TOWARD SAFER FIELDS: USING AWPA'S WORKING ARRANGEMENT PROVISIONS TO ENFORCE HEALTH AND SAFETY REGULATIONS DESIGNED TO PROTECT FARMWORKERS

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INTRODUCTION

On a Saturday morning in the summer of 2002, Norma Torres was working in a Colorado lettuce field. As she worked, an airplane passed overhead, spraying pesticides on the adjacent field. The wind carried the chemical spray to where she and a group of other farmworkers were working. Ms. Torres's throat began to hurt, her eyes stung, she could not get enough oxygen. She remembers feeling as if she was drowning. The foreman allowed the workers to leave the field for about thirty minutes, then forced Ms. Torres and the others to come back to work for the remainder of the day, telling them that nothing was wrong. Two days later, while Ms. Torres was still suffering from vomiting and other ill effects of the first exposure, the same thing happened. A plane sprayed pesticides on the adjacent field, and Ms. Torres and her co-workers were again forced to work the entire day in the lettuce field as the pesticide spray drifted over to coat the workers and field in which they worked. To this day Ms. Torres continues to suffer physically as a result of these exposures. She cannot breathe well and feels as if she is constantly struggling to get oxygen. She feels tired much of the time. Her employers in Colorado never provided pesticide training for the workers and failed to post warnings of impending or past pesticide applications.[1]

In this article I consider whether farmworkers whose employers violate administrative health and safety regulations designed to protect the workers, such as those in the Environmental Protection Agency's ("EPA") Worker

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1. Telephone interview with Norma Torres (Mar. 11, 2003). The name of the worker has been changed to protect her identity.

Protection Standard and the Occupational Safety and Health Administration's ("OSHA") Field Sanitation Standard, can bring private actions under the Agricultural Worker Protection Act[2] ("AWPA") to remedy the violations. AWPA, like its predecessor, the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), was enacted in response to a "historical pattern of abuse and exploitation of migrant and seasonal farm workers."[3] Under AWPA, agricultural employers have certain obligations to their farmworker employees extending from the time of recruitment until the end of the employment relationship. Most important for purposes of this article is AWPA's prohibition on employer violation of the terms of any "working arrangement" made with an agricultural employee.[4] Significantly, AWPA created a private right of action through which aggrieved workers can take action against their employers to remedy past violations and deter future violations of AWPA's protections.[5]

This article argues that it is consistent with the intent of Congress and with judicial decisions interpreting AWPA and desirable from a policy perspective to use AWPA to enforce health and safety standards designed to protect farmworkers. Part I addresses the need for greater protection of farmworkers from the health hazards of agricultural work. It describes the health and safety risks that farmworkers face in their work and outlines the administrative schemes that have been implemented with the goal of addressing at least some of these risks. It explores the weaknesses of these schemes, most notably their chronic underenforcement by the agencies charged with enforcing them. Finally, it addresses policy rationales that support the use of AWPA's private right of action to enforce health and safety regulations provided for elsewhere in the law. Part II argues that a correct reading of AWPA's working arrangement provision demonstrates that it can be used by farmworkers to enforce the regulations designed to benefit them. The section does so by examining the text of the provision, the statute as a whole, and the legislative history surrounding the enactment of AWPA and its predecessor, FLCRA. It further argues that judicial decisions interpreting AWPA support a broad reading of the working arrangement provision that encompasses requirements imposed on employers of farmworkers by other statutory schemes. Part III answers potential objections to this interpretation of AWPA, including that Congress did not intend farmworkers to enforce rights from distinct statutory schemes through AWPA and that workers' compensation and tort remedies are adequate to protect the health of farmworkers.

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2. 29 U.S.C. §§ 1801–1872 (2000).

3. H.R. REP. NO. 97-885, at 3 (1982).

4. 29 U.S.C. §§ 1822(c), 1832(c) (2000). AWPA itself does not expressly define what constitutes a "working arrangement" under §§ 1822(c) and 1832(c).

