



UNITED STATES MISSION
TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

May 2, 2014

United Nations Office of the High Commissioner for
Human Rights (UNOHCHR)
Palais Wilson
1211, Geneva

OHCHR REGISTRY

- 5 MAI 2014

Recipients :.....S.P.O.....

To the attention of:

Maria Magdalena Sepulveda Carmona, Special Rapporteur on Extreme Poverty and Human Rights

Margaret Sekaggya, Special Rapporteur on the Situation of Human Rights Defenders

Francois Crepeau, Special Rapporteur on the Human Rights of Migrants

Thank you for your letter dated December 27, 2012. The United States fully supports the mandates of the Special Rapporteurs on the Human Rights of Migrants, the Situation of Human Rights Defenders, and Extreme Poverty and Human Rights.

Attached to this letter is our response to your inquiry concerning the human rights of migrant farmworkers. We appreciate the opportunity to respond to your inquiry.

Sincerely,

Peter Mulrean
Chargé d'Affaires *ad interim*

Enclosure
As Stated

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Recipients :.....

The Government of the United States welcomes the opportunity to respond to your letter of December 27, 2012, concerning alleged limitations on access to justice for migrant farmworkers, and raising questions regarding obligations to provide equal protection of the law, the right to seek and receive information, the right to an effective remedy for violations of obligations. In this regard, the United States has enacted a host of laws, rules, and regulations aimed at protecting the rights of its workers, including farmworkers, in the areas addressed in this questionnaire. Regulation and enforcement responsibilities relating to the employment of farmworkers belong to both state and federal-level agencies, including the U.S. Department of Labor (DOL), the U.S. Equal Employment Opportunity Commission (EEOC), and the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). We are pleased to provide additional information regarding the questions raised in your letter.

Question 1: Is the information alleged in the Special Rapporteur's summary accurate?

The United States cannot presently confirm the accuracy of all the information in the summary. We recognize that migrant workers are among the country's most vulnerable low-wage workers, and the federal government enforces a number of laws and regulations aimed at protecting the health, safety, and working conditions of migrant workers employed in the United States. These workers may be young, they may be temporary or seasonal, they may have temporary work visas, they may be undocumented immigrants, and they may have limited English language skills. These workers are susceptible to labor violations and disparate treatment yet may be reluctant to come forward with complaints for fear of job loss or retaliation.

Your letter describes how the Fair Labor Standards Act (FLSA) "does not apply to small farms and excludes farmworkers from overtime coverage and the guarantee of the federal minimum wage." While the FLSA does not define what a small farm is, the statute provides an exemption from the requirements of minimum wage and overtime for agricultural employees when their employer uses less than a certain amount of labor (500 man days) within a calendar quarter of the preceding calendar year. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) contains a similar exemption as the FLSA from the requirements of that statute for employers who use less than a certain amount of labor. The MSPA defines a migrant worker as any person who is employed in agriculture of a seasonal or other temporary nature and who is required to be away overnight from his/her permanent residence (but does not include those using the H-2A Nonimmigrant Visa for Agricultural Workers). Annually, employers must ensure this exemption still applies to their business, under both the FLSA and the MSPA.

The FLSA also provides an exemption from the overtime requirements of the statute for any person employed in agriculture, whether a migrant, seasonal or year-round worker. This exemption applies only to those employees performing agricultural work, as defined by the statute, and does not necessarily apply to all employees on a farm. The employer is still obligated to comply with other requirements of the FLSA with respect to those exempt employees. This includes maintaining certain records and complying with child labor provisions.

Your letter alleges that many farmworkers are not in a position to invoke their rights under the MSPA and the FLSA. Recognizing that migrant agricultural workers may not be likely to file

complaints with DOL's Wage and Hour Division (WHD) on their own and that these workers are often subject to workplace violations, WHD conducts directed investigations in the agricultural industry to assess employer compliance with these laws, even in the absence of a complaint by a worker, and employers who violate these laws may be sentenced to prison or be fined for violations of these laws. In addition, the MSPA and the FLSA provide workers with a private right of action to seek redress in federal court, and H-2A visa workers may also bring private contract actions under state law. Further, workers are entitled to anti-retaliation protections that prohibit employers from discharging or in any other manner discriminating against any employee who has filed a complaint or instituted a proceeding under the MSPA, the FLSA, or the H-2A program.

