

# Proposal: Protecting U.S. Agricultural Workers Utilizing Existing Legal Structures and Augments to the U.S. Farm Bill

*Alexia Kulwiec\**

## ABSTRACT

American leaders and citizens now recognize agricultural workers as “essential,” yet policy affords them few protections.<sup>1</sup> While workers and advocates have pushed for improvement in working conditions for farmworkers for decades, in the time of COVID-19 and beyond it is imperative to provide these workers the health protections and working conditions they deserve. Federal assistance to the agricultural industry, whether in the form of COVID-19 relief policies or in the next U.S. Farm Bill, must condition any receipt of benefits on the guarantee of safe working conditions. Dismal working conditions in agriculture can be traced to New Deal legislative compromises, which resulted in financial relief to agriculture and worker protections but specifically excluded protections for agricultural labor.<sup>2</sup> This Article argues that the increase in government support for agriculture, both in the U.S. Farm Bill and relief policies in response to COVID -19, provides the opportunity to include long needed protections for agricultural workers.

---

\* Alexia M. Kulwiec, J.D. and LLM, Food and Agriculture Law, Director and Associate Professor, UW-Madison, Department of Labor Education. The author wishes to thank attorney Tom Starck for his contributions and UW-Madison School of Law, J.D. Candidate Susan Kania assistance in legal research, writing and editing.

<sup>1</sup> See, e.g., Helena Bottemiller Evich & Liz Crampton, *Trump Deems Farmworkers ‘Essential’ but No Safety Rules for Them. That could Threaten the Food Supply*, POLITICO (May 12, 2020, 11:55 AM), <https://www.politico.com/news/2202/05/12/trump-farmworkers-essential-coronavirus-safety-250142> [https://perma.cc/923H-HZYW]; Miriam Jordan, *Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html> [https://perma.cc/W2NW-FJEB].

<sup>2</sup> Helena Bottemiller Evich, Ximena Bustillo, and Liz Crampton, *Harvest of Shame: Farmworkers face Coronavirus Disaster*, POLITICO (Sept. 8, 2020, 4:30 AM), <https://www.politico.com/news/2020/09/08/farmworkers-coronavirus-disaster-409339> [https://perma.cc/E4DV-NMLR]; see also *Updated ICE Statement on COVID-19*, U.S. IMMIG. AND CUSTOMS ENFT (Mar. 18, 2020), <https://www.ice.gov/news/releases/uupdate-ice-statement-covid-19> [https://perma.cc/LVP5-KPKB] [hereinafter *Updated ICE Statement on COVID-19*].

This Article argues for regulation of labor standards through creation of a new Title in the U.S. Farm Bill concerning agricultural labor. It then explains how in the alternative any government support to farms, whether through COVID-19 relief or regular existing Farm Bill programs, should condition financial support on the farm's provision of minimal protections for agricultural labor.

The Farm Bill already conditions receipt of certain program benefits on behavior designed to improve farming practices and should likewise condition receipt of benefits on producers providing minimal labor conditions. Conditioning receipt of benefits on meeting minimal labor standards is a practice utilized in other industries and should be in agriculture as well. These conditions should, at a minimum, include: provisions of personal protective equipment, compliance with federal and local labor laws, respect for collective bargaining, provisions of clean water, housing, food, and break times, as well as sufficient processes to address concerns in the field, such as physical abuse and sexual harassment. While such requirements will not address all agricultural labor concerns overnight, it will provide a healthy start.

#### I. PROPOSAL: PROTECTING U.S. AGRICULTURAL WORKERS UTILIZING EXISTING LEGAL STRUCTURES AND AUGMENTS TO THE U.S. FARM BILL.<sup>3</sup>

On April 17, 2020, the United States Secretary of Agriculture (“USDA”) Sonny Perdue announced the Coronavirus Food Assistance Program (“CFAP”), outlining actions intended to assist farmers and ranchers in response to the COVID-19 national emergency,<sup>4</sup> followed in September 2020 with the announcement of an additional \$14 billion in support for

---

<sup>3</sup> See generally MARGARET GRAY, LABOR AND THE LOCAVORE (2014) (exploring the conditions of hired labor on larger and smaller agricultural operations and the need to address issues on smaller and organic operations as a policy matter, although this Article will focus primarily on hired labor employed by the larger agricultural employers in the U.S. system, those with annual sales of greater than \$1,000,000).

<sup>4</sup> *USDA Announces Coronavirus Food Assistance Program*, U.S. DEP'T OF AGRIC. (Apr. 17, 2020), <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program> [https://perma.cc/62LT-YKEJ].

agricultural producers.<sup>5</sup> In the May 2020 program, USDA pledged direct payments to producers based on actual losses, to purchase food for disbursement to those in need, and to provide administrative assistance under the CARES Act and the Families First Coronavirus Relief Act (“FFCRA”).<sup>6</sup> On May 19, 2020, the USDA announced details of the CFAP direct assistance to farmers, including payment rates and details of the application process.<sup>7</sup> In September 2020, the USDA announced an additional \$14 billion to support agricultural producers, providing financial support to producers impacted by COVID-19 (“CFAP 2”).<sup>8</sup> With no mention of protection for farm employees, or mention of them as beneficiaries, the CFAP “Farmers to Families Food Box” program committed the USDA to purchasing food to distribute to “Americans in need,” including workers affected by COVID-19 business closures.<sup>9</sup> CFAP 2 similarly provides no support to U.S.

---

<sup>5</sup> *USDA to Provide Additional Direct Assistance to Farmers and Ranchers Impacted by the Coronavirus*, U.S. DEP’T OF AGRIC. (Sept. 18, 2020), <https://www.usda.gov/media/press-releases/2020/09/18/usda-provide-additional-direct-assistance-farmers-and-ranchers> [<https://perma.cc/JCY2-Z9F4>]; see generally *Coronavirus and USDA Assistance for Farmers*, U.S. DEP’T OF AGRIC., <https://www.farmers.gov/coronavirus> [<https://perma.cc/9DFE-9949>].

<sup>6</sup> Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as 15 U.S.C. § 9001) (providing certain direct payments to taxpayers, increased funding for unemployment benefits, relief to employer payroll taxes, small business relief, and increased funding to the USDA); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified as 29 U.S.C. § 2601) (providing paid sick leave and expanded family and medical leave to eligible employees, although neither relief Act provided benefits to undocumented agricultural workers).

<sup>7</sup> Notice of Funding Availability; Coronavirus Food Assistance Program (CFAP) Additional Commodities Request for Information, 85 Fed. Reg. 100 (proposed May 22, 2020) (to be codified at 7 C.F.R. pt. 9).

<sup>8</sup> *Coronavirus Food Assistance Program 2*, U.S. DEP’T OF AGRIC., <https://www.farmers.gov/cfap> [<https://perma.cc/TUJ8-VW3Y>] [hereinafter *Coronavirus Food Assistance Program 2*]; *Breaking Down CFAP 2.0*, AM. FARM BUREAU FED’N (Sept. 18, 2020), <https://www.fb.org/market-intel/breaking-down-cfap-2.0> [<https://perma.cc/M7JV-9TKJ>].

<sup>9</sup> *USDA Announces Details of Direct Assistance to Farmers Through the Coronavirus Food Assistance Program*, U.S. DEP’T OF AGRIC. (May 19, 2020), <https://www.usda.gov/media/press-releases/2020/05/19/usda-announces-details-direct-assistance-farmers-through> [<https://perma.cc/3JG8-MSRH>] (reading the CFAP closely exposes its failure to mention farmworkers, meaning farmworkers will not benefit from the food relief provided by the Act, since an ongoing farm business is not a “business closure”).

farmworkers.<sup>10</sup> Meanwhile, conservative estimates suggest that at least 6,700 farmworkers have tested positive for COVID-19.<sup>11</sup>

While the U.S. has recognized agricultural labor as “essential,” government authorities have said little about improving conditions.<sup>12</sup> One exception that occurred early during the COVID-19 pandemic was a statement from the U.S. Immigration and Customs Enforcement’s statement that because of COVID-19, it would temporarily focus deportation efforts only on those who pose a public safety or criminal threat.<sup>13</sup> While the Centers for Disease Control and U.S. Department of Labor made COVID-19 recommendations to agricultural producers, little more has been done.<sup>14</sup> Some growers have initiated their own measures intended to protect workers, but without any guidance from national standards or policy dictates.<sup>15</sup> Advocacy groups have also called for hazard pay and safeguards to protect these essential workers.<sup>16</sup> Yet to date, there has been no indication that the federal government will limit COVID-19 relief to agricultural producers providing safety, health, and other protections to the agricultural workforce. There has long been a need to address working conditions of U.S. agricultural labor. Now is the time to require that any relief to farmers address this need.<sup>17</sup>

<sup>10</sup> *Coronavirus Food Assistance Program 2*, *supra* note 8.

