No. 13-950

IN THE

Supreme Court of the United States

PERI & SONS FARMS, INC.,

Petitioner,

v.

VICTOR RIVERA RIVERA ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

Matthew J. Piers
José Jorge Behar
Counsel of Record
Christopher J. Wilmes
Caryn C. Lederer
HUGHES SOCOL PIERS
RESNICK & DYM, LTD.
70 W. Madison Street
Suite 4000
Chicago, IL 60602
(312) 580-0100
jbehar@hsplegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE.................................... 1

A. Statutory and Regulatory Background.......... 1

B. Factual and Procedural Background 4

REASONS FOR DENYING THE WRIT.................... 6

I. There Is No Need to Review the Court of Appeals' FLSA Analysis 7

A. There Is No Conflict on the FLSA Question Presented 7

B. The FLSA Question Presented Is Not Significant Enough to Warrant Review....... 11

C. This Case Is a Poor Vehicle for Addressing Employers' FLSA Obligations for Inbound Expenses.................................. 14

D. The Court of Appeals Correctly Determined that Neither the FLSA nor DOL's Regulations Precluded DOL's Interpretation 15

II. This Case Lacks Any Certworthy Question Relating to the Deference Due to DOL's 2010 Issuance. 18

A. Well-Settled Principles of *Auer* Deference Support the Court of Appeals' Decision....... 18

B. There Is No Reason Here to Reconsider *Auer* Itself. 21

CONCLUSION 26

APPENDICES

Appendix A, 20 C.F.R. § 655.122 .... 1a

Appendix B, Dep't of Labor, Final Rule (Feb. 12, 2010).. 17a

TABLE OF AUTHORITIES

Cases

Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n,
212 F.3d 1301 (D.C. Cir. 2000) 21

Arriaga v. Fla. Pac. Farms, L.L.C.,
305 F.3d 1228 (11th Cir. 2002) 7, 16, 22

Auer v. Robbins,
519 U.S. 452 (1997) .... *passim*

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 26

Castellanos-Contreras v. Decatur Hotels, LLC,
622 F.3d 393 (5th Cir. 2010) (en banc) 8, 9, 10

Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984) 23, 24, 25

Christensen v. Harris Cnty.,
529 U.S. 576 (2000) 24

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 6, 19, 21, 26

Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007) 24

Clason v. Johanns,
438 F.3d 868 (8th Cir. 2006) 20

Cooper Techs. Co. v. Dudas,
536 F.3d 1330 (Fed. Cir. 2008) 23

CSX Transp., Inc. v. McBride,
131 S. Ct. 2630 (2011) 25

Dandridge v. Williams,
397 U.S. 471 (1970) 23

Decker v. Nw. Envtl. Def. Ctr.,
133 S. Ct. 1326 (2013) 25

DeLuna-Guerrero v. N.C. Grower's Ass'n, Inc.,
338 F. Supp. 2d 649 (E.D.N.C. 2004).................. 22

Edelman v. Lynchburg Coll.,
535 U.S. 106 (2002) 22

EEOC v. Abercrombie & Fitch Stores, Inc.,
731 F.3d 1106 (10th Cir. 2013) 20

Gose v. U.S. Postal Serv.,
451 F.3d 831 (Fed. Cir. 2006) 21

Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations,
730 F.3d 1024 (9th Cir. 2013)............................. 21

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 9

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 6, 19, 26

Manufactured Hous. Inst. v. EPA,
467 F.3d 391 (4th Cir. 2006) 24

Martinez-Bautista v. D & S Produce,
447 F. Supp. 2d 954 (E.D. Ark. 2006)................. 22

Mich. Dep't of Cmty. Health v. Sec'y of Human Servs., 496 Fed. Appx. 526 (6th Cir. 2012),
cert. denied, 133 S. Ct. 1581 (2013).................... 22

Mining Energy, Inc. v. Dir., Office of Workers' Comp. Programs,
391 F.3d 571 (4th Cir. 2004) 20

Neal v. United States,
516 U.S. 284 (1996) 25

Perez-Benites v. Candy Brand, LLC,
2011 WL 1978414 (W.D. Ark. 2011) 22

Price v. Stevedoring Servs. of Am., Inc.,
697 F.3d 820 (9th Cir. 2012) (en banc) 21

Salazar-Martinez v. Fowler Bros., Inc.,
781 F. Supp. 2d 183 (W.D.N.Y. 2011) 22

Sw. Pharmacy Solutions, Inc. v. Ctrs. for Medicare & Medicaid Servs.,
718 F.3d 436 (5th Cir. 2013) 20

Talk Am., Inc. v. Mich. Bell Tel. Co.,
131 S. Ct. 2254 (2011) 23, 25

Union Carbide Corp. & Subsidiaries v. Comm'r of Internal Revenue, 697 F.3d 104 (2d Cir. 2012).. 20

United States v. Mead Corp.,
533 U.S. 218 (2001) 23, 24

Statutes

29 U.S.C. § 203(m) (2011)............................... 1, 15, 16

29 U.S.C. § 206(a) (2011)... 1

29 U.S.C. § 206(a)(1)(c) (2011)..................................... 2

Regulations

8 C.F.R. § 214.1(a)(3)(ii) 12

8 C.F.R. § 214.2(h)(5)(vi)(B)(1)(iii) 12

8 C.F.R. § 214.2(h)(5)(viii)(A) 12

20 C.F.R. § 655.20(j) 8

20 C.F.R. § 655.103 .... 1, 2

20 C.F.R. § 655.122 2

20 C.F.R. § 655.122(h)(1) 2, 18

20 C.F.R. § 655.122(q) 2

20 C.F.R. § 655.135(j) 12

22 C.F.R. § 22.1 12

29 C.F.R. § 531.3(d)(1) 1, 15

29 C.F.R. § 531.29 1

29 C.F.R. § 531.32 15

29 C.F.R. § 531.32(c) 17

29 C.F.R. § 531.35 .... 1, 16

Other Authorities

73 Fed. Reg. 77,110 (Dec. 18, 2008) 2, 3

74 Fed. Reg. 13,261 (Mar. 26, 2009) 3

75 Fed. Reg. 6884 (Feb. 12, 2010) 3, 24

77 Fed. Reg. 10,038 (Feb. 21, 2012) 8, 10

Black's Law Dictionary (9th ed. 2009) 15

Boehner, John, *Standards for Immigration Reform* 10, 11

Chamber of Commerce, *Multi-Industry Letter on Immigration Reform* (Feb. 25, 2014) 11

Dep't of Labor, Adverse Effect Wage Rates – Year 2014 2

Dep't of Labor, DOL Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* (2009) 3

Dep't of Labor, *Annual Report* (2012). 13

Dep't of Labor News Release 12-1352-SAN (July 10, 2012) 4, 15

Dep't of Labor, Wage-Hour Opinion Letter, 1970 WL 26461 (Nov. 10, 1970) 2

Dep't of Labor, Wage-Hour Opinion Letter, 1990 WL 712744 (June 27, 1990) 2

Johnston, Elizabeth, Note, *The United States Guestworker Program: The Need for Reform*, 43 Vand. J. Transnat'l L. 1121 (2010) 4

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Fair Labor Standards Act ("the FLSA") requires employers to pay the federal minimum wage. 29 U.S.C. § 206(a) (2011). However, an employer need not pay the minimum wage in cash. An employer may satisfy the minimum wage requirement, in whole or in part, by taking credit for the "reasonable cost" of "board, lodging, or other facilities" given to employees. *Id.* § 203(m). Essentially, this allows employers to count in-kind goods as wages.