Question 2: What measures have been taken to ensure that the United States of America complies with its treaty obligations, outlined above, to ensure the rights of farmworkers, regardless of their immigration status, to equal protection of the law and to access legal and other services in full equality?

The needs and welfare of U.S. agriculture workers, including migrant farmworkers, are a priority for the Government of the United States. The measures that the United States has taken to comply with U.S. and international obligations are detailed below in sections 2a, 2b, and 2c. These measures and the enforcement efforts undertaken by the Department of Labor, the Equal Employment Opportunity Commission, and the Office of Special Counsel of the Department of Justice help ensure that the United States complies with its constitutional requirements, as well as articles 2, 19, and 26 of the International Covenant on Civil and Political Rights (ICCPR).

Question 2a: What legal and other measures have been taken to ensure that legal advocates and legal outreach personnel can visit migrant farmworkers in the camps and farms in which they reside without being harassed and or threatened?

There is no federal law providing physical access for advocates onto privately owned camps or farms. The laws governing this type of access are typically within each state's power to legislate. Accordingly, across the country there may be dozens of different laws relevant to whether advocates can access private property for the purpose of visiting farmworkers who work and reside on that property. However, the MSPA, the FLSA, Title VII of the Civil Rights Act, and the DOL regulations under the Immigration and Nationality Act's (INA) authorization for the H-2A program include anti-retaliation provisions that protect the workers when they assert their rights under these statutes. Both MSPA and the H-2A regulations prohibit a person from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against a worker covered under the statute because such worker has filed a complaint or instituted a proceeding or has testified in a proceeding under the applicable law. The H-2A regulations also specifically prohibit such forms of retaliation due to a worker's consulting with an attorney or legal assistance program. In addition, it is a violation under the FLSA for any person to discharge or in any other manner discriminate against an employee for filing a complaint, instituting a proceeding under the FLSA, or testifying in any such proceeding. Title VII's anti-retaliation provision prohibits any conduct that is reasonably likely to deter someone from pursuing their right to be free from employment discrimination; it covers any worker who has pursued their rights under the Act by filing a claim, participating in an

employment discrimination proceeding (such as by testifying in a lawsuit or responding to an investigator's questions), or complaining to their employer or other covered entity about workplace discrimination.

Similarly, the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the anti-discrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which protect U.S. citizens and certain work authorized immigrants from employment discrimination based upon citizenship or immigration status. OSC can investigate alleged citizenship status discrimination against migrant workers who are protected under certain section 1324b provisions, and national origin discrimination against migrant workers not covered by Title VII of the federal Civil Rights Act of 1964. With regard to national origin discrimination, employers with fewer than 15 workers are covered by the OSC-enforced INA, while employers with 15 or more are covered by the U.S. Equal Employment Opportunity Commission-enforced Title VII. The agencies cooperate when appropriate to ensure a forum for national origin claims regardless of the employer's size. Citizenship discrimination, in contrast to national origin discrimination, may involve, for example, a migrant worker who is "protected" under section 1324b(a)(1)(B) and alleges that the farm/employer prefers to hire a visa holder or unauthorized worker rather than a migrant worker. OSC has authority to investigate the allegations and, if discrimination is found, file a suit. OSC could also independently investigate a farm if there were reason to believe that the farm engaged in a pattern or practice of discriminating against protected migrant workers based on their citizenship status or national origin.

Question 2b: How are these measures enforced? Have there been any protection measures adopted to ensure that these human rights defenders can do their work in a conducive environment?