<sup>11</sup> Ximena Bustillo, *supra* note 2.

<sup>12</sup> Evich & Crampton, *supra* note 1; Jordan, *supra* note 1.

<sup>13</sup> *Updated ICE Statement on COVID-19*, *supra* note 2.

<sup>14</sup> *See generally Agriculture Workers & Employers*, CDC (last updated Nov. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html> [<https://perma.cc/UD97-GHAV>].

<sup>15</sup> Evich & Crampton *supra* note 1; Jordan, *supra* note 1; *see* Scott Faber et al., *Trump’s Farm Relief Won’t Protect Essential Farmworkers from COVID-19*, EWG (Apr. 23, 2020), <https://www.ewg.org/news-and-analysis/2020/04/trump-s-farm-relief-won-t-protect-essential-farmworkers-covid-19> [<https://perma.cc/M6DR-HRZ2>]; Daniel Costa & Phillip Martin, *Coronavirus and Farmworkers*, ECON. POL’Y INST. (Mar. 24, 2020), <https://www.epi.org/publication/corocoronav-and-farmworkers-h-2a/> [<https://perma.cc/Q4XR-VTD4>].

<sup>16</sup> *See* Faber et al., *supra* note 15; Daniel Costa & Phillip Martin, *Coronavirus and Farmworkers*, ECON. POL’Y INST. (Mar. 24, 2020), <https://www.epi.org/publication/corocoronav-and-farmworkers-h-2a/> [<https://perma.cc/Q4XR-VTD4>]; *see also* *What We Do: COVID-19*, FARMWORKER JUST., <https://www.farmworkerjustice.org/ccovi-19> (last viewed Nov. 9, 2020) [<https://perma.cc/8WX9-69A9>].

<sup>17</sup> *See generally* Dianne Gallagher & Pamela Kirkland, *Meat Processing Plants Across the US are Closing Due to the Pandemic. Will Consumers Feel the Impact?*, CNN BUS. (Apr. 27, 2020, 8:43 AM), <https://www.cnn.com/2020/04/26/busbusin/meat-processing-plants-coronavirus/index.html> [<https://perma.cc/9GYB-T2H5>]; *COVID-19 Shuts Down Half of Canada’s Beef Supply*, NAT’L FARMERS UNION (Apr. 22, 2020), <https://www.nfu.ca/covid->

Well before COVID-19, United States policy intentionally excluded agricultural workers from workers' protections. The origins of the modern Farm Bill, and its neglect of agricultural labor conditions, can be traced back to New Deal legislation passed in response to losses in the agricultural economy.<sup>18</sup> Congress created farm assistance because of poor growing conditions, increasingly low farm income, and decreased demand for American agricultural products following World War I.<sup>19</sup> New Deal legislation included a system of price supports, production controls, agricultural credit and crop insurance.<sup>20</sup>

In exchange for support for the agricultural industry, the (then) conservative and overtly racist southern Democrats agreed to New Deal reforms protecting labor, including the Fair Labor Standards Act and the National Labor Relations Act, but only with exemptions for agricultural and domestic workers.<sup>21</sup> Thus, from the very beginning, agricultural workers of color were deemed unworthy of decent protections and working conditions.

Today, U.S. farm policy supports the business of agriculture. Farms earning greater than 1 million dollars in sales receive much of the farm program benefits.<sup>22</sup> On May 19, 2020, the USDA announced a series of available payments to producers who experienced price declines, unexpected surpluses, and lack of market access caused by COVID-19, with an additional \$14 billion in assistance announced in September 2020.<sup>23</sup> Meanwhile, farm laborers continue to suffer from high rates of COVID-19

---

19-shuts-down-half-of-canadas-beef-supply/ [https://perma.cc/E6WY-XMNU] (bringing appropriate attention to the crowded and difficult working conditions in North American meat packing plants, many of which have been closed due to widespread transmission of the virus).

<sup>18</sup> See generally Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (1938); Soil Conservation and Domestic Allotment Act, ch. 104, 49 Stat. 1148 (1936); Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933).

<sup>19</sup> See SUSAN A. SCHNEIDER, *FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* (2d ed. 2016).

<sup>20</sup> See Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (1938); Soil Conservation and Domestic Allotment Act, ch. 104, 49 Stat. 1148 (1936); Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933).

<sup>21</sup> Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L. J. 95, 118 (2011).

<sup>22</sup> T. KIRK WHITE & ROBERT A. HOPPE, U.S. DEP'T OF AGRIC., *ECON. INFO. BULL. NO. 91, CHANGING FARM STRUCTURE AND THE DISTRIBUTION OF FARM PAYMENTS AND FEDERAL CROP INSURANCE* (2012).

<sup>23</sup> *Coronavirus Food Assistance Program*, U.S. DEP'T OF AGRIC., <https://www.farmers.gov/cfap1> [https://perma.cc/A2R6-FEDG] (last viewed Oct. 4, 2020); see *Breaking Down CFAP 2.0*, *supra* note 8.

infection, low wages, poor health, variable and grueling hours, and arduous conditions. This Article argues that continued support for the agricultural industry should only be made available to farms meeting a minimum level of labor standards that includes fair wages, benefits, and working conditions.

## II. NEED FOR IMPROVED LABOR CONDITIONS IN AGRICULTURE

The poor working conditions of agricultural labor in the United States is becoming increasingly well-known even prior to the increased dangers caused by COVID-19. The Congressional Research Service describes the lives of farmworkers as characterized by “poverty” and “chronic unemployment and underemployment.”<sup>24</sup> According to the data from the National Agricultural Worker Survey (“NAWS”), the average hired U.S. farmworker’s income, including non-farm income, is between \$17,500-19,999.<sup>25</sup> At least 33 percent of farmworker families earn below the federal poverty rate and are food insecure.<sup>26</sup> Farm work is “grueling, backbreaking” work, often done in extreme heat, for which workers, who often live in isolated communities, receive little compensation and very few benefits.<sup>27</sup>

Sexual harassment and physical abuse are commonly experienced by workers in the fields.<sup>28</sup> Farmworkers often suffer from heat exhaustion, receive insufficient water and food, and lack appropriate rest and bathroom breaks.<sup>29</sup> Many live in substandard and crowded housing, without appropriate food preparation facilities or adequate plumbing.<sup>30</sup> Farm labor contractors have been known to enslave, physically abuse, and

<sup>24</sup> RENÉE JOHNSON, CONG. RESEARCH SERV., FRUITS, VEGETABLES AND OTHER SPECIALTY CROPS: SELECTED FARM BILL AND FEDERAL PROGRAMS (2014).

<sup>25</sup> *Selected Statistics on Farmworkers (2015-16 Data)*, FARMWORKER JUSTICE (2019) <http://www.farmworkerjustice.org/wp-content/uploads/2019/05/NAWS-Data-FactSheet-05-13-2019-final.pdf> [hereinafter *Selected Statistics on Farmworkers*] [<https://perma.cc/52QR-GQPD>].

<sup>26</sup> Laura-Anne Minkoff-Aern, *Farmworker-Led Food Movements Then and Now*, THE NEW FOOD ACTIVISM, 157 (Alison Hope Alkon & Julie Guthman, ed. 2017).

<sup>27</sup> FARMWORKER JUSTICE & OXFAM AMERICA, WEEDING OUT ABUSES (2010) [hereinafter OXFAM AMERICA]; SETH M. HOLMES, FRESH FRUIT, BROKEN BODIES (2013).

<sup>28</sup> OXFAM AMERICA, *supra* note 27.

<sup>29</sup> *Id.*; HOLMES, *supra* note 27; ROBERT GOTTLIEB & ANUPAMA JOSHI, FOOD JUSTICE (2010).

<sup>30</sup> OXFAM AMERICA, *supra* note 27; GOTTLIEB & JOSHI, *supra* note 29.

steal wages from immigrant farmworkers.<sup>31</sup> More than twelve hundred individuals have been freed from agricultural slavery rings in Florida from 2000-2015 alone.<sup>32</sup> Somewhere between 49-70 percent of farmworkers are undocumented, leaving many subject to these conditions without recourse.<sup>33</sup>

Farmworkers suffer from high rates of injury and chronic illness, including exposure to pesticides causing long term health conditions, potentially making them more susceptible to the COVID-19 virus.<sup>34</sup> Studies show a correlation between pesticide use applied in the fields by farmworkers and neurological degeneration.<sup>35</sup> There have been reported deaths and illness of agricultural workers due to COVID-19, although at the time of writing, numbers remain unknown.<sup>36</sup> Testing rates are uneven, and most states are not collecting the numbers of farmworkers who have contracted COVID-19. The Food and Environment Reporting Network estimates that approximately 12,601 farmworkers in the U.S. have tested positive for COVID-19.<sup>37</sup> Prior to COVID-19, according to one review of U.S. Department of

---

<sup>31</sup> GOTTLIEB & JOSHI, *supra* note 29.