The Department of Labor ("DOL") has issued regulations that interpret these provisions. Employers may not credit "facilities" as compensation if they are "primarily for the benefit or convenience of the employer." 29 C.F.R. § 531.3(d)(1). Accordingly, employers must reimburse employees for any out-of-pocket expenses that primarily benefit the employer to the extent that such expenses reduce weekly compensation below the federal minimum wage. *Id.* § 531.35 ("The wage requirements of the Act will not be met where the employee 'kicks-back' [wages] . . . to the employer or to another person for the employer's benefit . . . ."). In other words, wages must be received "free and clear" of such out-of-pocket expenses. *See id.*; *id.* § 531.29.

2. The H-2A program allows employers to lawfully hire foreign agricultural workers if they cannot find U.S. workers to fill those positions. 20 C.F.R. § 655.103. Employers must give H-2A workers certain benefits, including housing and wages at the "adverse

effect wage rate."[1] *Id.* §§ 655.122, 655.103(a)-(b). They also must reimburse all inbound travel and related subsistence expenses by the halfway point of the employee's work period. *Id.* § 655.122(h)(1). This is sometimes referred to as "the 50 percent rule." Finally, all the terms and conditions of the H-2A workers' employment must be memorialized in a written job order that includes all of the provisions of 20 C.F.R. § 655.122 and that is enforceable by the worker as a binding employment contract. *Id.* § 655.122(q).

3. In directing H-2A employers on compliance with the FLSA, DOL has repeatedly stated that inbound expenses primarily benefit employers. *See, e.g.*, DOL Wage-Hour Opinion Letter, 1990 WL 712744 (June 27, 1990) ("Under the FLSA, it has always been the position of [DOL] that no deduction . . . may be made for [inbound] transportation of workers . . . ."); DOL Wage-Hour Opinion Letter, 1970 WL 26461 (Nov. 10, 1970) ("We have consistently regarded the cost of transporting employees to and from the point of hire as a cost to be borne by the employer . . . .").

However, in 2008 – one month before a change in administrations – DOL asserted that the FLSA did not require employers to reimburse inbound expenses in the first workweek. 73 Fed. Reg. 77,110, 77,149 (Dec. 18, 2008). Even under that view, however, DOL

---

[1] The adverse effect wage rate is the wage that DOL sets in order not to depress domestic wages for agricultural labor. In all states, that wage is currently higher than the FLSA minimum. *Compare* DOL, Adverse Effect Wage Rates – Year 2014, http://www.foreignlaborcert.doleta.gov/adverse.cfm (detailing adverse effect wage rates), *with* 29 U.S.C. § 206(a)(1)(c) (2011) (detailing the FLSA minimum wage).

continued to adhere to its requirement that employers reimburse those costs under the 50 percent rule. *Id.*

Just three months later, DOL retracted its revised interpretation relating to the first workweek, stating the 2008 position "may not be relied upon as a statement of agency policy." 74 Fed. Reg. 13,261, 13,262 (Mar. 26, 2009). Five months after that, DOL reinstated its "longstanding interpretation" that employers must reimburse non-agricultural guestworkers' travel and immigration expenses by the end of the first workweek. DOL, Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* (2009).[2]

Following a period of notice and comment that included "a large number of comment[s]" on whether inbound expenses primarily benefit the employer, DOL promulgated new regulations for the H-2A program. 75 Fed. Reg. 6884, 6914 (Feb. 12, 2010). In the preamble to the final rule, DOL referenced the 2009 Bulletin and confirmed that H-2A employers, just like employers of non-agricultural foreign guestworkers, are "responsible for paying inbound transportation costs in the first workweek to [meet] . . . the FLSA minimum wage." *Id.* at 6915.[3]

B. Factual And Procedural Background

1. Respondents are Mexican citizens and former H-2A employees of petitioner. Pet. App. 3a. To begin

---

[2] http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm.

[3] Petitioner does not include the new regulations or the preamble in its appendix. Accordingly, the relevant portions of those issuances are reproduced in the Appendix to this document.

work, each respondent paid more than $400 in inbound expenses, including recruitment, immigration, transportation, and subsistence costs. Second Am. Compl. ¶¶ 16-18.[4] H-2A workers typically borrow at high interest rates to pay such upfront expenses. Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 Vand. J. Transnat'l L. 1121, 1132 (2010).

2. Petitioner, a Nevada corporation, is one of America's largest onion producers and routinely uses H-2A labor. Pet. 9. While this suit was ongoing, petitioner settled with DOL for widespread violations of the H-2A regulations. DOL investigators found that petitioner systematically paid employees less than the H-2A adverse effect wage rate and federal minimum wage and did not "reimburse[] [them] for subsistence expenses while traveling to and from the U.S." DOL News Release 12-1352-SAN (July 10, 2012).[5] In that agreement, petitioner paid a "record" fine for H-2A violations, totaling $2.3 million in back wages and $500,000 in penalties. *Id.*

3. In February 2011, respondents filed suit in the U.S. District Court for the District of Nevada, raising claims under the FLSA, Nevada wage-and-hour and contract laws, and the Nevada Constitution. Pet. App. 4a-5a. Relevant here, respondents alleged that petitioner did not reimburse their inbound expenses,

---

[4] Because this appeal arises on a motion to dismiss, all factual allegations in the complaint must be taken as true.

[5] http://www.dol.gov/opa/media/press/whd/WHD20121352.htm.

either during the first workweek or at the contract's halfway point.[6]

Petitioner moved to dismiss all of respondents' claims, and the district court granted the motion. Pet. App. 27a-35a. The court held that the FLSA does not require repayment of inbound expenses, making no mention of DOL's 2009 Bulletin or the 2010 final rule. *Id.* 28a-29a. The court also dismissed respondents' breach of contract and Nevada wage-and-hour claims with leave to amend. *Id.* 35a.

4. The Ninth Circuit reversed. Writing for a unanimous panel, Judge O'Scannlain concluded that the relevant provisions in the FLSA and its regulations are ambiguous. Pet. App. 9a. The court of appeals thus found DOL's guidance in the 2010 final rule, which requires reimbursement for transportation and immigration expenses under the FLSA, dispositive. *Id.* 10a-11a.

In deferring to DOL's 2010 final rule, the court of appeals acknowledged that "DOL briefly changed its interpretation at one point in 2008." Pet. App. 11a. But the court found that this did not make it inappropriate to defer to the 2010 issuance. The court of appeals detected "no indication" that withdrawing the 2008 issuance "caused any unfair surprise" for petitioner. *Id.* Furthermore, the court of appeals explained that "[t]here is no reason to think that

---

[6] Contrary to petitioner's contention that "[r]espondents did not claim that Peri failed to reimburse workers . . . once workers completed 50% of their contract period," Pet. 10 n.4, respondents expressly alleged that petitioner "*never* reimbursed Plaintiffs and the other Class Members for these expenses." Second Am. Compl. ¶ 21 (emphasis added).

DOL's determination [in 2010] was not a product of its considered judgment." *Id.*

Finally, the court of appeals also reinstated most of respondents' state-law claims. Pet. App. 20a.[7]

REASONS FOR DENYING THE WRIT

Facing a shortage of U.S. workers willing to perform agricultural labor, petitioner received permission from DOL to hire foreign farmworkers under the H-2A visa program. DOL interprets the FLSA and its own regulations to require employers to reimburse inbound travel and immigration costs of H-2A workers in the first workweek to meet the federal minimum wage. Petitioner argues that the court of appeals incorrectly deferred to that interpretation.