Given that advocates' access to private property is regulated at the state level, advocates are encouraged to work with both local law enforcement and federal agencies to protect migrant workers. For example, the DOL, EEOC, and OSC all have enforcement mandates that permit them to use a wider array of investigatory and legal tools than may be available to a private advocate. The mission of DOL's Wage and Hour Division (WHD) is to promote and achieve compliance with labor standards and to protect and enhance the welfare of the nation's workforce. Accordingly, the WHD enforces many U.S. regulations that provide protections for migrant and seasonal farmworkers workers. These protections are found in several different U.S. laws.

☐ Migrant workers covered by the Fair Labor Standards Act (FLSA) are afforded minimum wage, anti-retaliation, and child labor protections. Such workers may also be entitled to overtime pay depending on the type of work performed.

☐ Workers under the Immigration and Nationality Act's (INA's) H-2A visa program (for temporary, nonimmigrant agricultural workers) are entitled to protections including wage payments that are at least equal to the highest of the applicable Adverse Effect Wage Rate, the prevailing wage, the agreed-upon collective bargaining rate, or the federal or state statutory minimum wage; prohibitions on paying employer recruitment and certification expenses; timely

disclosure of working terms and conditions; payment of inbound transportation and subsistence after half the work contract is completed and outbound transportation and subsistence after half the work contract is completed, and daily transportation that meets federal and state safety standards; provision of free housing that meets federal and state safety and health standards; and a guaranteed offer to work or be paid for three-fourths of the work hours disclosed in the job contract. Migrant or seasonal farmworkers are also entitled to these protections when performing covered work for a certified H-2A employer during the period of the H-2A work contract.

□ The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) includes such protections as safe housing, safe transportation, requirements that all wages owed be paid when due, full and proper disclosure of the terms and conditions of employment, anti-retaliation, and that farm labor contractors be registered with DOL.

□ WHD also enforces the field sanitation standards, designated by the Occupational Safety and Health Administration, which require providing agricultural workers with accessible toilets, hand-washing facilities, and potable drinking water.

When violations are found, the agency uses all enforcement tools available to recover back wages for the affected workers and deter future violations from occurring. These include, where appropriate, assessing back wages, civil money penalties, and liquidated damages; debarment; litigation; and seeking to prevent interstate shipment of goods produced in violation of the minimum wage, overtime pay, child labor or special minimum wage provisions of the Fair Labor Standards Act (FLSA) (so-call “hot goods”). In addition to the enforcement measures employed by DOL, the U.S. Equal Employment Opportunity Commission (EEOC) is the lead federal agency charged with enforcing the U.S. laws prohibiting discrimination in employment on the bases of race, color, national origin, sex, religion, age, disability, and genetic information. These laws also prohibit retaliation against workers who complain about discrimination, participate in an employment discrimination proceeding, or who otherwise oppose discriminatory practices. Discrimination against farm workers, especially sexual harassment and retaliation against those who complain, started to gain the EEOC’s attention when worker rights groups met with EEOC staff during the late 1990s and detailed egregious sexual harassment, including rape, of women working in the agriculture industry. The EEOC frequently works collaboratively with worker rights groups in its enforcement and litigation efforts.

Workers may file charges alleging employment discrimination in any of the EEOC’s 53 offices around the country and may interact with the agency via a telephone system with access to interpretive services in over 100 languages. The EEOC investigates charges of discrimination regardless of immigration status; the EEOC does not collect information about immigration status or, if it is disclosed, share it with immigration enforcement officials. Additionally, farm worker rights groups or others may file charges with the EEOC “on behalf of” individual farm workers. The EEOC also may pursue investigations of employer practices on its own initiative when it receives information about potential violations of employment discrimination law.