<sup>32</sup> Eve Turrow Paul, *You Need to Know: The Slavery Conditions on Tomato Farms*, HUFF POST (Feb. 25, 2015), [https://www.huffpost.com/entry/you-need-to-know-the-slavery-conditions-on-tomato-farms\\_b\\_6735842?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAI8NjrLhSmAPKvqBU\\_nPVd7vjwiIdWBMP6qEsAsU32vmsPIu5nhGpCKOGjHDFm3RWy6e56LAFfy5oxYO0bAJ90R1X3\\_Clvt7Pwy9y3lpK6uoVsiiZIFYpGP2K-lMmlDeipmbEIRKIBQvJw9TRKbSZOKOkyAbE8o0N1p0wSjF5VxE](https://www.huffpost.com/entry/you-need-to-know-the-slavery-conditions-on-tomato-farms_b_6735842?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAI8NjrLhSmAPKvqBU_nPVd7vjwiIdWBMP6qEsAsU32vmsPIu5nhGpCKOGjHDFm3RWy6e56LAFfy5oxYO0bAJ90R1X3_Clvt7Pwy9y3lpK6uoVsiiZIFYpGP2K-lMmlDeipmbEIRKIBQvJw9TRKbSZOKOkyAbE8o0N1p0wSjF5VxE) [<https://perma.cc/958C-Z8UL>].

<sup>33</sup> OXFAM AMERICA, *supra* note 27.

<sup>34</sup> See OXFAM AMERICA, *supra* note 27; HOLMES, *supra* note 27; GOTTLIEB AND JOSHI, *supra* note 29.

<sup>35</sup> See, e.g., Freya Kamel & Jane A. Hoppin, *Association of Pesticide Exposure with Neurologic Dysfunction and Disease*, 112 ENVTL. HEALTH PERSP. 950 (2004).

<sup>36</sup> See, e.g., Aaron Sánchez-Guerra, *First Coronavirus case of seasonal farmworker in NC confirmed. More are suspected*, THE NEWS & OBSERVER (Apr. 16, 2020), <https://www.newsobserver.com/news/coronavirus/article242052916.html> [<https://perma.cc/6KT5-SLYR>]; Cameron Probert, *Farmworker unions due Washington state for safer work conditions due to coronavirus*, TRI-CITY HERALD (Apr. 16, 2020), <https://www.tri-cityherald.com/news/coronavirus/article242061046.html> [<https://perma.cc/9QT9-5LAD>].

<sup>37</sup> See Bottemiller, *supra* note 11; see also Leah Douglas, *Mapping Covid-19 Outbreaks in the food System*, FOOD AND ENV'T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> [<https://perma.cc/GBZ7-7MY9>].

Labor (“DOL”) data, “one farmworker dies every day in the United States, and hundreds more are injured.”<sup>38</sup>

Farmworkers also commonly develop other ailments from farming, such as skin disease, cancer, and respiratory problems.<sup>39</sup> Despite the high rate of injury and illness, each year Congress includes a rider to the budget of the Occupational Safety and Health Administration (“OSHA”) that prohibits OSHA inspections of farms without camps or with less than 10 employees.<sup>40</sup>

As discussed below, much of the enforcement of the limited labor law protections for agricultural workers has been against farm labor contractors (“FLC”) and the farm as joint employers.<sup>41</sup> However, in early 2020, the DOL recently promulgated a new rule making it more difficult to prove joint employer status.<sup>42</sup> Since this change is likely to decrease the liability for labor law violations of larger industrial farms, which often utilize FLCs to hire farm laborers, it is more urgent than ever that government relief and future farm bills include protections for agricultural labor.

### III. THE CURRENT U.S. REGULATORY SCHEME IS INSUFFICIENT TO IMPROVE LABOR CONDITIONS

#### *A. Agricultural labor law is insufficient to improve standards*

The conditions described above demonstrate a desperate need for improvements in the labor conditions for agricultural workers. Labor regulations such as the Fair Labor Standards Act (FLSA),<sup>43</sup> specific state labor relations statutes,<sup>44</sup> and the Migrant

---

<sup>38</sup> Roque Planas, *12 Disturbing Facts about Farm Labor Conditions*, HUFF POST (Jan. 15, 2013), [https://www.huffpost.com/entry/12-disturbing-facts-about-farm-labor-conditions\\_n\\_2479452](https://www.huffpost.com/entry/12-disturbing-facts-about-farm-labor-conditions_n_2479452) [<https://perma.cc/WW3T-37DA>].

<sup>39</sup> HOLMES, *supra* note 27; GOTTLIEB & JOSHI, *supra* note 29.

<sup>40</sup> MARTHA MCCLUSKEY, THOMAS MCGARITY, SIDNEY SHAPIRO, & MATTHEW SHUDTZ, *AT THE COMPANY’S MERCY: PROTECTING CONTINGENT WORKERS FROM UNSAFE WORKING CONDITIONS* (2013).

<sup>41</sup> Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020).

<sup>42</sup> Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020); 29 C.F.R. § 791.2 (Jan. 16, 2020) (effective until Mar. 16, 2020).

<sup>43</sup> 29 U.S.C. § 206 (2016).

<sup>44</sup> Agricultural Labor Relations, Cal. LAB. CODE §§ 1140–1166.3 (West 2020).



and Seasonal Agricultural Worker Protection Act (MSPA)<sup>45</sup> seemingly have the potential to protect these workers. Yet these regulations have proven insufficient to ensure the improvements necessary.

Perhaps the most glaring concern is the fact that agricultural workers are exempt from the National Labor Relations Act (NLRA), which otherwise provides private sector workers in the United States the right to organize, to engage in collective activity, and to collectively bargain for improved conditions.<sup>46</sup> In addition to their vulnerability caused by lack of power, isolation, and often their immigration status, this exclusion discourages farmworkers from speaking out to improve their conditions. Without legal protection for employees who act collectively to improve conditions, farms have successfully terminated employees for seeking increased compensation, improved housing, or voicing other concerns about working conditions.<sup>47</sup>

While hired workers at large farms are entitled to the federal minimum wage, they remain exempt from the overtime protections of the FLSA.<sup>48</sup> The hours of agricultural workers can vary widely, ranging from vastly insufficient number of work hours to earn survival wages to sixteen hours per day of physically demanding work with little rest.<sup>49</sup>

While providing some protections, the MSPA also has not sufficiently improved conditions experienced by farmworkers. The MSPA requires registration of farm labor contractors, written disclosure of employment terms, prompt payment of wages, accurate recordkeeping, minimum health and safety standards in housing, as well as some safety protections.<sup>50</sup> These requirements

---

<sup>45</sup> Migrant and Seasonal Agricultural Worker Protection, 29 U.S.C. § 1801-1872 (2020).

<sup>46</sup> 29 U.S.C. § 152(3); 29 U.S.C. §§ 157–158.

<sup>47</sup> See Farm Labor, USDA ECONOMIC RESEARCH SERVICE (2019), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> [<https://perma.cc/8H3C-N6VW>].

<sup>48</sup> 9 C.F.R. § 780.305 (2020); Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA), U.S. DEPT. OF LAB. (Jan. 2020), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs12.pdf> [<https://perma.cc/9CWV-9L2E>].

<sup>49</sup> Mike Price, *Are Your Employees Exempt or Non-Exempt?*, THE BLUEPRINT (Aug. 25, 2020), <https://www.fool.com/the-blueprint/payroll/exempt-vs-non-exempt/> [<https://perma.cc/HBC5-C6ZE>].

<sup>50</sup> 20 U.S.C. §§ 1801 (2020), 29 C.F.R. §§ 500.0–500.271 (2020).

are minimal at best, as written notice of employment terms and other recordkeeping does little to improve conditions. Moreover, enforcement of the MSPA has been a challenge, and farms and farm labor contractors are often in violation.

Congress intended that when a farmworker was hired by a farm labor contractor,<sup>51</sup> the farm could be liable for violations as a joint employer. In early 2020, however, the DOL adopted a rule, making it more difficult to establish joint employer liability, which could prove catastrophic for employees hired by farm labor contractors rather than employing farms.<sup>52</sup> Under the new rule, joint liability will only attach if the farm directly hires and supervises the employees and otherwise maintains control of working conditions.<sup>53</sup> Yet in many cases, farm labor contractors, rather than the farms themselves, hire the farmworkers, supervise their work, and maintain payroll.<sup>54</sup> Many farm labor contractors are small and thinly capitalized, and as such, enforcement against them has proven challenging.<sup>55</sup>

In addition, the Act's coverage is insufficient. The MSPA does not apply to H-2A guest workers or year-round workers; instead, it only covers seasonal and temporary workers. Even for those who are covered, the Act can hardly be used because these workers are often undocumented and thus fearful of retaliation. Furthermore, they often live in isolated, on-farm housing facilities without access to farmworker advocates or government agencies.<sup>56</sup>

Another explanation for the failure of the current system to protect workers is the role of immigration in the agricultural economy. Large numbers of agricultural workers lack work authorization and will not attempt to protect their rights out of fear of deportation.<sup>57</sup> Workers legally working in the United

---

<sup>51</sup> It is common for farms to contract with Farm Labor Contractors (FLC) to hire, transport, and supervise farmworkers.