5. 29 U.S.C. § 1854(c) (2000).

I.
NEED FOR GREATER PROTECTION OF FARMWORKERS FROM DANGERS UNIQUE TO AGRICULTURAL WORK

A. Farmworkers' Rates of Occupational Injuries Are Among the Highest Across Industries

Approximately 1.8 million farmworkers[6] in the United States face health and safety risks on a daily basis as a result of the work they perform on farms and in fields.[7] Agriculture is one of the three most dangerous occupations in the United States, as measured by occupational mortality rates.[8] During the ten-year period from 1990 to 2000 in California, the state with the largest agricultural economy in the U.S.,[9] there were approximately 300,000 agriculture-related

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6. U.S. GENERAL ACCOUNTING OFFICE, IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN, GAO/RCED-00-40, at 6 (2000) [hereinafter 2000 GAO REPORT] (citing U.S. Department of Labor estimates that there are approximately 2.5 million hired farmworkers in the U.S. and that approximately 1.8 million work on crops).

7. In addition to data specific to farmworkers, general concern has been raised regarding the disproportionate rate of workplace injuries and fatalities among Latinos in the United States. Eighty-one percent of farmworkers were foreign born in 1997–1998. U.S. DEPARTMENT OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 5 (2000) [hereinafter NAT'L AGRICULTURAL WORKERS SURVEY]. Eighty-five percent of the workers were foreign born in 1999–2000 and ninety percent of those were from Latin America. *Workplace Safety and Health for Immigrant and Low Wage Workers: Testimony Before the Senate Subcomm. on Employment, Safety, and Training of the Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 30–31 (2002) (statement of Dr. Rosemary Sokas, Associate Director for Science, National Institute for Occupational Safety and Health) [hereinafter Sokas testimony]. This indicates that the impact of the disproportionate rate of injuries and fatalities among Latinos is felt quite heavily in the agriculture industry. The Senate Subcommittee on Employment, Safety, and Training held hearings in February 2002 to address the issue of workplace safety and health among immigrant and low wage workers, and at the hearings a number of witnesses addressed the issue of disproportionality. The Assistant Secretary of Labor for Occupational Safety and Health acknowledged in his testimony that, while the overall number of fatal workplace injuries decreased by two percent from 1999 to 2000, for foreign born Latino workers, the number actually increased by 11.6 percent during the same time period. *Id.* at 19 (statement of John L. Henshaw, Assistant Secretary of Labor for Occupational Health) [hereinafter Henshaw testimony]. Additionally, in 2000, Latinos experienced workplace fatalities disproportionate to their overall representation in the workforce; Latinos comprise 10.7 percent of the U.S. working population, but experienced 13.8 percent of the workplace fatalities. The Assistant Secretary explained this increase as resulting from the disproportionate employment of Latinos in more dangerous industries. *Id.*

8. Sokas testimony, *supra* note 7, at 29. The death rate among agricultural workers in the United States in 2001 was estimated at 22.8 per 100,000 workers, compared to an all-industry average of 4.3 per 100,000 workers. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES, 2001, *available at* http://www.bls.gov/iif/oshwc/cfoi/cfnr0008.pdf (last visited March 28, 2004).

9. Paul Mills & Sandy Kwong, *Cancer Incidence in the United Farmworkers of America (UFW), 1987–1997*, 40 AM. J. INDUS. MED. 596, 598 (2001) (noting California's production of more than $20 billion in various crops and commodities each year); MARGARET REEVES, KRISTIN SCHAFER, KATE HALLWARD, & ANNE KATTEN, CALIFORNIANS FOR PESTICIDE REFORM, FIELDS OF

injuries in total and twenty-five to fifty agriculture-related fatalities each year.[10] These hard statistics, however, do not tell the whole story regarding workplace health and safety dangers. Farmworkers underreport occupational injuries for a variety of reasons. Many farmworkers lack work authorization in the United States[11] and do not report workplace injuries for fear of adverse immigration consequences.[12] Even farmworkers who do have work authorization may be unaware of the proper channels through which to report a workplace injury.[13] Fear of employer reprisals also leads farmworkers to underreport workplace health and safety incidents,[14] especially since many farmworkers are engaged in temporary employment with no job security.[15] Additionally, employers who hire undocumented farmworkers may be afraid to report workplace deaths or injuries due to the legal consequences that could follow from such a disclosure.[16]