After conducting an investigation, the EEOC may pursue conciliation, settlement, and, if these efforts fail, litigation to obtain civil damages for farm workers subjected to discrimination or harassment, including compensatory damages and injunctive relief. Money damages help to

compensate victims while providing strong economic incentives for companies to comply with the law. Injunctive relief is particularly important to effect changes in employer practices and to protect workers from future discrimination and harassment. Many of the EEOC's enforcement actions on behalf of farm workers are resolved through conciliations or settlements. These settlement agreements typically require agricultural employers to provide monetary relief for victims, to change their workplace policies, and to submit to outside monitoring over a period of years. The EEOC will often contract with an outside monitor to visit the company bi-annually and report her findings to the agency. Recent examples of EEOC enforcement actions involving farm workers include the following:

□ In March 2014, a federal judge held that farm labor contractor Global Horizons was liable for a pattern or practice of harassing, discriminating, and retaliating against hundreds of Thai workers brought to the United States to work on pineapple plantations and subjected to physical abuse, exploitation, and barbaric security measures. While the issue of damages remains open and the litigation is ongoing against Global Horizons, the EEOC settled its lawsuit against one of the farms that used Global Horizon's labor, Del Monte Fresh Produce, when the employer agreed to pay \$1.2 million to be distributed to the workers, and to enact extensive training and policy changes to safeguard the civil rights of its workers. Settlement discussions continue with several other farms that used Global Horizons to procure laborers.

□ In July 2012, the EEOC settled two lawsuits involving sexual harassment of female farm workers, against major tomato growers DiMare Ruskin in Florida, and one of the nation's largest table grape producers, Giumarra Vineyards in California. In both cases, the harassment allegations included repeated sexual advances, inappropriate sexual comments, groping, and the firing of women who either resisted the advances or helped the victims. Both settlements included mandatory training of workers and supervisors concerning EEOC-enforced sexual harassment law, as well as ongoing monitoring of the employers for a period of three years. Giumarra Vineyards additionally was required to create workplace policies for handling sexual harassment, distribute those policies in languages other than English, create a centralized system for complaints, and hire a human resources professional to effectively handle discrimination complaints. The settlements also included significant sums for those affected. In the DiMare Ruskin litigation, the EEOC was pleased to work cooperatively with the Coalition for Immokalee Workers.

The EEOC has filed numerous cases currently pending in courts around the country involving employment discrimination against farm workers. All of these cases grow from the EEOC's commitment to eliminating discrimination in the workplace and collaborating with farm worker advocacy groups to address this problem.

Further, OSC has actively utilized its enforcement mandate:

□ In 2010, OSC achieved a settlement on behalf of migrant farm workers in a citizenship status and national origin discrimination suit against Sernak Farms, in Pennsylvania. Workers received monetary relief payments.

□ In June 2012, based on a complaint received from a worker, the OSC filed a suit in an administrative tribunal to vindicate the rights of non-U.S.-citizen farm workers of a major U.S. egg producer that operates in more than 40 locations in six states. (*US v. Rose Acres Farms.*) The case is still being litigated.

The efforts of DOL, the EEOC, and OSC detailed above are examples of how the United States works to protect migrant farmworkers. Human rights defenders are encouraged to work with local law enforcement and the applicable government agencies to ensure that the government's enforcement apparatus is used to protect migrant farmworkers.

Question 2c: What legal and institutional measures have been taken to ensure that farmworkers have access to legal information with regard to their rights, given their specific situation?

The United States is committed to reaching out to agricultural workers and their representatives to inform them of their rights and the services available to them. We continually encourage them to contact us if they believe their rights have been violated.

To further strengthen channels of communication between DOL and the public, WHD has contracted with an interpreter telephone service line with a capacity of more than 170 languages available 365 days a year 24 hours a day via a toll-free telephone number. Additionally, WHD has identified the need to make in-person interpretation services available for special circumstances. WHD has initiated an interagency agreement with the National Language Service Corps, a U.S. government program with a corps of on-call language certified Americans, and is negotiating the final details for offering this service.