There is no circuit conflict as to either question presented. The only court of appeals to find employers not obligated to reimburse inbound costs during the first workweek did so under a now-outdated regulatory scheme, and with respect to a different class of workers. The decision below is moreover a straightforward application of this Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), and *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), that does not conflict with any other court of appeals' application of those cases. Finally, given the nature of the administrative guidance at issue,

[7] The court of appeals also held that respondents sufficiently alleged willful violation of the FLSA to warrant a three-year statute of limitations at this stage, reversing the dismissal of claims that the district court based on a two-year limitations period. Pet. App. 19a-20a.

this case would be a poor vehicle for revisiting the concept of *Auer* deference itself. Further review is accordingly unwarranted.

I. There Is No Need to Review the Court of Appeals' FLSA Analysis.

Petitioner first argues that the FLSA and its implementing regulations preclude deferring to DOL's position, expressed in the preamble to the 2010 final rule, that H-2A employers must reimburse inbound expenses in the first workweek under the FLSA. No court in any other case has ever accepted this argument, and it is unworthy of this Court's review.

A. There Is No Conflict on the FLSA Question Presented.

1. Only two federal courts of appeals have ever considered whether H-2A employers must reimburse employees for inbound expenses by the end of the first workweek, and they came to the same conclusion. In *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), the Eleventh Circuit interpreted DOL's regulations to dictate that H-2A employees' inbound expenses primarily benefit the employer. *Id.* at 1241-44. Accordingly, that court concluded employers must reimburse those expenses in the first workweek to meet the FLSA minimum wage. *Id.*

The court of appeals here reached the same result. In light of administrative guidance that DOL issued after *Arriaga*, the Ninth Circuit found no need to determine the better reading of the pre-existing regulations. Instead, it simply characterized the regulations as "ambiguous," Pet. App. 9a, and therefore applied *Auer* to defer to the preamble to DOL's 2010 final rule, *id.* 10a-11a.

2. Petitioner nonetheless suggests the court of appeals' decision conflicts with the Fifth Circuit's holding in *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc). This is incorrect for two independent reasons.

First, the Fifth Circuit limited its holding to non-agricultural workers, admitted under the H-2B visa scheme. *Castellanos-Contreras*, 622 F.3d at 400. The Fifth Circuit therefore explained that "*Arriaga*'s reasoning does not control here" because that case involved only "H-2A workers." *Castellanos-Contreras*, 622 F.3d at 402-03.

Notwithstanding the Fifth Circuit's express reliance on the distinctions between H-2A and H-2B regulations, petitioner insists that those regulations are "indistinguishable" on this issue. Pet. 17 n.6. But the Fifth Circuit did not think so. The court reasoned H-2A and H-2B workers are "treated differently" under DOL regulations, highlighting that "[t]here *are* laws that say . . . inbound expenses for H-2A workers require reimbursement [under the 50 percent rule], but no statute or regulation expressly requires [such] reimbursement . . . for H-2B workers." *Castellanos-Contreras*, 622 F.3d at 400, 403 (emphasis in original). Given that distinction, the court considered DOL's regulatory silence on H-2B reimbursement obligations to be "deafening." *Id.* at 400.[8]

---

[8] The H-2B regulations were amended in 2012 to include the same 50 percent rule. *See* 20 C.F.R. § 655.20(j) (current); 77 Fed. Reg. 10,038, 10,075-76 (Feb. 21, 2012) (amending H-2B regulations). But that was not the law in 2010, when the Fifth Circuit issued its holding in *Castellanos-Contreras*. The Fifth Circuit has never ruled on whether employers must reimburse

Second, the Fifth Circuit did not definitively hold that employers need not reimburse foreign guestworkers for the costs at issue in the absence of a 50 percent rule. That is because the court explicitly declined to consider the impact of DOL's 2009 Bulletin or the 2010 final rule. Citing the anti-retroactivity presumption in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Fifth Circuit declined to take these administrative issuances into account, explaining that they were "issued long after the events in question." *Castellanos-Contreras*, 622 F.3d at 401 & n.9. The court "express[ed] no opinion" about that new regulatory framework, reserving the prospective question about what it would hold under "the regulatory landscape" that it characterized as "now very different." *Id.* at 401-02 & n.9.[9]

3. Contrary to petitioner's suggestion (Pet. 3, 18-19), DOL does not believe that a conflict exists over the question presented either. In the preamble to the new H-2B regulations, DOL stated that it "does not interpret [*Castellanos-Contreras*] to be the ultimate

---

workers for inbound expenses by the end of the first workweek under a regime that requires reimbursement at the halfway point of the contract.

[9] To the extent that respondents seek relief based on events preceding DOL interpretations issued in 2009 and 2010, petitioner does *not* ask this Court – nor did it ask the Ninth Circuit – to decide any such question under *Landgraf* concerning whether those interpretations have retroactive effect. Nor would it make any sense to do so, since respondents expect the evidence to show that petitioner did not employ any respondent during the three-month period that DOL interpreted employers' reimbursement obligations differently. The first question presented is *prospective*, asking this Court to decide FLSA obligations in the post-2008 landscape and going forward.

determination on these issues," and recognized "the decision did not address what the proper deduction analysis would be under newly promulgated regulations . . . ." 77 Fed. Reg. 10,038, 10,070 (Feb. 21, 2012). Likewise, DOL's *amicus* brief filed below acknowledged merely that the Fifth Circuit held under the pre-2009 regulatory landscape that H-2B employers were not obligated to reimburse the expenses at issue. Br. for the Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants 24-26, *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013). DOL stressed that the Fifth Circuit distinguished between H-2A and H-2B workers and relied on outdated regulations. *Id.*

4. Even if there were a conflict, it still would not warrant review, for Congress could soon obviate the issue by overhauling the H-2A program. While Congress is divided about many aspects of immigration reform, the need to revamp the H-2A program is a point of common ground among business interests, the House of Representatives, and the Senate. Thus, even when the House rejected the Senate's latest attempt at an immigration bill, it issued guiding principles for reform emphasizing that "[o]f particular concern are the needs of the agricultural industry . . . . It is imperative that these temporary workers are able to meet the economic needs of the country." John Boehner, *Standards for Immigration Reform*;[10] *see also* Chamber of Commerce, *Multi-Industry Letter on Immigration Reform* (Feb. 25, 2014) (praising, on behalf of 636 business

---

[10] http://www.speaker.gov/sites/speaker.house.gov/files/Immigration-Standards.pdf.

organizations, the House Republican Conference's review of *Standards for Immigration Reform* and urging Congress to act this year).[11]

B. The FLSA Question Presented Is Not Significant Enough to Warrant Review.

For several reasons, petitioner vastly overstates the importance of the FLSA question it presents for review.

1. For over half of the expenses involved here, all that is at stake is *when*, not *whether*, the employer must reimburse workers for those expenses. That is because petitioner concedes – as it must – that under the H-2A regulations' 50 percent rule, it must fully reimburse inbound travel and subsistence costs by the halfway point of the work term. *See* Pet. 30. The cost of credit for petitioner to pay these reimbursements during the first workweek to the extent necessary to satisfy the FLSA minimum-wage requirement (seemingly no more than about $4 per respondent[12]) is unworthy of this Court's attention.

Nor is it the case that early reimbursement will cause H-2A workers to abandon their jobs. *Contra* Br. of Nat'l Council of Agric. Emp'rs, 17-18. It does not

---

[11] https://www.uschamber.com/sites/default/files/documents/files/140225_Multi-Industry_Immigration_Reform.pdf.