<sup>52</sup> 85 FR § 2820 (2020), 29 C.F.R. § 791 (2020).

<sup>53</sup> *Id.*

<sup>54</sup> Megan Horn and Nicholas Marritz, *Unfinished Harvest: the Agricultural Worker Protection Act at 30*, FARMWORKER JUSTICE, <http://www.farmworkerjustice.org/wp-content/uploads/2012/05/FarmworkerJusticeUnfinishedHarvest.pdf> [https://perma.cc/8HVH-YSAP] (last viewed Nov. 9, 2020).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

States are vulnerable as well. On average, these workers have reached only a seventh-grade education level and 76 percent lack proficiency in spoken English.<sup>58</sup> Many lack knowledge about their rights and many fear losing work and the little income they have.<sup>59</sup>

Any attempt to include agricultural workers in the current federal labor laws will not address challenges in enforcement or the use of undocumented immigrants. Moreover, any such amendment would need to be carefully designed to retain the limited state protections afforded to agricultural workers. States such as California and New Jersey explicitly grant agricultural workers the right to organize and engage in collective activity and grant protections against retaliation.<sup>60</sup> However, as a general rule, the NLRA preempts any state law in matters of labor relations.<sup>61</sup> Thus, amending the NLRA to expand the jurisdiction of the National Labor Relations Board to include agricultural workers may lead to the ironic and distressing result of preempting state protections and decreasing rights of workers in states with agricultural labor protections.<sup>62</sup> A better approach is to include a Farm Bill Title that requires minimum labor standards, or in the alternative, establishes incentives to support workers and maintain safe and fair working conditions as part of any relief provided the agricultural industry.<sup>63</sup>

*B. The limited mention of labor concerns in the current Farm Bill is insufficient to improve working conditions on U.S. farms*

The Farm Bill includes a comprehensive approach to agriculture that includes nearly every stakeholder and subject—

---

<sup>58</sup> HOLMES, *supra* note 27.

<sup>59</sup> *Id.*

<sup>60</sup> N.J. CONST. art. 1, § 19, Agricultural Labor Relations, CAL. LAB. CODE §§ 1140-1166.3 (West 2020).

<sup>61</sup> *San Diego Building Trades v. Garmon*, 359 U.S. 236, 246 (1959) (citing *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958)).

<sup>62</sup> Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too – a Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. OF PA. J. OF LAB. & EMP. LAW, 525, 526 (2004).

<sup>63</sup> There is also a need to provide incentives to ensure fair working conditions in a way that does not simply pass labor expenses to farmers and growers at the demand of global food corporations. This is a complex issue beyond the scope of this Article.

from commodities to trade, nutrition, rural development, research, energy, and insurance. Absent from this list is any Title relating to farm labor.<sup>64</sup> Title XII, Miscellaneous, mentions farm labor under the Food, Conservation and Energy Act, yet merely to authorize grants to farmers to assist in securing and retaining agricultural workers.<sup>65</sup> These grants may be used for skills development, transportation, housing, and worksite literacy.<sup>66</sup> Similarly, in the 2014 description of the Farm Bill given by the Congressional Research Service, the only discussion under “labor protections” concerned the H-2A Visa program, grants for worker training, and “certain” protections already granted under the MSPA.<sup>67</sup> The glaring omission from both these provisions is any requirement that farm operators maintain labor standards for those they employ.

*C. The only current proposals relating to agricultural labor in national discourse involve new immigration rules that favor industrial agriculture.*

There is a shortage of agricultural labor in the United States.<sup>68</sup> This, along with concerns over the stability of the U.S. food supply resulting from COVID-19, has led to a renewed discussion of needed changes in immigration policy.<sup>69</sup> Approximately 75 percent of agricultural workers are immigrants, many of whom lack work authorization.<sup>70</sup> Studies and anecdotal evidence have revealed that the shortage of agricultural workers has increased as enforcement of federal immigration law has strengthened, leading U.S. farmers to push for immigration reform and an improved agricultural worker visa program.<sup>71</sup>

---

<sup>64</sup> Agriculture Improvement Act of 2018, Pub. L. 115-334 (2018).

<sup>65</sup> Agricultural Act of 2014, Pub. L. 113-79, § 12301 (2014).

<sup>66</sup> Food, Conservation and Energy Act, Pub. L. No. 110-234 (2008) (codified in 7 U.S.C. § 2008q-1).

<sup>67</sup> Johnson, *supra* note 24; *Fruits, Vegetables and Other Specialty Crops: Selected Farm Bill and Federal Programs* (Congressional Research Service, 2014).

<sup>68</sup> *See, e.g.*, Memorandum from Farmworker Justice on U.S. Dep’t of Labor’s Nat’l Agric. Workers Surv. *Selected Statistics on Farmworkers*, (2019).

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> Parties as vastly different as the American Farm Bureau and Farmworker Justice support Immigration reform for foreign born agricultural workers in the United

Notably, President Trump's plan to decrease immigration during COVID -19 exempted farm workers because the pandemic further disrupted an already unstable agricultural labor supply.<sup>72</sup> Previously, a bipartisan bill had passed in the House judiciary committee that would provide a path to legal status for some agricultural workers, streamline the H-2A Visa process for employers, and reform the existing federal system for confirming work status known as E-Verify.<sup>73</sup> While some applaud the bill for potentially granting increased work authorization, it fails to address agricultural working conditions. Neither growers nor policy makers have considered how improved working conditions might address current agricultural labor shortages.

*D. The current regulatory structure has no method for farm assistance to transition food prices to reflect the true cost of food.*

As noted above, the United States has historically undervalued labor, and has done so legislatively since the New Deal. In response, farms provide certain wages and conditions and receive a particular price for their product, either on the market or from food processing companies holding great influence in the prices paid. Farms receive approximately 15.6 cents on the dollar from the sale of raw food commodities.<sup>74</sup> The USDA calculates this as the average price spread between what farms typically receive for their products and the retail price.<sup>75</sup> At this

---

States. *See, e.g.*, Tim J. Richards, *Immigration Reform and Farm Labor Markets*, Am. J. of Agric. Econ. Vol. 100, Issue 4 (July 2018); *See* Agriculture Labor Reform, American Farm Bureau, <https://www.fb.org/issues/immigration-reform/agriculture-labor-reform/> [<https://perma.cc/7L2W-WS9U>]; *Immigration and Labor*, FARMWORKER JUSTICE (2019); Jeff Daniels, *Immigration reform to ease farm labor crunch could few new and unexpected hurdles*, CNBC (June 19, 2018), <https://www.cnbc.com/2018/06/19/immigration-reform-to-ease-farm-labor-crunch-face-new-obstacles.html> [<https://perma.cc/URF8-E5AF>].

<sup>72</sup> Liz Crampton, *Farm Workers to be exempt from Trump's Immigration Ban*, POLITICO (April 21, 2020), <https://www.politico.com/news/2020/04/21/farm-workers-exempt-trumps-immigration-ban-198039> [<https://perma.cc/2CGU-KBHN>].

<sup>73</sup> Farm Workforce Modernization Act, H.R. 5038, 116th Cong. (2019).

<sup>74</sup> *See* Krista Garva, *Food Processing Industry Account for 15.6 % of Food Cost*, FOOD INDUSTRY EXECUTIVE (Aug. 16, 2017), <https://foodindustryexecutive.com/2017/08/food-processing-accounts-16-food-cost/> [<https://perma.cc/SD3B-JWSG>].

<sup>75</sup> *See* USDA ERS, Interactive Chart: Price Spreads and Food Markets, <https://www.ers.usda.gov/data-products/price-spreads-from-farm-to-consumer/interactive-chart-price-spreads-and-food-markets/> [<https://perma.cc/B42J-S6KS>] (last viewed Oct. 5, 2020).

farm-to-retail spread, farmers are unlikely to be able to improve conditions for agricultural workers and simply recoup the cost in the prices they receive. This will require a more comprehensive government program addressing the cost of food, including financial assistance to offset the increased cost of food.