To achieve a more ongoing presence in communities with vulnerable workers, the agency has hired new Community Outreach and Resource Planning Specialists to work in several WHD District Offices. These officers establish and maintain lines of communication at the local level; they engage partners in dialogue about local industry practices and labor concerns; they provide training and resources to advocates and other stakeholders on wage and hour laws; and they provide District Offices with recommendations on how to better serve both workers and their communities. WHD has a printable work hours calendar in English and Spanish to track rate of pay, work start and stop times, and arrival and departure times. The calendar also includes easy-to-understand information about workers' rights and how to file a complaint with the agency regarding alleged wage and hour violations. These materials are available on the agency's website.

WHD has made significant investments in creating extensive guidance to assist employers in understanding and complying with the law, as well as providing migrant workers with clear and accurate information about their rights and protections. The agency has:

□ translated more than 200 publications into 16 different languages for dissemination through its website. These publications include labor law fact sheets, posters, Employee Rights Cards, youth employment guides, bookmarks, forms, and public service announcements.

□ released new fact sheets outlining the prohibitions against employee retaliation under federal law. These fact sheets provide general information concerning the FLSA's prohibition of retaliating against an employee who has filed a complaint or cooperated in an investigation; and the MSPA prohibition of discrimination against a migrant or seasonal agricultural worker who has filed a complaint or participated in any proceeding under or related to the Act. The fact sheets are available in English and Spanish on the WHD website.

□ released a series of educational "Know Your Rights" videos to inform workers of their rights and provide information on how to file a complaint with WHD. Know Your Rights DVDs have been and continue to be distributed to workers' rights centers, consulates, career centers, and other stakeholders, for use as educational and compliance assistance materials. The videos are also available in English and Spanish on the WHD website. Additionally, WHD makes frequent and varied outreach and education efforts to the Latino community as part of its commitment to increasing public awareness and compliance with federal wage and hour laws.

□ In FY 2012, WHD participated in 328 outreach events impacting Latino workers.

□ WHD also conducts public education campaigns aimed at connecting America's workforce, especially vulnerable and low-wage workers, with the broad array of services offered by the Department. Through the use of Spanish/English bilingual publications and public service announcements on local television and radio stations, and through the enforcement efforts of nearly 500 Spanish-speaking investigators, the campaign is reaching and assisting workers who are often reluctant to exercise their rights or file a complaint when subject to illegal treatment. Through such successful public education campaigns, WHD is empowering the nation's workforce and providing greater assistance to underserved communities.

□ In order to assist the Department in protecting the rights of migrant workers employed in the U.S. and to help communicate with workers whom it might not otherwise be able to reach, WHD has formal partnership agreements with the embassies of 11 countries and formal local partnerships between WHD district offices and 129 consulates of these 11 countries. DOL's 11 formal partnerships under the Consular Partnership Program (CPP) are with the embassies and their consular networks of: Belize, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru and the Philippines. The Department is working to expand these partnerships to include additional countries.

□ WHD participates in an annual event planned by the Mexican consular network called Labor Rights Week, during which all 50 Mexican consulates hold activities to educate Mexicans in the United States about their labor rights, including through presentations, workshops, and Q&A sessions. Since its launch in 2009, Labor Rights Week has drawn significant support from WHD in providing outreach and education to workers regarding their rights under federal labor laws. The theme of Labor Rights Week for 2012 was "Promover los derechos laborales es responsabilidad de todos" ("Promoting Labor Rights is Everyone's Responsibility"), and WHD participated in events sponsored by all 50 consulates throughout the country.

Like DOL, the EEOC has taken significant strides to ensure farmworkers have access to legal information. Recognizing that many immigrant workers may be reluctant to contact a

government agency when subjected to discrimination in the workplace, may not know how to pursue their rights, or may even be unaware of their rights to be free from harassment and other forms of discrimination, the EEOC has emphasized greater outreach to vulnerable and underserved communities, including immigrant farm workers. To help in these efforts, the EEOC has partnered with non-governmental organizations with experience providing services to the immigrant farm worker community. During 2012, the EEOC conducted 254 outreach efforts targeting farm worker communities that reached over 17,000 people. A few notable examples of outreach during 2012 include the following:

- In Mecca, CA, EEOC staff provided a Spanish-language presentation on EEOC's laws and enforcement for the Dia del Trabajador Migrante event hosted by California Rural Legal Assistance (CRLA), one of the largest annual events for farm workers in Southern California.