Among the occupational risks farmworkers face, the widespread use of pesticides on U.S. crops poses a particularly grave danger.[17] Farmworkers make up one of the "primary populations" exposed to pesticides,[18] and they suffer the

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POISON: CALIFORNIA FARMWORKERS AND PESTICIDES 6 (1999) [hereinafter FIELDS OF POISON].

10. John Hubner, *Farm Workers Face Hard Times*, SAN JOSE MERCURY NEWS, July 9, 2000, at 1A.

11. In 1997–1998, fifty-two percent of employed farmworkers lacked authorization to work in the United States. NAT'L AGRICULTURAL WORKERS SURVEY, *supra* note 7, at 22.

12. *See* Henshaw testimony, *supra* note 7, at 20.

13. A lack of English language fluency may influence whether workers are aware of proper reporting procedures for occupational injuries. Among U.S.-born farmworkers of Hispanic ethnicity, approximately forty percent self-reported a lack of fluency in spoken or written English. Of non-U.S.-born farmworkers from Mexico and Latin America, approximately ninety-six to ninety-eight percent reported that they were unable to speak or read English well. NAT'L AGRICULTURAL WORKERS SURVEY, *supra* note 7, at 17.

14. U.S. GENERAL ACCOUNTING OFFICE, PESTICIDES ON FARMS: LIMITED CAPABILITY EXISTS TO MONITOR OCCUPATIONAL ILLNESSES AND INJURIES, GAO/PEMD-94-6, at 9, 15 (1993) [hereinafter 1993 GAO REPORT].

15. Sokas testimony, *supra* note 7, at 30.

16. Henshaw testimony, *supra* note 7, at 20. It is illegal for employers to knowingly hire or continue to employ undocumented workers. 8 U.S.C. § 1324a(a)(1)–(2) (2000). Employers who commit violations of this provision can face civil penalties of up to $10,000 for each undocumented worker, and in the case of an employer with a "pattern or practice of violations," employers can face criminal penalties of up to $3,000 per worker and six months imprisonment. *Id.* § 1324a(e)(4), (f)(1).

17. The EPA has reported that approximately 950 million pounds of pesticides are used in the agriculture industry each year in the United States. 2000 GAO REPORT, *supra* note 6, at 5.

18. *Id.* Exposure can be direct, through activities associated with the application of pesticides (like mixing or loading the chemicals, or maintaining the equipment used to apply them), or indirect, through contact with residue on treated fields. 1993 GAO REPORT, *supra* note 14, at 2. In California, many "specialty crops," such as strawberries, grapes, and broccoli, require labor-intensive field preparation, maintenance and harvesting, meaning that farmworkers have increased potential for direct contact with pesticides at various stages in the process, as compared with crops like wheat and soybeans, where production has become largely mechanized. FIELDS OF POISON, *supra* note 9, at 12. In one California study, the activities most often associated with pesticide exposure were ground and hand application of pesticides, drift exposure, mixing and loading of pesticides, packing and processing of crops, and contact with residue in the field. *Id.* at 44.

highest rate of illness caused by chemical exposure across industries.[19] Acute effects of pesticide exposure include headaches, fatigue, nausea, skin rashes, eye irritation, flu-like symptoms, first or second degree chemical burns, paralysis, and death.[20] Chronic illnesses that have been associated with prolonged pesticide exposure include various types of cancer,[21] neurological disorders, and reduced cognitive skills.[22] One study examining cancer rates among farmworkers and former farmworkers who were members of the United Farmworkers of America found significantly elevated rates of leukemia, stomach, cervical, and uterine cancer and elevated levels of brain cancer and skin melanoma.[23]