[12] Respondents allege that they incurred about $250 each ($400 total minus $150 for visa expenses) in travel and subsistence costs. For an eight-month contract, those costs would be repaid four months earlier than they otherwise would be at the halfway point of the contract. Assuming that full reimbursement during the first week is necessary to bring respondents up to minimum wage and a 5% continuously compounding annual interest rate, the total cost of credit would equal $4.20 per worker ($250 × 5% × 4 months ÷ 12 months).

make any sense for H-2A workers to voluntarily give up a guaranteed salary and legal protections. In particular, an H-2A employee who abandons his job forfeits legal status immediately. 8 C.F.R. § 214.1(a)(3)(ii). Employers must report absconding employees within 48 hours to the Department of Homeland Security, *id.* § 214.2(h)(5)(vi)(B)(1)(iii), raising risks to such employees of punishment for immigration violations. *See id.* § 214.2(h)(5)(viii)(A).

2. Petitioner nonetheless complains that many other expenses that the H-2A program imposes are "burdensome." Pet. 30-31. But nearly all of the expenses petitioner mentions fall outside of the ambit of this case. The only costs not covered by the 50 percent rule but that are nonetheless at issue here are visa costs.[13] But during the relevant time period here, those visa costs totaled only $150 per worker. *See* 22 C.F.R. § 22.1 (effective June 4, 2010 until April 12, 2012).

3. Even less convincing is petitioner's suggestion (Pet. 31-32) that if the court of appeals' decision stands, employers will be burdened by having to reimburse U.S. workers for similar costs. Traveling domestically, U.S. workers incur low travel and zero immigration costs. Hence, even assuming U.S. workers were entitled to reimbursement of inbound travel expenses by the end of the first workweek to the extent necessary to bring them up to minimum wage, this

[13] Petitioner makes stray references to recruitment fees, Pet. 10, 12, but while respondents seek reimbursement of those costs below, petitioner does not raise them in this petition. In any case, DOL independently prohibits any collection of recruitment fees from H-2A employees. 20 C.F.R. § 655.135(j).

would matter little because they typically earn the FLSA minimum even without reimbursement.[14]

4. Finally, petitioner's contention that the Fifth, Ninth, and Eleventh Circuits have "a significant majority of all H-2A and H-2B workers," Pet. 20, is based on old data. Today, H-2A and H-2B workers are spread across the country, with the majority employed in other circuits.[15] If any genuine uncertainty exists going forward, this Court will surely have an opportunity in the future to address it.

---

[14] An employer need not reimburse workers beyond the federal minimum wage, which is lower than the adverse effect wage rate in every state. *See supra* n.1. Someone working 40 hours in Nevada at the adverse effect wage rate of $10.89/hour will make $435.60 during the first workweek. The FLSA requires that employee to earn at least $7.25 per hour, totaling $290 for 40 hours per week. An employer must reimburse expenses in the first workweek only to the extent they exceed $145.60 (that is, $435.60 minus $290). Thus, if a U.S. worker spent $180 to travel from New York to Nevada, the employer would reimburse that worker for $34.40 during the first workweek (that is, $180 minus $145.60). In contrast, an employer would have no FLSA reimbursement obligations for one-way travel from Atlanta, Miami, Philadelphia, or Raleigh to Reno, which costs about $130 by bus. *See Tickets* (last visited May 6, 2014), http://www.greyhound.com. Any reimbursement obligation at the 50 percent mark of the contract is not at issue.

[15] Petitioner relies on statistics from 2010, but more recent data reveal a significantly changed landscape. *See* DOL, *Annual Report*, App. A (2012), http://www.foreignlaborcert.doleta.gov/pdf/OFLC-2012_Annual_Report-11-29-2013-Final%20Clean.pdf.

C. This Case Is a Poor Vehicle for Addressing Employers' FLSA Obligations for Inbound Expenses.

This Court's review is unwarranted because any decision would not be outcome determinative.

1. Regardless of whether the FLSA entitles respondents to obtain reimbursement for the expenses at issue during the first workweek, they still have pending state contract claims for those expenses. Respondents' work contracts required petitioner to reimburse their transportation and subsistence expenses according to federal law. ETA Form 9142A.[16] At the time those contracts were executed, federal law included DOL's 2009 and 2010 issuances requiring reimbursement under the FLSA. Thus, even if this Court invalidated those issuances, respondents could still claim that the best reading of their contracts is that they required reimbursement according to what DOL said the law was at that time.

2. This interlocutory appeal also lacks the factual development required for this Court's thorough consideration of the first question presented. For example, petitioner's assertion (Pet. 30-31) that early reimbursement would be burdensome due to farmers' credit constraints has yet to be tested in the adversarial process. Moreover, it is unclear how much of petitioner's liability in this case overlaps with its DOL settlement for $2.3 million for H-2A violations, which included back pay for inbound subsistence costs

---

[16] The contracts here follow a DOL template available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix.pdf. The particular contracts in this case are not yet part of the record, but they include this language.

and wages paid below the adverse effect wage rate. DOL News Release 12-1352-SAN (July 10, 2012).[17] To the extent that settlement overlaps with respondents' FLSA claim, any ruling by this Court would not affect recovery.

D. The Court of Appeals Correctly Determined that Neither the FLSA nor DOL's Regulations Precluded DOL's Interpretation.

The best interpretation of the FLSA and its implementing regulations – or at least a permissible one – is that inbound expenses must be reimbursed by the end of the first workweek.

1. The FLSA requires employers to pay the minimum wage, subject to deductions only for "board, lodging, or other facilities" that employers customarily give employees. 29 U.S.C. § 203(m) (2011). DOL has interpreted that provision to forbid employers from counting "facilities" in minimum wage compensation if they are "primarily for the benefit" of employers. 29 C.F.R. § 531.3(d)(1). Travel expenses primarily benefit the employer where they are "an incident of and necessary to" employment. *Id.* § 531.32(c).

The inbound travel expenses at issue are "an incident of and necessary to" employment. An "incident" means a "dependent, subordinate, or consequential part (of something else)." Black's Law Dictionary 830 (9th ed. 2009). As the Eleventh Circuit recognized, "[t]ransportation charges are an inevitable and inescapable consequence of" hiring H-2A

---

[17] http://www.dol.gov/opa/media/press/whd/WHD20121352.htm.

employees. *Arriaga*, 305 F.3d at 1242. Indeed, the H-2A program exists solely to enable U.S. employers to lawfully hire foreign workers. H-2A workers will *necessarily* travel long distances to worksites.

Similarly, immigration expenses primarily benefit employers because employers cannot otherwise legally hire foreign workers. Indeed, petitioner itself recognizes how deeply it benefits from H-2A labor, describing it as "a critical lifeline" without which "crops will literally wither in the field." Pet. 28-29. "When an employer decides to utilize the H-2A program," visa costs "are certain to arise, and it is therefore incumbent upon the employer to pay them." *Arriaga*, 305 F.3d at 1244. Furthermore, H-2A visas are restricted to a single employer for a specific time period, thereby conferring no benefit to employees outside the specific employment agreement.

2. None of petitioner's counterarguments has merit. First, petitioner suggests that use of the past tense in the FLSA and DOL's regulations means employers must reimburse expenses only when incurred after employment begins. Pet. 20. But the past tense in the FLSA indicates only that employees are *paid* after starting work, not that pre-employment expenses do not factor into minimum wage, *see* 29 U.S.C. § 203(m). Similarly, the regulations' prohibition against kicking back wages "delivered to the employee" refers to when employees are paid, not when expenses occur, *see* 29 C.F.R. § 531.35. If the law were otherwise, employers could evade minimum wage laws by having workers buy required items, such as specialized protective clothing, the day *before* starting work rather than the day *after*. That would make no sense.