- In a joint effort with the Migrant Farm Workers Law Center of Indiana, bilingual EEOC staff visited labor camps in rural Indiana to provide information about EEOC-enforced laws and procedures.

- In connection with Lideres Campesinas, Poder Popular, and the Mixteco Indigenous Community Organizing Project (MICOP), EEOC Commissioner Constance Barker, EEOC's Los Angeles Regional Attorney Anna Park, and other EEOC staff met with farm workers in an agricultural area near Los Angeles and facilitated a discussion between women attendees and EEOC staff on sexual harassment that resulted in referral of a charge.

- EEOC staff conducted outreach and disseminated information in Spanish to approximately 300 farm workers in six work camps in Pennsylvania.

Finally, OSC maintains a toll-free worker hotline, with interpreters available, to receive calls from workers who have questions about their rights or complaints about employers. Farm workers, including migrant farm workers, may call this hotline. If a worker falls within the statute's protection, OSC may, if the worker requests, directly contact the employer to try to informally resolve a complaint for the worker.

Question 3: What enforcement measures are taken to ensure the current laws protecting farmworkers in the United States of America are effective in practice in protecting their rights?

The welfare of all workers is a priority for the United States and the methods used to protect workers are continually evolving. WHD has concentrated resources on strengthening compliance in low-wage industries, including industries like agriculture that commonly employ migrant workers and where labor violations are prevalent.

In recent years, the agency has taken many steps to strengthen the ways it responds to complaints. For instance, WHD has hired more than 300 new investigators since 2009, bringing the Division's total to more than 1,000. More than 600 of WHD's investigators speak at least one language other than English, including 500 who speak Spanish.

Additionally, in FY 2011 WHD opened 13 new offices and upgraded several others across the country and has created a contact center where workers may seek help or ask questions using a toll-free phone number. Regardless of where a complaint is made during a migrant worker's itinerary, WHD policies ensure that the District Office in the appropriate geographic region conducts the investigation. WHD also has the ability to assign investigators from other states to interview workers during different points of their itinerary.

Similarly, the EEOC's efforts reflect an evolving agency-wide strategy for protecting immigrant workers generally, and migrant farm workers in particular. In 1999, the EEOC publicly recognized the need for greater emphasis on the enforcement of employment rights for migrant farm workers, and it made assistance of low-wage workers, particularly immigrant workers, a national enforcement priority. Then Chairwoman Ida Castro, the first Latina Chair of the EEOC, explained that "[u]nauthorized workers are especially vulnerable to abuse and exploitation. It is imperative for employers to fully understand that discrimination against this class of employees will not be tolerated and that they will be responsible for appropriate remedies if they violate the civil rights laws."

In subsequent years, the EEOC continued to include discrimination against farm workers as a priority. In 2002, former EEOC Chair Cari M. Dominguez, in announcing the \$1.525 million *DeCoster* settlement for sexual harassment and retaliation, declared that "[p]rotecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC . . . to ensure that such harassment can never occur again." In 2006, the Commission took testimony from experts concerning immigrant workers and how the EEOC may better serve them. Today, General Counsel P. David Lopez leads an Immigrant Worker Team of EEOC staff charged with developing a comprehensive plan to address employment discrimination issues affecting workers of non-U.S. national origin, and Commissioner Constance Barker has focused her efforts as a member of the Commission specifically on the sexual harassment and abuse of female farm workers. Looking to the future, the EEOC's Strategic Plan for 2012-2016 includes an emphasis on "new immigrants who may be unfamiliar with the nation's equal employment laws."

Question 4: Has the government considered extending the federal rights and protection for migrant farmworkers with regard to their access to legal assistance and information?

The executive branch of the government, which includes DOL, the EEOC, and OSC, does not have the authority to extend rights or protections absent new legislation. Legislation of this nature would require action by the United States Congress.