Pesticide exposure, as a subset of farmworker workplace injuries, poses a unique set of difficulties with respect to identification, treatment, and record-keeping. First, it is difficult for farmworkers themselves to identify particular symptoms as associated with pesticide-related illnesses.[24] Second, health care providers may lack adequate training in and experience with pesticide-related illnesses.[25] Third, even if pesticide-related illnesses are correctly diagnosed, health care providers do not always report them properly, as many are unfamiliar with state reporting requirements regarding the illnesses, and others fail to report them at all.[26] In fact, after a comprehensive examination of programs in place at both the state and federal level to monitor occupational injuries attributable to pesticide exposure, the U.S. General Accounting Office ("GAO") concluded that the problems plaguing these programs were such that "the number of reported incidents cannot be used to indicate either the nature or the extent of events actually occurring, nor can they form the basis for national estimates."[27] Taken together, the above factors indicate that it is a challenge to isolate diseases caused by pesticide exposure, making it difficult to determine the true overall risk to farmworkers.

B. Administrative Schemes Designed to Address Farmworker Health and Safety Risks Are Inadequate to Protect Farmworkers' Health Because of Agency Underenforcement

1. Occupational Safety and Health Act, 29 U.S.C. §§ 651-700

Under the authority of the Occupational Safety and Health Act ("OSH

19. Field Sanitation, 52 Fed. Reg. 16,059 (May 1, 1987) (codified at 29 C.F.R. pt. 1928).
20. 2000 GAO REPORT, *supra* note 6, at 5; 1993 GAO Report, *supra* note 14, at 3.
21. 1993 GAO REPORT, *supra* note 14, at 3.
22. 2000 GAO REPORT, *supra* note 6, at 5.
23. Mills & Kwong, *supra* note 9, at 598.
24. 1993 GAO REPORT, *supra* note 14, at 9; FIELDS OF POISON, *supra* note 9, at 12.
25. 1993 GAO REPORT, *supra* note 14, at 9; FIELDS OF POISON, *supra* note 9, at 12.
26. 1993 GAO REPORT, *supra* note 14, at 9.
27. *Id.* at 21.

Act"),[28] the Secretary of Labor in 1987 enacted a Field Sanitation Standard which requires agricultural employers to provide potable drinking water, toilet facilities, and handwashing facilities for all employees engaged in hand-labor operations in fields and to allow employees reasonable opportunities throughout the workday to use these facilities.[29] The Field Sanitation Standard resulted from a 1972 petition initiated by the National Congress of Hispanic American Citizens and other organizations requesting that OSHA issue such regulations.[30] In enacting the standard, the agency recognized that a lack of adequate facilities in fields threatens the health of farmworkers. Among other dangers,[31] the agency highlighted the danger of pesticide-related illnesses inherent in agricultural work[32] and concluded that "[p]rovision and use of the required handwashing facilities will significantly reduce the risks to farmworkers [of pesticide-related illnesses]."[33]

Under the OSH Act, OSHA has the power to enter business establishments to conduct inspections,[34] issue citations for violations,[35] and levy civil and criminal penalties against employers in violation of rules promulgated under authority of the OSH Act.[36] There is, however, no private right of action through which employees, the intended beneficiaries of the rules and standards promulgated under the OSH Act, can enforce those rules or standards.[37]

2. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y

In 1974, the EPA issued a standard prescribing certain pesticide use protections for agricultural workers.[38] The standard prohibited spraying workers

28. 29 U.S.C. §§ 651–700 (2000).