#### IV. PROPOSAL: THE FARM BILL SHOULD HAVE A SPECIFIC TITLE REGULATING AGRICULTURAL LABOR CONDITIONS.

Congress intentionally excluded agricultural workers from New Deal labor protections at the same time the agricultural industry first began receiving government assistance.<sup>76</sup> This began the general policy where agricultural labor lacks protection, wages are suppressed, and working conditions are barely monitored, keeping the corresponding price of food artificially low. Since the New Deal and before, the agricultural economy of the United States has depended on a vulnerable and exploited workforce. This is unlikely to change without government involvement due to the complexity of the agricultural economy.

The USDA Economic Research Service estimates at least 12 percent of agricultural production expenses are labor costs, but for fruit and vegetable farms this percentage shoots up to 42 percent.<sup>77</sup> The bulk of Farm Bill spending, other than the SNAP nutrition component, provides crop insurance, commodity crop assistance, and supports conservation efforts, without consideration of labor.<sup>78</sup> This means the Farm Bill provides very little funding for employment assistance to farmers or protection to agricultural laborers despite the vast importance of labor to the industry, particularly in the production of fruits and vegetables.

In light of the new health risks and the corresponding threat to the U.S. food supply, a pre-existing labor shortage, the overall importance of agriculture to the U.S. economy, and the

---

<sup>76</sup> Ximena Bustillo, *supra* note 2; *Updated ICE Statement on COVID-19*, *supra* note 2.

<sup>77</sup> Linda Calvin & Phillip Martin, *Labor-Intensive U.S. Fruit and Vegetable Industry Compete in a Global Market*, USDA ERS, (Dec. 1, 2010).

<sup>78</sup> Agriculture Improvement Act, H.R.2, 115th Cong. (Oct. 1, 2019).

fact that workers face uncertainty and grueling conditions, farm labor should be a topic for comprehensive treatment under future Farm Bills. Farms with high numbers of hired labor may need financial assistance to transition to a system where workers receive improved wages, health protections and working conditions.

Potential avenues for such assistance may include grant funding, research, subsidized loans, or direct program payments at higher levels to compensate for higher labor costs. With such assistance being provided, the Farm Bill can include protections for all agricultural workers by requiring farm operators to meet basic labor standards. These include personal protective equipment, hazard pay, payment of minimum wages, guaranteed hours and breaks, overtime pay, one-day of rest per week, clean and safe housing, safety precautions, benefits, sufficient access to medical care and clean water, and access to the nutritious food supply they grow themselves. Labor issues associated with this industry should receive significant study and be addressed in the Farm Bill.

Some in the agricultural industry will likely balk at increased regulation and raise concerns with the economic viability of such requirements. Yet this is precisely why protections and financial incentives are needed in the Farm Bill. Moreover, treating farmworkers with respect will likely increase productivity in the long run. When employers fail to meet employee needs through granting respect, job security, fair pay and safe working conditions, this impedes productivity. In contrast, the impact of increased wages, benefits, and enforcement of employment laws boost workers' lives and builds stronger and more vibrant communities and enterprises.<sup>79</sup> When farmworkers are treated well and have time to physically recuperate, they are happier, healthier, and thus more productive.<sup>80</sup>

The Farm Bill provides a great deal of support for producers and their continued economic viability. Indeed, this is

---

<sup>79</sup> Michael Reich & Ken Jacobs, Miranda Dietz, editors, *When Mandates Work, Raising Labor Standards at the Local Level*, UNIVERSITY OF CALIFORNIA PRESS (2014).

<sup>80</sup> Gregorio Billikopf, *Managing People on the Farm*, University of California Berkley (Aug. 11, 2006); Mary Jo Dudley, *Creating Positive Workplaces: A Guidebook for Dairy Farmers*, Cornell Farmworker Program (Nov. 2017).

the rationale for many of the benefits programs currently offer. In exchange, it is time for agricultural labor concerns to be considered in providing program support to agricultural producers. The true cost of food, supported through various programs in the Farm Bill must include the expenses required for food production, which include safe and fair working conditions for those in the fields.

V. PROPOSAL: IN THE ALTERNATIVE AND AT A MINIMUM, ANY  
GOVERNMENT RELIEF AND FARM BILL PROGRAMS SHOULD  
CONDITION BENEFITS ON MEETING MINIMUM LABOR STANDARDS.

In the alternative to a Farm Bill Title regulating agricultural labor, any benefits provided to farms should condition receipt of benefits on meeting minimum labor standards. This should be true whether farms are receiving relief from emergencies, such as those created by the COVID-19 virus or receiving traditional USDA program benefits. The Farm Bill already conditions certain benefits on behavior intended to help the environment and should similarly reward only those meeting labor standards. Conditioning benefits on meeting labor standards is increasingly necessary since Farm Bill benefits are now received by more growers of specialty crops, those farms with the majority of hired farm labor. Such conditioning of benefits on meeting labor standards is utilized in other industries and can be adapted for agriculture.



*A. The Farm Bill already conditions receipt of certain program benefits on behaviors intended to improve farming practices, conservation, improved nutrition, regional food systems, and competitiveness in fruit and vegetable crops.*

The Farm Bill already contains a number of incentive programs to encourage particular farming practices and behavior. These include incentives to encourage conservation and to support vegetable crops. Thus, a Farm Bill model exists to condition agricultural benefits to certain behaviors that can be expanded to encourage positive labor practices. The sections below provide examples of existing programs conditioning financial support on meeting specified criteria.

*i. Incentives to encourage environmental sustainability*

Title II of the 2014 and 2018 Farm Bills includes incentives to protect erodible soil and encourage conservation of “converted wetlands.”<sup>81</sup> Specifically, farmers who plant on “highly erodible land” are ineligible for certain USDA Marketing Assistance Loans, disaster relief payments, and subsidized payment of crop insurance by the Federal Crop Insurance Corporation.<sup>82</sup> Farmers who plant commodity crops on converted wetlands are likewise ineligible for certain subsidized loans and crop insurance premiums.<sup>83</sup>

Conversely, the USDA provides incentives for those farmers who protect erodible soils.<sup>84</sup> To be eligible for benefits, the farmer must certify that the USDA has determined the land is in fact highly erodible, the farmer will not produce on the land, and granted funds will not be used in a way contributing to

---

<sup>81</sup> The Agricultural Act of 2014, Pub. L. No. 113-79, § 2001, 128 Stat. 713-14; 16 U.S.C. § 3821(2018); The Agricultural Act, Pub. L. No. 115-334, §§ 2102, 2201, 132 Stat. 4530-34 (2018).

<sup>82</sup> 16 U.S.C. § 3811.

<sup>83</sup> 16 U.S.C. § 3821.

<sup>84</sup> 16 U.S.C. § 3821.

erosion.<sup>85</sup> With this certification, individuals are entitled to a low-cost Farm Service Agency or farm credit program loan.<sup>86</sup>

The Environmental Quality Incentives Program (“EQIP”) provides technical and financial assistance for resource conservation practices addressing soil, water, air quality, and wildlife habitat concerns.<sup>87</sup> To receive benefits, participants must comply with the highly erodible land and wetland conversation provisions and agree to implement an EQIP plan of operation or plan for acquiring an air or water quality permit.<sup>88</sup> On meeting these detailed requirements, individuals are entitled to payments to implement conservation practices.<sup>89</sup>

Similarly, the Conservation Stewardship Program offers incentives for farmers to conserve the quality and condition of natural resources.<sup>90</sup> Requirements include meeting program priorities, sharing in crop production risk, and detailed record keeping.<sup>91</sup> On meeting these requirements, participants receive program payments for conversation practices.<sup>92</sup>

*ii. Incentives to encourage improved nutrition*

Title IV of the Farm Bill is devoted to nutrition and includes a number of incentive programs.<sup>93</sup> These programs involve federal support for SNAP purchases of fruits and vegetables, including the use of SNAP benefits at local farmers’ markets.<sup>94</sup> The Fresh Fruit and Vegetable Program provides cash grants to states and Indian reservations to provide free snacks of fresh fruits and vegetables to elementary school children.<sup>95</sup> The Farm Bill has increased support for organic produce, as well as

---

<sup>85</sup> 7 C.F.R. § 12.7.

<sup>86</sup> 16 U.S.C. § 3821.

<sup>87</sup> 7 C.F.R. § 1466.1.

<sup>88</sup> 7 C.F.R. § 1466.7.

<sup>89</sup> 7 C.F.R. § 1466.24.

<sup>90</sup> 16 U.S.C. § 3839aa-22.

<sup>91</sup> 7 C.F.R. § 1470.20, 7 C.F.R. § 1466.24.

<sup>92</sup> 16 U.S.C. § 3839aa-24.

<sup>93</sup> Agricultural Act § 4001–4214.

<sup>94</sup> 128 Stat. at 782-819; *see* 7 U.S.C. § § 2012, 2018; *see, e.g.*, CRS Report, R42155, *The Role of Local Food Systems in U.S. Farm Policy* (July 17, 2014).