Second, petitioner argues that inbound expenses are "highly analogous" to various items that DOL considers not for the employer's benefit, such as "employer-provided transportation" for commuting or "relocation expenses." Pet. 21-22. Not so.

For transportation expenses, petitioner ignores DOL's specific guidance on this very point. Those regulations, as noted above, provide that travel expenses primarily benefit the employer where they are "an incident of and necessary to" employment. 29 C.F.R. § 531.32(c). The proper analysis is thus not a facile comparison between H-2A transportation expenses and everyday commuting or relocation costs. Rather, the relevant inquiry is whether such travel *by H-2A workers* is "incident of and necessary to" their employment. H-2A workers necessarily travel long distances solely for that employment and, unlike even domestic workers, are prohibited from remaining in the employer's locale after their employment ends.

For immigration expenses, the examples petitioner cites do not compel the conclusion that such expenses primarily benefit employees. Rather, they merely show that DOL considers everyday costs to be different from expenses necessary to perform a particular job, *see* 29 C.F.R. § 531.32(c) (stating "[s]afety caps" or required "uniforms," which are purchased to perform a particular job, primarily benefit the employer). Because an H-2A visa ties the worker to a single U.S. employer, inbound immigration expenses are inherent to that job.

Third, petitioner contends that requiring reimbursement during the first workweek renders the 50 percent rule superfluous. Pet. 22. But, as the court

of appeals recognized, this is not so "because an employee paid more than the minimum wage would receive some reimbursement in the first week and some reimbursement later." Pet. App. 7a n.2. Since all H-2A employees receive the adverse effect wage rate, which is higher than the federal minimum in every state, *see supra* n.1, employers need only partially reimburse employees in the first workweek.[18]

II. This Case Lacks Any Certworthy Question Relating to the Deference Due to DOL's 2010 Issuance.

Petitioner argues that even if the court of appeals correctly held that "primary benefit" is ambiguous, it still should not have deferred to DOL's 2010 issuance (which also incorporated by reference DOL's 2009 Bulletin) definitively stating that the expenses at issue primarily benefit employers. Pet. 23-28. Neither of petitioner's contentions in this respect warrants review.

A. Well-Settled Principles of *Auer* Deference Support the Court of Appeals' Decision.

1. This Court has provided clear rules for when courts should defer to agencies. Courts generally should defer to an agency's interpretation of its own ambiguous regulations. *Auer v. Robbins*, 519 U.S. 452,

---

[18] For example, an H-2A employee in Nevada will earn $435.60 during the first workweek, which is above the FLSA minimum of $290. If the employee incurred $400 of travel and immigration expenses, the employer would only reimburse $254.40 in the first workweek ($435.60 minus $400 is $35.60, or $254.40 below the FLSA minimum). The employer would then reimburse the balance at the 50 percent point of the contract. *See* 20 C.F.R. § 655.122(h)(1).

461 (1997). And this Court has unanimously held that a "change in interpretation alone presents no separate ground for disregarding [an agency's] present interpretation." *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 171 (2007). Deference is inappropriate, by contrast, if an interpretation is "plainly erroneous or inconsistent with the regulation[,]" is a "*post hoc* rationalization[,]" or "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 461-62. Similarly, deference is inappropriate if changing agency pronouncements cause "unfair surprise" for regulated entities. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

The court of appeals faithfully applied this Court's guidance from *Auer*, *Long Island Care*, and *Christopher*. *See* Pet. App. 9a-11a. As Judge O'Scannlain reasoned, "[a]lthough the DOL briefly changed its interpretation at one point in 2008, there is *no indication that the change caused any unfair surprise* for Peri & Sons. Therefore, we defer to the DOL's interpretation." *Id.* 11a (emphasis added). Indeed, DOL's withdrawal notice "expressly stated that the 2008 'interpretation may not be relied upon as a statement of agency policy.'" *Id.* 11a n.4. The court further concluded "[t]here is no reason to think that the DOL's determination was not a product of its considered judgment." *Id.* 11a.[19]

---

[19] Although, as with the first question presented, petitioner makes a couple passing grumbles in its *Auer* argument that the court of appeals' holding might create retroactive liability, Pet. 23, 27, petitioner never advanced any retroactivity argument below and does not squarely present any such argument to this Court. As a result, any such argument has been waived. At any rate,

2. Contrary to petitioner's assertion (Pet. 25), there is no conflict among courts over when to accord *Auer* deference to "an agency's current interpretation . . . if it contradicts prior interpretations."

Following this Court's precedents, all the cases petitioner cites (Pet. 25-26) treat inconsistency as *one* factor to consider when determining whether to grant *Auer* deference. Those courts withholding *Auer* deference did so *in part* because of inconsistent agency interpretations.[20] Likewise, those granting *Auer* deference also did so *in part* because of consistent agency interpretations.[21]

---

any such argument – even if available on the facts here, *but see supra* at 9 n.9 – would have extremely limited importance, because FLSA claims have a two-year statute of limitations generally and a three-year statute of limitations for willful violations. Thus, for any FLSA suits going forward, the relevant conduct would have occurred *after* the 2010 final rule clearly delineated employer obligations.

[20] *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1137-40 (10th Cir. 2013) (withholding *Auer* deference, based on lack of ambiguity, repeatedly inconsistent interpretations, inadequate notice, and unfair surprise); *Mining Energy, Inc. v. Dir., Office of Workers' Comp. Programs*, 391 F.3d 571, 574 n.1 (4th Cir. 2004) (withholding *Auer* deference from an interpretation that was plainly erroneous and followed a contradictory interpretation during the same litigation).

[21] *See Sw. Pharmacy Solutions, Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 718 F.3d 436, 442-43 (5th Cir. 2013) (granting *Auer* deference because there were no inconsistent interpretations, evidence of post hoc rationalization, imposition of liability, or unfair surprise); *Union Carbide Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 697 F.3d 104, 109 (2d Cir. 2012) (granting *Auer* deference to an interpretation that was not plainly erroneous or inconsistent with the regulations, did not conflict with prior interpretations, and was not a post hoc

Ninth Circuit case law is no different. In this case and others, the Ninth Circuit has granted *Auer* deference notwithstanding a lack of perfect consistency *only* when doing so does not create unfair surprise and the interpretation reflects fair and considered judgment. Pet. App. 11a; *see Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 829 n.4 (9th Cir. 2012) (en banc) (noting "conflicts between the agency's current and previous interpretations" can indicate inadequate consideration that would render *Auer* deference inappropriate). By contrast, the Ninth Circuit withholds *Auer* deference when the agency's interpretation "is inconsistent with its prior interpretation, and there is a significant potential for unfair surprise." *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (applying *Christopher*, 132 S. Ct. 2156).

B. There Is No Reason Here to Reconsider *Auer* Itself.

Finally, petitioner suggests that this Court use this case to revisit *Auer* itself. Pet. 28. This Court,

---

rationalization); *Clason v. Johanns*, 438 F.3d 868, 871 (8th Cir. 2006) (granting *Auer* deference to an interpretation that was not plainly erroneous or inconsistent with prior interpretations). The other cases petitioner cites are even further afield from the relevant issue. *See Gose v. U.S. Postal Serv.*, 451 F.3d 831, 839-40 (Fed. Cir. 2006) (rejecting a post hoc and plainly erroneous agency interpretation of its regulation, without evidence of inconsistency); *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (remanding the case to secure a definite interpretation from DOL and not deciding the question of deference, because DOL's multiple positions in the same litigation reflected poorly reasoned judgment).

however, recently declined to take that step, *see Mich. Dep't of Cmty. Health v. Sec'y of Human Servs.*, 496 Fed. Appx. 526 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1581 (2013) (No. 12-589), and there is even less reason to do so here.