29. 29 C.F.R. § 1928.110 (2003). The regulation applies only to agricultural establishments with eleven or more employees working in the fields on a given day. *Id.* § 1928.110(a). For an explanation of OSHA's refusal to regulate smaller operations, see Field Sanitation, 52 Fed. Reg. 16,083–85 (May 1, 1987) (codified at 29 C.F.R. pt. 1928).

30. Field Sanitation, 49 Fed. Reg. 7,589–91 (Mar. 1, 1984) (codified at 29 C.F.R. pt. 1928). The petitioning organizations eventually filed suit to compel regulatory action when OSHA did not respond immediately. *Id.* Approximately fourteen years elapsed between the initial petition and the issuance of the Field Sanitation Standard.

31. The agency also mentioned hazards related to dehydration and heat stress, urinary tract infections, and communicable diseases. Field Sanitation, 52 Fed. Reg. at 16,055–61.

32. *Id.* at 16,059–61. Testimony at the time demonstrated that farmworkers were 24.76 times more likely to report pesticide-related illnesses than workers in all other occupations. *Id.* at 16,061.

33. *Id.* at 16,061. One doctor estimated a sixty-five percent reduction in risk for all pesticide-related illnesses. Another estimated a thirty-five percent to ninety-seven percent decrease in pesticide-related skin rashes. *Id.*

34. 29 U.S.C. § 657 (2000).

35. *Id.* § 658.

36. *Id.* § 666.

37. *See* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY & HEALTH LAW § 502 (4th ed. 1998) (citing cases that have found no private right of action under the OSH Act).

38. 59 Fed. Reg. 38,103–04.

or other persons, mandated the intervals of time that must pass between application of pesticides and worker reentry into fields, required protective clothing for workers who had to enter fields before a specific reentry period had expired, and required timely warnings of pesticide application. In 1992, the EPA, under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"),[39] updated the regulations, resulting in the Worker Protection Standard currently in place.[40]

The current Worker Protection Standard is extremely detailed. Generally, it imposes the following obligations on agricultural employers: it prohibits agricultural employers from requiring or directing farmworkers to enter an area treated with pesticides until after the expiration of the restricted-entry interval ("REI") listed on the pesticide's label, requires them to notify farmworkers of upcoming pesticide applications, requires them to notify farmworkers that pesticides have been applied in a particular area within the last thirty days, requires that they provide pesticide training and pesticide safety information to farmworkers, and requires them to provide emergency assistance, including transportation and information about the pesticide used, when a farmworker has been injured by pesticide exposure.[41] Additional protections are provided for farmworkers who work as pesticide handlers.[42] As with the OSH Act, FIFRA does not expressly provide a private right of action through which farmworkers can hold employers liable for violations of EPA regulations.[43]

3. *Underenforcement of Regulatory Regimes by EPA and OSHA*

Administrative enforcement of these schemes has proven to be inadequate to protect the health of farmworkers. Since neither the OSH Act nor FIFRA expressly contemplates a private right of action by a worker whose employer has violated the regulations, the responsibility for enforcement rests entirely on the shoulders of the EPA and OSHA. The regulatory regimes set up by the EPA and OSHA to address the severe occupational health and safety risks farmworkers face have been systematically underenforced by the agencies. Even when enforcement efforts have been undertaken, the penalties employers receive for violations are too low to effect significant deterrence.

a. OSHA Underenforcement

OSHA has admitted that its highest enforcement priorities are reports of

39. 7 U.S.C. §§ 136–136y (2000).

40. 40 C.F.R. pt. 170 (2004).

41. 40 C.F.R. §§ 170.110–.160 (2002).

42. *Id.* §§ 170.202–.260.