<sup>95</sup> Food, Conservation, and Energy Act § 4304; 42 U.S.C. § 1769.

support for conventional fruit and vegetable crops, which is recognized as supporting a healthy diet.<sup>96</sup>

*iii. Incentives to support Local and Regional Food Systems*

The Farm Bill likewise supports local and regional farms and food systems. The 2018 Farm Bill expanded the Farmers' Market and Local Food Promotion Program (LAMP) by guaranteeing loans to producers of local and regional foods.<sup>97</sup> On April 18, 2019, the USDA announced \$23 million in grants to develop, coordinate, and expand local and regional food business enterprises.<sup>98</sup> Examples of LAMP programs include support of local food policy councils, assistance to local producers, businesses and food buying hubs, and supporting collaboration between growers and agricultural extension services.<sup>99</sup> The Farm Bill explicitly supports farmers markets and local food promotion,<sup>100</sup> including data collection on local produce.<sup>101</sup> Title XII, Miscellaneous, includes support for socially disadvantaged and limited-resource producers, thus providing further aid to local economies.<sup>102</sup>

---

<sup>96</sup>Jeffrey K. O'Hara, Ensuring the Harvest, *Crop Insurance and Credit for a Healthy Farm and Food Future* (Union of Concerned Scientists, 2012). This support for better nutrition may in fact be undermined by the current administration's proposed amendment to change requirements of the school lunch program. See Laura Reiley, *More pizza, fewer vegetables: Trump administration further undercuts Obama school-lunch rules*, THE WASHINGTON POST (Jan. 17, 2020, 5:28 PM), <https://www.washingtonpost.com/business/2020/01/17/usda-proposes-changing-school-menus-allow-more-fries-pizza-fewer-vegetables-fruits-reversing-michelle-obama-effort/> [https://perma.cc/W8NF-SPU7].

<sup>97</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4888, 4890-91; See 7 U.S.C. § 1932(g)(9)(B); 7 U.S.C. § 1921; *Local and Regional Foods*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/local-and-regional-foods/> (Aug. 20, 2019) [https://perma.cc/5TLD-EDLS].

<sup>98</sup> *USDA Announces \$23 Million in Grants Available to Local and Regional Food Systems*, USDA AGRIC. MKTG. SERV. (Apr. 18, 2019), <https://www.ams.usda.gov/content/usda-announces-23-million-grants-available-local-and-regional-food-systems> [https://perma.cc/JD5R-99WT].

<sup>99</sup> *Local and Regional Foods*, USDA ECON. RSCH. SERV. (Aug. 20, 2019), <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/local-and-regional-foods/> [https://perma.cc/5TLD-EDLS].

<sup>100</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4888, 4890-91.

<sup>101</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4812-13, 4888, 4890-91.

<sup>102</sup> *Id.* at 4950-52.

*iv. Limitations of the Farm Bill incentives*

As the U.S. government continues to provide financial support to farms, the most obvious limitation of the Farm Bill incentives is its reauthorization, which only occurs every four or five years.<sup>103</sup> Therefore, the timing of the current Farm Bill, passed in 2018, could not anticipate the COVID-19 pandemic, and could not require incentives to improve labor conditions in its wake.<sup>104</sup>

Moreover, despite recent improvements, commodity programs dominate federal agricultural policy. Alternative values beyond supporting commodity crops are increasingly receiving attention by the drafters of the Farm Bill such as conservation, research, education, land retirement, renewable energy, rural development, and increased support for specialty crops, which utilize the most hired labor.<sup>105</sup> Omitted are protections for labor, those vulnerable individuals actually producing and providing U.S. and global consumers with nutritious foods.<sup>106</sup>

At least part of a potential solution is to require minimum labor standards, or alternatively, to offer Farm Bill or relief incentives encouraging fair labor standards for farmworkers. Block grant monies awarded to the states could limit assistance to those farm operators free from labor violations. Using the incentive model outlined in Title II, Conservation, policymakers should condition crop insurance and disaster relief on certification the farmer is free from proven labor violations.<sup>107</sup> This should, at a minimum, require farmers receiving these benefits to be free of wage and other labor violations, be in

---

<sup>103</sup> RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., 2018 FARM BILL PRIMER: WHAT IS THE FARM BILL? 1 (2019).

<sup>104</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. *A Timeline of COVID-19 Developments in 2020*, AJMC (July 3, 2020),

<https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [<https://perma.cc/6FF5-W7GX>].

<sup>105</sup> JOHNSON & MONKE, *supra* note 103; *Agricultural Improvement Act of 2018: Highlights and Implications*, USDA ECON. RSCH. SERV. (Oct. 1, 2019), [HTTPS://WWW.ERS.USDA.GOV/AGRICULTURE-IMPROVEMENT-ACT-OF-2018-HIGHLIGHTS-AND-IMPLICATIONS/](https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/) [<https://perma.cc/NP9E-9EZ7>]; *see also* JOHNSON, *supra* note 24, at 49.

<sup>106</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

<sup>107</sup> *Id.* at 4547, 4551, 4555.

compliance with the MSPA, and be free of interference with collective activity and bargaining.<sup>108</sup> Much needs to be done to improve U.S. labor standards the United States, but an incentive program under any relief effort or Farm Bill program could be a healthy start.<sup>109</sup>

*B. The Farm Bill Increasingly Provides Benefits to Large Fruit and Vegetable Growers, the Farms with High Labor Needs and Poor Conditions*

Historically, most financial support in the Farm Bill for agricultural producers benefitted commodity crop growers in the form of payments from the Price Loss Coverage program, Agricultural Risk Coverage, Marketing Assistance Loans, conservation and crop insurance.<sup>110</sup> These crops utilize less labor than non-commodity “specialty crops” such as fruits and vegetables, so attaching labor standards previously may have been of limited value.<sup>111</sup> Specialty crops, however, are increasingly eligible for Farm Bill assistance, and utilize a larger number of hired labor.<sup>112</sup> Similar to the incentive programs discussed above, COVID-19 relief benefits and Farm Bill benefits

---

<sup>108</sup> See LAND STEWARDSHIP PROJECT, CROP INSURANCE ENSURES THE BIG GET BIGGER 2-3, 7 (2014) (noting how as critics of the Conservation Programs point out, larger and better financed operations may more easily meet program requirements, and thus benefit more from the program benefits); see, e.g., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b) (applies to private sector employers with 15 or more employees); Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (applies to private sector employers with 20 or more employees); Family Medical Leave Act, 29 U.S.C. § 2611(4)(A)(i) (applies to public sector and private sector employers with 50 or more employees) (explaining how in the case of labor incentives, such operations may be more able to meet the incentives. A potential solution to this is to apply such incentives only to agricultural operations of a certain size. In fact, application of federal labor laws to employers of a particular size is quite common).

<sup>109</sup> GORDON LAFER, ECON. POL’Y INST., THE LEGISLATIVE ATTACK ON AMERICAN WAGES AND LABOR STANDARDS 3 (2013).

<sup>110</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115–334, 132 Stat. 4490, 4490-91; see JOHNSON & MONKE, *supra* note 103, at 2; *Agricultural Improvement Act of 2018: Highlights and Implications*, USDA ECON. RSCH. SERV. (Oct. 1, 2019), <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/> [<https://perma.cc/NP9E-9EZ7>] (explaining while the majority of funding under the Farm Bill funds SNAP, the majority of benefits to agricultural producers involve benefits to commodity crop producers).

<sup>111</sup> RENÉE JOHNSON, CONG. RSCH. SERV., FRUITS, VEGETABLES AND OTHER SPECIALTY CROPS: SELECTED FARM BILL AND FEDERAL PROGRAMS 49 (2014).

<sup>112</sup> See, e.g., *id.*; ISABEL ROSA & RENÉE JOHNSON, CONG. RSCH. SERV., FEDERAL CROP INSURANCE: SPECIALTY CROPS 7 (2019); Calvin & Martin, *supra* note 77.

to any farms with hired labor should require farms to meet minimum labor standards.<sup>113</sup>

The 2018 Farm Bill provides examples of increased support for specialty crops. The 2018 Farm Bill reauthorized a number of programs relating to specialty crops such as those relating to research, marketing, technical assistance, and support for organic production.<sup>114</sup> Other programs involved assistance with food safety, plant pests and disease, and improvements to specific crops.<sup>115</sup>

Some benefits previously limited to commodity crops also have expanded to include certain fruit and vegetable crops.<sup>116</sup> These include federal crop insurance, non-insured disaster relief, and market loss payments.<sup>117</sup> Similar to commodity crop producers, certain fruit and vegetable growers can obtain subsidized federal crop insurance through the USDA's Risk Management Agency ("RMA").<sup>118</sup> Though specialty crops comprise a small percentage of total crops receiving federal insurance, they have grown to represent approximately 17 percent of all crops participating in the crop insurance programs.<sup>119</sup> The USDA continues to expand specialty crop insurance.<sup>120</sup>

Producers of those crops ineligible for subsidized insurance programs are now potentially eligible to up to 125 thousand dollars per person under the USDA Noninsured Assistance Program ("NAP").<sup>121</sup> Growers can receive disaster relief benefits upon incurring a loss of greater than 50 percent of

<sup>113</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4547, 4551, 4555.