1. This case would be a poor vehicle for revisiting *Auer* because it is unnecessary to reach the question whether *Auer* deference applies to the preamble to DOL's 2010 final rule. This is so for two independent reasons.

First, as the Eleventh Circuit and numerous district courts have held, the best reading of the FLSA and its implementing regulations (none of which petitioner challenges) is that the expenses at issue primarily benefit employers. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1241-44 (11th Cir. 2002); *Perez-Benites v. Candy Brand, LLC*, 2011 WL 1978414, *13-*15 (W.D. Ark. 2011); *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954, 963-64 (E.D. Ark. 2006); *DeLuna-Guerrero v. N.C. Grower's Ass'n, Inc.*, 338 F. Supp. 2d 649, 661-62 (E.D.N.C. 2004); *see also Salazar-Martinez v. Fowler Bros., Inc.*, 781 F. Supp. 2d 183, 195-96 (W.D.N.Y. 2011) (deferring to recent DOL issuances but also deeming *Arriaga*'s analysis of the regulations "persuasive"); *supra* at 15-18 (analyzing the relevant statutory and regulatory language).

Where this Court finds that the agency's interpretation is one it would "adopt even if . . . [it] were interpreting the [provision at issue] from scratch . . . there is no occasion to defer and no point in asking what kind of deference, or how much." *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002);

see also Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation [of its regulations] is the fairest reading [of them.]").

Second, the language in the preamble to the 2010 final rule is sufficiently formal that it likely qualifies for deference also under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[22] Agency interpretations receive *Chevron* deference if (1) Congress delegated authority to an agency to make rules carrying the force of law, and (2) the agency promulgated rules pursuant to that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Therefore, at least one court of appeals has accorded *Chevron* deference to language in an explanatory introduction to a final rule where, as here, the agency received commentary on the relevant issue. *See Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1337 (Fed. Cir. 2008). Other courts likewise have held that similar agency statements published in the Federal

---

[22] The parties in the court of appeals did not address, and the court of appeals did not consider, whether the 2010 preamble is entitled to *Chevron* instead of *Auer* deference, because the court was bound by *Auer* and that was enough to reach the outcome it did. But if this Court were to grant certiorari to consider whether to overrule *Auer*, the question whether *Chevron* or *Auer* applies will obviously become important for the first time, and respondents will be entitled to defend the outcome below on the purely legal ground that *Chevron* applies. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (noting a party may defend judgment on a basis not relied upon below). At any rate, there is no doubt that the issue of what deference applies is fairly included within the second question presented, which asks merely "[w]hether deference is owed to DOL's interpretation of the FLSA and its regulations." Pet. i.

Register, but not codified in the Code of Federal Regulations, also receive *Chevron* deference.[23]

DOL's interpretation, appearing in the Federal Register, satisfies both *Mead* prongs. Contrary to petitioner's assertion (Pet. 27), DOL's relevant language in the preamble followed notice and comment, including "a large number of comment[s]" from employers and employee advocates concerning whether inbound expenses primarily benefit the employer. 75 Fed. Reg. 6884, 6914-15 (Feb. 12, 2010); *see also id.* at 6884 (noting DOL "received almost 7,000 comments on the proposed rule"). After considering those comments, DOL promulgated definitive language, interpreting employers' FLSA obligations, on this precise legal issue. *Id.* at 6915-16.

2. Even if this Court were to reach the issue whether to afford *Auer* deference to the 2010 preamble, this case still would be unsuitable for revisiting *Auer* because it does not present the kind of agency action typically associated with such deference. This Court's recent *Auer* cases have arisen in the context of agency interpretations first announced in *amicus* briefs. *See,*

---

[23] *See, e.g.*, *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007) ("Although publication in the federal register is not in itself sufficient to constitute an agency's intent that its pronouncement have the force of law, *see Christensen* [*v. Harris Cnty.*, 529 U.S. 576, 587 (2000)], where, as here, that publication reflects a deliberating agency's self-binding choice, as well as a declaration of policy, it is further evidence of a *Chevron*-worthy interpretation. As such, given the formal decision making process involved, *Chevron* applies."); *Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 399 (4th Cir. 2006) (agency's policy statement in Federal Register that was not codified in Code of Federal Regulations was "an equally binding" agency pronouncement).

e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013); *Talk Am.*, 131 S. Ct. at 2260-61; *Auer*, 519 U.S. at 461. Deference in these situations has drawn criticism because of the lack of any formalities in the agency's decision making processes – particularly when agencies have announced an interpretation after courts "rebuked" that view as not being the better reading of the regulation at issue. *See Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

In contrast, this case concerns a clarification of regulations that DOL issued after notice and comment. Even if that formality does not entitle the 2010 preamble to *Chevron* deference, it counsels against using this case as a vehicle to revisit *Auer*. DOL has definitively bound itself to a position on the relevant legal issue, so it cannot respond to future litigation with ad hoc interpretations. In addition, the democratic notice-and-comment process has created a record of the agency's consideration. Finally, unlike in *Talk America*, no judicial rebuke occurred here. To the contrary, every court to address the issue before the 2010 issuance had held that the best reading of the H-2A regulations was that the employee's inbound expenses primarily benefit the employer. *See supra* at 22.

3. At any rate, *stare decisis* weighs heavily against disturbing well-established precedent. This is particularly so where the precedent at issue has a deep pedigree, *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011), and has not grown at all "irreconcilable with competing legal doctrines," *Neal v. United States*, 516 U.S. 284, 295 (1996).

Such is the case here. This Court, for seven decades, has consistently deferred to legitimate agency interpretations of regulations. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). This Court's unanimous decision in *Auer* merely reaffirmed that approach as a bedrock principle of administrative law. Furthermore, this Court has since built upon *Auer* and made it a central tool of regulatory interpretation. *See, e.g.*, *Long Island Care at Home*, 551 U.S. 158; *Christopher*, 132 S. Ct. 2156.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Matthew J. Piers
José Jorge Behar
Counsel of Record
Christopher J. Wilmes
Caryn C. Lederer
HUGHES SOCOL PIERS
RESNICK & DYM, LTD.
70 W. Madison Street
Suite 4000
Chicago, IL 60602
(312) 580-0100
jbehar@hsplegal.com

APPENDIX A

20 C.F.R. § 655.122 Contents of Job Offers

(a) Prohibition against preferential treatment of aliens. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) Job qualifications and requirements. Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) Minimum benefits, wages, and working conditions. Every job order accompanying an Application for Temporary Employment Certification must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) Housing.

(1) Obligation to provide housing. The employer must provide housing at no cost to the H-2A workers and

those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) Employer-provided housing. Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) Rental and/or public accommodations. Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) Standards for range housing. Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged

in the range production of livestock must meet guidelines issued by OFLC.

(3) Deposit charges. Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) Charges for public housing. If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) Family housing. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) Certified housing that becomes unavailable. If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing

standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending Application for Temporary Employment Certification or revocation of the temporary labor certification granted under this subpart.

(e) Workers' compensation.

(1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) Employer-provided items. The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) Meals. The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(h) Transportation; daily subsistence.

(1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the

worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages.

(2) Transportation from place of employment. If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) of this subpart with respect to the referrals made after the employer's date of need.

(3) Transportation between living quarters and worksite. The employer must provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker.

(4) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and they must have property damage insurance.

(i) Three-fourths guarantee.

(1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to

reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks x 48 hours/week = 480 hours x 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks x 48 hours/week = 480 hours - 8 hours (Federal holiday) x 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all

hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) Guarantee for piece rate paid worker. If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) Failure to work. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) Displaced H-2A worker. The employer is not liable for payment of the three-fourths guarantee to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with the 50 percent rule described in § 655.135(d) with respect to referrals made during that period.

