This Rule and the Administration's promulgation of the rule reflects its disdain for the U.S. Supreme Court, the U. S. Congress, and all who engage in American agriculture.

"This offensive Rule was developed in complete bad faith and should be immediately withdrawn. This regulation should never have been allowed to see the light of day. To suggest this regulation somehow protects farmworkers is a bad joke and its punchline is its lasting damage to farmworkers and the American farm and ranch families who employ them," said Michael Marsh, President and CEO of NCAE. "The Department here seeks to make an undisguised end run around the Congress, the Supreme Court and the Constitution of the United States of America."

In this Rule, the Department blatantly thumbs its nose at the U.S. Supreme Court's June 2021 decision in *Cedar Point, et al, v. Haddid, et al,* and implies that the Executive Branch under Article II of the Constitution can simply override and ignore rulings of the Judicial Branch under Article III. In *Cedar Point*, the Court found in a 6-3 decision that a regulation providing union activist's access to farms and ranches was an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The Court struck that regulation down, but the Department's action here reveals its complete disgust for the rule of law.

This rule puts workers, who had enjoyed a brief respite from organizers' constant coercion, threats, harassment, misrepresentation, deceit, and bullying, at further jeopardy from union activists. Farmworkers were thrilled by the Court's protective action in *Cedar Point*, believing they would no longer be subject to the abuse of union representatives at their place of work. This new rule casts aside this most critical worker protection and again makes farmworkers vulnerable to deceitful union organizing tactics to which we and our employees object.

Shockingly, under this new rule, the Department asserts that unionization of H-2A Temporary Agricultural workers is not preempted by the laws passed by Congress. This unequivocally contradicts the Congress' specific exclusion of agricultural laborers under the National Labor Relations Act of 1935 (NLRA). Further, Congress instructed the National Labor Relations Board (NLRB) to use the expansive definition of "agriculture" provided by the Fair Labor Standards Act (FLSA) in determining whether workers fall under the category of agricultural laborers.

"Rather than accepting the interpretation of law by the Supreme Court, abiding by the laws passed by the Congress, or petitioning Congress to legislate change only it can make, the Department decided it can ignore the Separation of Powers inherent to our liberty, and fill all branches of our government," explained Marsh. "This is something the Department should know it cannot do."

Throughout this regulatory process the Department has used demoralizing, pejorative language to cast shade falsely and disrespectfully at farmers and ranchers who are forced to use the H-2A program for workers who are ready, willing, and available, to help us plant, nurture, and harvest crops that feed America. This vitriolic tenor began with the announcement and Notice of Proposed Rulemaking. The Department again disregarded the pleas of America's farm and ranch families when they denied employers' requests to extend the comment period so that they could adequately express their concerns about this convoluted regulation.

NCAE works with members and the government agencies themselves to advance compliance with more than just the H-2A regulations. Our members regularly study cases and law related to the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act, and rules promulgated by the Occupational Safety and Health Administration. In fact, NCAE members and their Human Resource teams annually spend hundreds of hours becoming educated on agricultural employment law and best practices to maintain compliance. They do this at significant expense to their operations.

NCAE members do this because it is the right thing to do.

The Department's own data indicates that unfortunately some employers do not follow the lead of NCAE's members. Their own data indicates that 5% of agricultural employers account for

95% of the violations uncovered in investigations. This rule ignores that reality. Rather than engage constructively with employers who are eager to make the H-2A program work well and safely to reduce violations further, the Department chose to treat all agricultural employers as malicious actors, demoralizing the farm and ranch families who work each day to ensure Americans have food on the table.

“American farmers and ranchers grow and produce the safest, most sustainable food in the world. If the portion of the American public who eats, wishes to find food produced by American families,” explained Marsh, “the incessant barrage of deleterious and crushing regulations targeting agricultural employers must stop. The Acting Secretary should withdraw this regulation, squalid in its bad faith, immediately.”

NCAE is the national trade association focusing on agricultural labor issues from the employer’s viewpoint.

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