<sup>114</sup> *Specialty Crops*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/specialty-crops/> (Aug. 20, 2019)

[<https://perma.cc/XM3Q-2KXP>]; *Organic Agriculture*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/organic-agriculture/> (Aug. 20, 2019) [<https://perma.cc/66PA-79QL>].

<sup>115</sup> RENÉE JOHNSON, CONG. RSCH. SERV., 2018 FARM BILL PRIMER: SPECIALTY CROPS AND ORGANIC AGRICULTURE (2019).

<sup>116</sup> JOHNSON & MONKE, *supra* note 103; JOHNSON, *supra* note 24, at 9, 11, 13, 15.

<sup>117</sup> *Id.*

<sup>118</sup> JOHNSON, *supra* note 24, at 9.

<sup>119</sup> ISABEL ROSA & RENÉE JOHNSON, CONG. RSCH. SERV., FEDERAL CROP INSURANCE: SPECIALTY CROPS 1 (2019).

<sup>120</sup> *Id.* at 6.

<sup>121</sup> RENÉE JOHNSON, CONG. RSCH. SERV., FRUITS, VEGETABLES AND OTHER SPECIALTY CROPS: SELECTED FARM BILL AND FEDERAL PROGRAMS 13 (2014).

their crop due to natural disaster.<sup>122</sup> The NAP has also periodically provided disaster relief payments retroactively to specialty crop producers when disaster is declared due to freeze or frost.<sup>123</sup> Similarly, Congress periodically has authorized market loss payments to vegetable growers based on circumstances and yield.<sup>124</sup>

Organic agriculture is widely recognized as helpful in moving toward environmental sustainability, and special crops also receive benefits through participation in the organics program.<sup>125</sup> Title X, Horticulture and Organic Agriculture offers financial support through organic cost share programs.<sup>126</sup> The act also requires products labeled as “organic” be certified by an entity accredited by the USDA.<sup>127</sup> The Farm Bill also supports vegetable and other specialty crops through state block grants but does not adhere to specific labor conditions.<sup>128</sup> States determine how to divide this funding among marketing and promotion, education and research, and crop management.<sup>129</sup>

Despite the increasing access of benefits to specialty crop growers, there is little government attention given to labor conditions. The U.S. fruit and vegetable industry is extremely labor intensive, with the vast majority of U.S. hired agricultural labor working in this industry.<sup>130</sup> This sort of work is grueling, physically taxing, emotionally challenging, and often causes illness and disease.<sup>131</sup> The work is often performed by immigrant workers, many of whom lack work documentation and legal protections.<sup>132</sup> Wages of vegetable and fruit crop workers lag

---

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *CCC Net Outlays by Commodity & Function*, USDA FARM SERV. AGENCY (July 8, 2009), [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/AboutFSA/Budget/pdf/msr10\\_tbl35a.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/AboutFSA/Budget/pdf/msr10_tbl35a.pdf) [https://perma.cc/9GS6-ZSEE].

<sup>125</sup> See Johnson, *supra* note 24, at 48.

<sup>126</sup> Agricultural Act of 2014 § 10003-10004, 7 U.S.C. § 6523 (2014).

<sup>127</sup> Organic Foods Production Act of 1990, Pub. L. No. 101-624, § 2106, 104 Stat. 3359, 3936 (1990).

<sup>128</sup> See Specialty Crop Block Grant Program—Farm Bill, 7 C.F.R. § 1291.1 (2008).

<sup>129</sup> Organic Foods Production Act § 2108.

<sup>130</sup> See William Kandel, *Profile of Hired Farmworkers, A 2008 Update*, U.S. DEPT OF AGRIC. ECON. RES. SERV. (July 2008), <https://www.ers.usda.gov/webdocs/publications/46038/err-60.pdf?v=0> [https://perma.cc/6T5R-N3DF].

<sup>131</sup> See generally *id.*

<sup>132</sup> See *id.*

behind workers in other industries.<sup>133</sup> The increase in benefits to specialty crop producers demands labor protection.<sup>134</sup>

Despite the dismal conditions of hired labor, government attention to fruit and vegetable crops largely has been limited to increasing production, profits, and stability.<sup>135</sup> Publications by the USDA lament labor costs and suggest strategies to adapt to so-called “rising-wages” of agricultural workers.<sup>136</sup> Advocates report data relied upon in these claims is misleading: Often more than one family member contributes to a single wage; no overtime pay or benefits are provided; and field conditions remain physically tedious.<sup>137</sup>

As more specialty crop farms receive Farm Bill benefits, they should be held to certain labor standards, even if it means higher prices.<sup>138</sup> Farm Bill programs could provide financial assistance easing the burden on farms and thus, improving conditions. U.S. relief efforts and USDA benefits for specialty crop growers must address these poor conditions.

### *C. Employers in Other Industries Must Meet Certain Labor Conditions to Receive Federal Benefits.*

The current agricultural examples of the government conditions to receive benefits involve environmental protection.<sup>139</sup> In other industries such as construction or contract service work, the government conditions receipt of economic benefits on an

<sup>133</sup> Kandel, *supra* note 130, at 20–21.

<sup>134</sup> *See id.* at 41.

<sup>135</sup> *See* Calvin & Martin, *supra* note 77, at 9–10.

<sup>136</sup> *Id.*

<sup>137</sup> *See, e.g., Selected Statistics on Farmworkers*, FARMWORKER JUST. (2019), <http://www.farmworkerjustice.org/wp-content/uploads/2019/05/NAWS-Data-FactSheet-05-13-2019-final.pdf> [<https://perma.cc/KDW5-FY4P>]; *see also* Megan Horn et al., *Unfinished Harvest: The Agricultural Worker Protection Act At 30*, FARMWORKER JUST. (2013), <https://www.farmworkerjustice.org/resource/unfinished-harvest-the-agricultural-worker-protection-act-at-30/> [<https://perma.cc/B9YT-VD85>].

<sup>138</sup> *See Labor costs on specialty crop farms accounted for 3 times as much of their total cash expenses as the average for all U.S. farms*, U.S. DEP’T OF AGRIC. ECON. RES. SERV. (2018), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=98569> [<https://perma.cc/97WJ-AXMG>].

<sup>139</sup> *See, e.g., Crop Production (including nurseries, greenhouses, forestry)*, U.S. ENVTL. PROTECTION AGENCY (October 30, 2019) (listing current EPA rules and regulations), <https://www.epa.gov/agriculture/laws-and-regulations-apply-your-agricultural-operation-farm-activity#CropProduction> [<https://perma.cc/6T3G-YWX9>].



entity meeting minimum labor requirements.<sup>140</sup> This model can be adapted to agriculture to provide farms relief benefits only if certain labor standards are met.<sup>141</sup>

As an example outside of agriculture, when awarding construction contracts of more than 2 thousand dollars to private contractors, the United States Department of Labor requires contractors to pay at least the federal prevailing wages and benefits.<sup>142</sup> The DOL sets these minimum prevailing wages based upon wage surveys of employees in particular job classifications and geographic areas.<sup>143</sup> To receive the benefits of federal contracts, employers must meet these labor standards.<sup>144</sup> This is true under a variety of additional federal statutes relating to construction work, known as “the related acts,” imposing wage requirements on contractors to receive certain grants, loans, loan guarantees, and insurance.<sup>145</sup> Likewise, the federal government requires certain wage and benefit levels to be paid by contractors providing services under the Service Contract Act.<sup>146</sup>

A number of other federal laws condition receipt of program funds on maintenance by the recipient of certain working conditions. Specifically, some federal programs such as the Head Start program prohibit the use of program funds to deter union organizing.<sup>147</sup> Funds received by employers pursuant to the National Community Service Act also may not be used to deter or promote unionization.<sup>148</sup>

The Workforce Reinvestment Act, later replaced by the Workforce Innovation and Opportunity Act (“WIOA”), had a

---

<sup>140</sup> See, e.g., *Government Contracts*, U.S. DEP’T OF LAB. (2020), <https://www.dol.gov/general/topic/benefits-leave/govtcontracts> [<https://perma.cc/R8MD-SZGW>].

<sup>141</sup> *Id.*

<sup>142</sup> Davis-Bacon Act § 3142, 40 U.S.C. § 3141 (2018).

<sup>143</sup> Fair Labor Standards Act of 1938 § 206, 29 U.S.C. § 201 (2018).

<sup>144</sup> See generally *Summary of the Major Laws of the Department of Labor*, U.S. DEP’T OF LAB. (2020), <https://www.dol.gov/general/aboutdol/majorlaws> [<https://perma.cc/6V43-AS7Y>].