(5) Obligation to provide housing and meals. Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) Earnings records.

(1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) Hours and earnings statements. The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address and FEIN.

(l) Rates of pay. If the worker is paid by the hour, the employer must pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing hourly wage or piece rate, the legal Federal or State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would

have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for H-2A temporary labor certification after 1977, such standards must be no more than those normally required (at the time of the first Application for Temporary Employment Certification) by other employers for the activity in the area of intended employment.

(m) Frequency of pay. The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) Abandonment of employment or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and

DHS in the case of an H-2A worker, in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the Federal Register not later than 2 working days after such abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. Abandonment will be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(o) Contract impossibility. If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the

employer, or transport the worker to the worker's next certified H-2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) Deductions.

(1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and

therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(q) Disclosure of work contract. The employer must provide to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H-2A worker going from an H-2A employer to a subsequent H-2A employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2A employer. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract.

APPENDIX B

RULES and REGULATIONS

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 501

RIN 1205-AB55

Temporary Agricultural Employment of H-2A Aliens in the United States

Friday, February 12, 2010

AGENCY: Employment and Training Administration, and Wage and Hour Division, Labor.

[6884] ACTION: Final rule.

SUMMARY: The Department of Labor (the Department or DOL) is amending its regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The Department is also amending the regulations at 29 CFR part 501 to provide for enhanced enforcement under the H-2A program requirements so that workers are appropriately protected when employers fail to meet their obligations under the H-2A program.

DATES: This Final Rule is effective March 15, 2010.

FOR FURTHER INFORMATION CONTACT: For further information on 20 CFR part 655, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

For further information on 29 CFR part 501 contact James Kessler, Farm Labor Branch Chief, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655 Subpart B

* * *

II. Discussion of Comments Received

The Department has addressed those areas in which it received comments. With regard to specific provisions on which the Department did not receive comments, it has retained the provisions as proposed, except where clarifying edits have been made, which have been explained below.

A. Section 655.103 Overview of This Subpart and Definition of Terms

* * *

7. Section 655.122 Contents of Job Offers

* * *

h. Transportation; Daily Subsistence

The NPRM proposed to require an employer to pay the worker for the reasonable costs incurred for transportation and subsistence from the place from which the worker has come to the place of employment if the worker completes 50 percent of the work contract period and the employer has not previously advanced or provided transportation to the place of employment and subsistence costs. If it is the prevailing practice of non-H-2A agricultural employers to advance such costs, or if the employer extends such benefits to similarly situated H-2A workers, the employer must advance or provide such costs to workers in corresponding employment who are traveling to the worksite. The transportation reimbursement must be no less than the most economical and reasonable common carrier transportation charges, and the daily subsistence payment must be at least what the employer would charge the worker for providing three meals a day (if applicable), but no less than the amount permitted under § 655.173(a). The NPRM, thus, proposed to return to the language of the 1987 Rule that the transportation reimbursement be for the cost from the place from which the worker has departed. The NPRM also proposed to remind employers that the FLSA applies independently of the H-2A requirements.

Section 655.122(h)(2) of the NPRM proposed to require employers to provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the work contract period or is terminated without cause (deleting the 2008 Final Rule's definition of the U.S. consulate or port of entry as the place from which the worker departed). Consistent with the 1987 Rule, the NPRM proposed that if the worker has subsequent H-2A employment, the current employer must pay for transportation to that worksite unless the subsequent employer has agreed in the work contract to pay for transportation and daily subsistence. The NPRM added that an employer is not relieved of its obligation if an H-2A worker is displaced as a result of the employer's compliance with the requirement to hire U.S. workers who are referred within the first 50 percent of the contract period.

Section 655.122(h)(3) of the NPRM proposed to continue to require employers to provide transportation between the workers' employer-provided housing and the employer's worksite at no cost to the workers.

Finally, § 655.122(h)(4) of the NPRM also proposed to require that all employer-provided transportation comply with all applicable laws and provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128. The NPRM thus proposed to extend the 2008 Final Rule's similar requirements, which were applicable only to transportation between

the living quarters and the worksite, because such safety requirements already exist elsewhere in other Federal, State or local transportation laws.

The Final Rule adopts § 655.122(h) of the NPRM as proposed, with a technical correction to an internal cross reference.

The vast majority of the comments pertained to § 655.122(h)(1). Numerous employers and their representatives objected to the proposed change regarding the requirement to pay for transportation from the place from which the worker has come, rather than transportation from the consulate or port of entry. They stated that it makes more sense to pay for transportation from the consulate, because that allows an employer to know in advance or to estimate more precisely what its costs will be. Some commenters expressed concern about how an employer will know with certainty where a worker's home is and how much the transportation from there to the consulate costs, and they wondered whether they would be liable for whatever an employee claims his travel costs were. Others stated that their first contact with the worker is at the consulate, where the workers must go through government screening to ensure that they meet the requirements for entry into the U.S., and that there is not an employer-employee relationship until an H-2A visa is issued at the consular office because that establishes the worker's entitlement to enter the country. Several other employer representatives emphasized that their disagreement was not with the proposed regulation, but with the NPRM's inconsistent preamble language, which described the requirement as to pay for the cost to and from the worker's home. These commenters gave an

example of an employee whose home is in Hawaii, but who was recruited in New Haven, CT by the Connecticut SWA, and they emphasized that it would be unreasonable to require a Connecticut employer to return the worker to Hawaii. These commenters noted that historically the requirement was to pay for transportation to and from the point of recruitment, which may or may not be the worker's home. They suggested that the Final Rule should eliminate the inconsistency by clarifying that the requirement is the same as it was in the 1987 Rule, which would eliminate the confusion caused by the preamble and bring the costs within the control of the eventual employer. Finally, as discussed in much more detail with regard to § 655.122(p), a number of employers encouraged the Department to follow the FLSA interpretation that had been set forth in the preamble to the 2008 Final Rule, which repudiated the decision in *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). [6912] These commenters objected to any requirement to reimburse an employee's transportation costs in the first workweek, rather than when the worker has completed 50 percent of the work contract period. They emphasized that the employee benefits from getting a job in the U.S., and so the employer should not be viewed as the primary beneficiary of the transportation.

In contrast, employee representatives approved of the proposed change back to the requirements of the 1987 Rule. Employee commenters noted that employees have suffered economically from the reduced reimbursement only for costs from the consulate and, therefore, welcomed the return to the prior rule. They also stated that U.S. workers will no

longer be at a competitive disadvantage regarding this benefit. Other employee representatives stated that the reinstatement of the former requirement is appropriate because the transportation costs impose an undue burden on workers when the expense benefits employers, and they emphasized that employers should be required to bear the full cost of their decision to import foreign workers in order to ensure that they do not prefer H-2A workers over U.S. workers. One employee advocate specifically emphasized that it is important to make clear that the FLSA applies independently of the H-2A requirements with regard to transportation.

The Final Rule adopts § 655.122(h)(1) as proposed. The Department believes that it is appropriate to return to the language of the 1987 Rule requiring employers to reimburse employees for their inbound transportation from the place from which the worker has come to work for the employer. The Department did not intend for the inartful language in the preamble to the NPRM, referring to the worker's home, to indicate a different standard that would be problematic for employers to implement. The Department believes that employers will not have difficulty returning to the standard that they used for more than 20 years. As a number of employer representatives acknowledged, whether with regard to workers in the U.S. or workers recruited in a foreign country, employers will know where they recruited the workers and, thus, can predict and control their ultimate transportation costs. Finally, with regard to the reference to the FLSA, an issue discussed in detail with regard to § 655.122(p), the Department believes that it is important to remind employers of their

obligations under other statutes to enable them to ensure that they are in compliance with all applicable laws.

In addition, a few employers or their representatives commented on the proposal to incorporate the standards used under the MSPA governing vehicle safety, licensure and insurance requirements for all employer-provided transportation, rather than just for transportation between the living quarters and the worksite (as did the 2008 Final Rule). They objected to this requirement, stating that it was inappropriate to apply MSPA standards to H-2A workers, who are statutorily excluded from MSPA. However, the transportation of H-2A workers is an essential part of the H-2A program. Transportation safety standards have been set for H-2A workers in the Department's regulations from the outset of the program, through the incorporation of existing standards. The 1987 Rule, for example, incorporated existing Federal, State, and local transportation laws and regulations. As noted in the preamble to the 2008 Final Rule, the Department does not seek to apply MSPA to H-2A workers and has no authority to do so. Rather, the regulation simply adopts these established safety standards under the Department's H-2A regulatory authority, in order to better assure the safety of H-2A workers.

Finally, one employee representative stated that the current subsistence allowance does not allow workers to purchase nutritionally adequate meals during their journey to the workplace or their return home. The commenter stated that the Department should determine an appropriate dollar figure, such as by surveying meal prices in the types of

establishments frequented by charter bus companies and readily available to passengers on common carriers or some other method, and then indexing the amount for inflation. The Department did not propose any changes to the subsistence amount or the methodology for setting it; therefore, it believes that it would be outside the scope of this rulemaking to adopt the suggested change. However, the Department notes that it does update the subsistence amount each year to account for inflation, based on the CPI.

* * *

p. Deductions

Section 655.122(p) of the NPRM proposed to require employers to make all deductions required by law and to specify all other deductions in the job offer. Further, it proposed that if an employer paid the employee's transportation and daily subsistence expenses to the place of employment, the employer could deduct those expenses from the worker's paycheck, but the job offer had to state that the worker would be reimbursed the full amount of the deduction upon the worker's completion of 50 percent of the work contract period. Additionally, an employer subject to the FLSA may not make deductions that would violate the FLSA. The Final Rule generally adopts the rule as proposed, with a new paragraph to more fully describe what is meant by the term reasonable.

A large number of commenters addressed this provision. Numerous employee advocates emphasized that farm workers' wages have been reduced by inappropriate wage deductions. Some employee advocates and [6915] Congressional representatives suggested that the Department should do more to

protect employees' wages from deductions for employer business expenses, and to ensure that workers receive the full required wage rate, by forbidding all deductions not required by law. Other employee advocates stated that the regulation should clearly delineate which deductions are permissible and which are not, rather than just requiring that deductions be reasonable. Some also suggested that the Department should strengthen the regulation by adding language incorporating the free and clear principle found in the FLSA and Service Contract Act regulations, thereby prohibiting any deductions or de facto deductions for expenses that primarily benefit the employer if the deductions would bring the employees' wages below the required wage. These commenters noted that the higher wage rates guaranteed by the requirements of the H-2A program can be subverted by unreasonable or unauthorized deductions, just as the FLSA minimum wage can be subverted. One farm worker advocacy organization specifically emphasized that H-2A workers are among the poorest and most vulnerable workers and should not be required to wait until they have completed 50 percent of the contract period to be reimbursed for their transportation and transit meal expenses. Others stated that the regulations should expressly forbid employers from recouping these expenses in any later workweek.

In contrast, numerous employers and their representatives stated that the requirement to reimburse employees for their inbound transportation and subsistence at the 50 percent point is appropriate, asserting that these costs are not for the primary benefit of the employer. They commented that employers, therefore, should not be required to

reimburse these expenses in the first workweek under the FLSA. Specifically, several employer associations stated that the Department should return to the FLSA interpretation set forth in the preamble to the 2008 Final Rule, repudiate the decision in *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002), and conclude that transportation and subsistence are not for the primary benefit of the employer. Under that analysis, refusing to reimburse such costs would not be a de facto deduction from the first week's wages that could constitute a minimum wage violation under the FLSA. These commenters emphasized that employers should not have to reimburse such costs in the first workweek under the FLSA, since the H-2A regulations provide that they must be reimbursed after the employee completes 50 percent of the job period. They also commented that the balance struck by requiring reimbursement at the 50 percent point works well, because both parties have an investment in the employment. A few of these commenters predicted that the rate at which workers leave their H-2A employment and stay in the U.S. out of visa status will increase if the FLSA requires reimbursement in the first workweek. One employer representative stated that while there may be some concern that withholding reimbursement until the middle of the contract period may go to the other extreme, the Department's final policy choice should reflect the mutual benefits to both the employer and the employee.

The Department concludes that the Final Rule should mirror the proposed rule, with additional clarifying language. The Department believes that, in order to avoid confusion, it is important for this

regulation to continue to remind both employers and employees that, where an employer is covered by the FLSA, the requirements of that statute also will apply. As the WHD explained in Field Assistance Bulletin 2009-2 (Aug. 21, 2009), which addressed the application of the FLSA to employers utilizing the H-2B visa program, employers that are covered by more than one law must always determine their wage requirements under each applicable statute and then apply the highest requirement in order to satisfy all laws. *See Powell v. United States Cartridge Co.*, 399 U.S. 497, 519 (1950). That Bulletin noted that an employer may participate in the H-2B visa program only when it demonstrates both that there are not sufficient U.S. workers available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers who want to bring in H-2B guest-workers must first comply with numerous requirements related to the recruitment of U.S. workers in order to satisfy the Department that there are not sufficient U.S. workers available. Any foreign workers who ultimately are brought in under the program are permitted to work only on a temporary basis, with no possibility of the job becoming permanent no matter how well the employees perform or what skills they acquire. Moreover, the employees may work only for the employer who received the labor certification for the H-2B visa program. At the conclusion of the specified work period, the workers must leave the country and they are not permitted to seek subsequent work from another U.S. employer, unless that subsequent employer also is certified under the H-2B program. In that context, the WHD concluded in the Bulletin that,

under the FLSA, the transportation expenses and visa fees of H-2B employees are for the primary benefit of the H-2B employers.

As the Bulletin noted, the H-2A visa program is similar to the H-2B program, because it also provides for the temporary employment of nonimmigrants only when there are not sufficient U.S. workers available for the jobs and the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The H-2A program also involves special recruiting requirements directed at locating any available U.S. workers, and the H-2A workers who enter the country are similarly limited to temporary employment for the qualifying employer, and must leave the country at the end of the work contract period unless they go to another qualifying employer. Because of the similar statutory requirements and similar structure of the H-2A and H-2B programs, the same FLSA analysis applies to the H-2A program as was set forth in the Field Assistance Bulletin. Therefore, an H-2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage.

The Bulletin also noted that, under the FLSA, there is no legal difference between deducting a cost from a worker's wages and shifting a cost to the employee to bear directly. Thus, employers may not make deductions from employees' wages for employer expenses or require employees to pay for such costs out of pocket, if that would bring them below the

minimum wage, because the minimum wage is received only when wages are paid free and clear. The Department concludes that it is appropriate to continue to remind employers and employees in the H-2A regulations of the simultaneous applicability of the FLSA; otherwise, the H-2A requirement that an employer reimburse transportation only after the employee completes 50 percent of the contract period could result in confusion regarding the FLSA requirement to ensure payment of at [6916] least the minimum wage in the first workweek.