<sup>145</sup> See U.S. DEP’T OF LAB., FIELD OPERATIONS HANDBOOK 15(a)(02) (2016), [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch15.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf) [<https://perma.cc/Z9J2-D83V>].

<sup>146</sup> See Service Contract Act, Pub. L. No. 11-350, § 6703, 124 Stat. 3677, 3813 (2011).

<sup>147</sup> 42 U.S.C.A. § 9839 (e).

<sup>148</sup> 42 U.S.C.A. § 12634 (b)(1).

similar protection.<sup>149</sup> The new WIOA restricts the use of sub-minimum wage for disabled employees and includes provisions to guarantee employees' wages during training and program participation.<sup>150</sup> The United States Supreme Court has determined such conditions, on the receipt of federal funding, do not interfere with federal labor policy and is an appropriate restriction on such funding.<sup>151</sup>

While not specifically involving labor standards, the Federal Acquisition Regulation ("FAR") requires that before awarding a federal contract, contracting officers must make an affirmative determination of the contractor's responsibility.<sup>152</sup> The term 'responsibility' is not well defined and allows great deference to the contracting officer, but the definition requires a "record of integrity and business ethics," often interpreted to require contractors to be free of legal convictions or infractions.<sup>153</sup> More than one administration, including President Barack Obama, clarified this included compliance with an array of federal labor and employment laws; although this requirement has since been nullified by the Trump administration.<sup>154</sup> In any case, conditioning government program benefits on meeting labor standards is an established practice that should be implemented in the agricultural industry.

A number of states have similar provisions, requiring state work only be awarded to "responsible contractors," which typically only includes those paying prevailing wages and

---

<sup>149</sup> 29 U.S.C.A. § 2931 (b)(7).

<sup>150</sup> 29 U.S.C.A. § 794 (g).

<sup>151</sup> Chamber of Commerce v. Brown, 554 U.S. 60, 74–75 (2008).

<sup>152</sup> 48 C.F.R. § 9.103(b).

<sup>153</sup> See, e.g., Caroline Ginsberg, *What were they thinking? How the FAR makes responsibility determination a guessing game*, 27 Fed. Circuit B. J. 69 (2017); John Bryan Warnock, *Principled or Practical Responsibility: Sixty Years of Discussion*, 41 Pub. Cont. L. J. 881 (Summer 2012) (The general factors considered under FAR in determining responsibility include: (a) appropriate financial resources, (b) ability to comply with schedule, (c) satisfactory performance record, (d) satisfactory record of integrity and business ethics, (e) possess the necessary organization, experience and business controls, (f) have the necessary production, construction and technical equipment facilities, and (g) be otherwise qualified and eligible to receive an award under applicable laws and regulations.); 48 C.F.R. § 9.104.

<sup>154</sup> President Barack Obama had signed Executive Order No. 13673, known as the Fair Pay and Safe Workplaces Act (July 31, 2014). President Trump rescinded this order through Executive Order 13782(2017), and a joint resolution of Congress nullified guidance and regulations pertaining to the new standards in Public Law 115-11, H.J. Res. 37 (2017), 48 C.F.R. § 22.

benefits.<sup>155</sup> Similarly, state and local government agencies have the right to ensure labor peace on their projects, including requiring the use of “project labor agreements” imposing certain working conditions on a particularly job site in exchange for an agreement that labor will not strike or otherwise disrupt the project.<sup>156</sup>

In addition, the government can influence labor policy through procurement. The federal government, as well as many state governments, is a large consumer of farm products. In fact, as part of the CFAP, the USDA has committed to increasing its purchasing of farm products.<sup>157</sup> Announced as the Farmers to Families Food Box Program, the USDA has committed to purchasing 4 billion dollars in fresh produce, dairy, and meat products from national, regional, and local food suppliers for distribution.<sup>158</sup> Limiting government food purchases to producers meeting labor standards could also provide great incentives to farms to improve working conditions.

*D. Any government relief and financial assistance through Farm Bill programs should condition benefits on meeting minimum labor standards.*

Ideally, the Farm Bill would require worker protections. In the meantime, and as a minimum, any temporary relief efforts such as those provided during COVID-19 as well as future Farm Bill programs should provide support to farms with hired labor to ensure safe and healthy working conditions. This alternative proposal can expand and shift policies already in existence and does not require a radical shift in policy making. As discussed above, the Farm Bill already encourages a host of particular behaviors using incentive-based systems. Conditioning participation in government programs or receipt of benefits on meeting certain labor standards is already done in other areas of the law.

---

<sup>155</sup> See, e.g., 820 Ill. Comp. Stat. Ann. 130/1; NJSA 34:11-5625 *et. seq.*

<sup>156</sup> *Building and Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993).

<sup>157</sup> USDA CFAP program, <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box> (last viewed Oct. 5, 2020) [<https://perma.cc/S72Q-66UM>].

So too should the USDA require farms meet minimum labor standards to qualify for COVID-19 benefits or various farm programs and benefits. In other words, to receive CFAP or CFPA 2 financial assistance, labor protections discussed above must be provided. Farm Bill benefits in the form of PRC or ARC payments, MAL assistance, crop insurance, disaster relief, or state administered grant funding to improve crop production the USDA should certify the agricultural operator is in compliance with labor standards. Thus, the USDA should certify farms with hired labor as meeting minimum labor standards to be eligible for farm programs.

Such certification should include confirmation that the agricultural producer complies with the FLSA minimum wage requirements, applicable state wage and hours laws, and offer overtime pay, and provide sufficient personal protective equipment (“PPE”) and other COVID-19 protections. Farms must satisfy the requirements of the MSPA, any safety protocols and guidelines recommended by OSHA, and state Workers’ Compensation requirements.<sup>159</sup> The employer must certify it respects employees’ choice to organize and collectively bargain.<sup>160</sup>

USDA certification also should address the reported concerns of agricultural workers, including those collected in the NAWS survey. First and foremost, as the country learned from the COVID-19 pandemic experience, agricultural workers must receive personal protective equipment and health care access. USDA certification should also include satisfactory and clean housing (above and beyond the requirements of the MSPA), sufficient provisions of water, food, and break times, sufficient policies and procedures to address complaints of sexual harassment, set written schedules requiring no more than ten hours in one shift and one weekly day of rest. These suggestions do not solve all problems with working conditions, but they would create a bare minimum of labor standards for agricultural workers.

---

<sup>159</sup> See Fair Labor Standards Act, 29 U.S.C.A. § 201, *et. seq.*, The National Labor Relations Act, 29 U.S.C.A. § 158 *et. seq.*, the Migrant Seasonal Agricultural Workers Protection Act, 29 U.S.C.A. § 1801 *et. seq.*, and the Occupational Health and Safety Act, 29 U.S.C.A. § 651, 29 C.F.R. 1910 (agriculture). Workers Compensation is a state-based system that would require consideration of state law.

<sup>160</sup> *Id.*

In the absence of a Farm Bill Title relating to labor conditions, incentives can be used to improve conditions. For producers to receive tax-sourced government benefits, they must ensure human beings doing the hard work of planting and harvesting are treated fairly, meaning program participants must meet minimum labor standards. This benefits workers, producers, and communities and ensures a system where viable producers are those who are responsible in their stewardship of the land and fair treatment of their workforce.

### CONCLUSION

The policies set forth in the Coronavirus Food Assistance Program and the regular Farm Bill are intended to mitigate the financial risks of agriculture. Farm Bill incentives are provided to improve environmental conditions, increase organic production, assist local and regional food programs, and maintain the viability of agricultural producers. Thus, the Farm Bill conditions receipt of certain benefits on practices protecting the earth, soil, and environment, which in turn ensures healthy farms. In the same manner, the Farm Bill can and should be used to ensure healthy and safe farmworkers.

In addition to the priorities of continued viability of farms and protection of the earth, there should be respect for the people who work these farms. The health, vitality, and sustainability of human beings toiling in the fields and working the earth should receive at least equal consideration. Thus, agricultural policy should ensure minimum labor standards and protections for agricultural workers. In the alternative, and at an absolute minimum, farm policy must ensure government assistance to growers such as provided in the COVID-19 CFAP relief is only received by those protecting the continued viability of their workforce.

Increased protections for labor will lead to an increase in food costs, and the ideal solution would include a multifaceted approach, creating a sustainable yet affordable food system. Many factors affect our food system in addition to labor, such as farming inputs, weather patterns, control of the markets, Farm Bill programs, and mechanization. In considering the impact of this Article's proposals, Farm Bill financial assistance and incentives could to some degree ameliorate the potential increase

in food price. With or without a comprehensive approach, government attention to agricultural labor is needed now to ensure the health and safety of labor, and therefore, the continued viability of our food supply.