43. *See, e.g.*, No Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001).

imminent danger and fatality investigations.[44] Since violations of OSHA's Field Sanitation Standard may not, from the agency's perspective, rise to the level of imminent danger or result in immediate fatalities, they necessarily fall lower in the agency's list of priorities. Additionally, OSHA targets its inspections to industries with the highest accident rates; construction and manufacturing. Its remaining resources are spread among a large number of industries, including agriculture. In 1988, OSHA employed only 1,181 compliance officers to inspect 4.5 million businesses employing 65 million workers. During this time, its officers made less than 59,000 inspections. Eighty-three percent of the inspections were in the construction and manufacturing sectors.[45] Only about 10,000 inspections were conducted in the remaining sectors, where seventy-five percent of the workforce is employed.[46] Realistically, employers outside of the target industries are almost never inspected by OSHA officers unless an employee files a formal complaint with the agency.[47] In 1990, only about 700 OSHA inspections were related to enforcement of the Field Sanitation Standard.[48] Where violations of the Field Sanitation Standard are discovered by the agency, OSHA's guidelines for implementing the Standard indicate that, because of the "short duration of field activities," administrators need only implement procedures sufficient to ensure that at least five percent of inspections resulting in "serious citations" receive follow-up inspections.[49]

Across industries, the penalties levied by the agency against employers who violate the OSH Act are extremely low. In Massachusetts, the average fine for a violation of the OSH Act likely to cause serious physical harm is $864; for a violation resulting in the death of a worker the average fine is $12,563.57.[50] Employers can often settle violations with fines significantly lower than those

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44. *See* Henshaw testimony, *supra* note 7, at 19.

45. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 504–05 (1992). Even among the targeted industries, each business would only have been inspected, on average, every eight to ten years. *Id.*

46. *Id.* at 505. If OSHA's resources were spread evenly across industries, each business would be inspected approximately every seventy-five years. Since its inspections are targeted, however, employers in nontargeted industries can anticipate inspections even less than once every seventy-five years. *Id.*

47. *Id.*

48. Letter from Lynn Martin, Occupational Safety and Health Administration, to D. Michael Hancock, Executive Director, Farmworker Justice Fund, Inc. (Oct. 31, 1991), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20442&p_text_version=FALSE (last visited March 25, 2003).

49. Guidelines for Implementing the Field Sanitation Standard, OSHA Instruction CPL 2-2.42 (June 22, 1992), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show document?p table=DIRECTIVES&p_id=1553&p_text_version=FALSE (last visited March 25, 2003).

50. MASSACHUSETTS AFL-CIO, MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MASSCOSH) AND THE WESTERN MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (WESTERN MASSCOSH), DYING FOR WORK IN MASSACHUSETTS: THE LOSS OF LIFE AND LIMB IN MASSACHUSETTS WORKPLACES (2002), *available at* http://www.massaflcio.org/dying2002/executive.html (last visited January 7, 2004).

originally proposed by the agency.[51]

An indication that the OSH Act's enforcement mechanism is not working effectively is that, despite the existence of the Field Sanitation Standard, a nationwide study of farmworkers demonstrated that more than thirteen percent do not have access to toilets at the workplace, almost sixteen percent do not have water with which to wash, and two percent of farmworkers do not have any access to drinking water.[52]

b. EPA Underenforcement

FIFRA gives the states primary enforcement responsibility for pesticide use violations where either the state has entered into a cooperative agreement with the EPA or the EPA Administrator has determined that a state has adopted "adequate pesticide use laws and regulations" and "adequate procedures for the enforcement" of those laws and regulations.[53] Because most states have cooperative agreements with the EPA, it is the states that primarily carry out the implementation and enforcement of pesticide requirements, including the Worker Protection Standard.[54] The EPA's regional offices oversee state enforcement activities under the cooperative agreements.[55]

A 2000 report by the GAO on the effects of pesticides on farmworkers and their children found that the EPA "has little assurance that the protections called for in the [Worker Protection] Standard are actually being provided to farmworkers generally or to children who work in agriculture." The GAO recommended that the EPA take concrete steps to improve its oversight of the states' implementation and enforcement of the Worker Protection Standard.[56]

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51. In one case, OSHA originally proposed to fine an employer $4,000 for the death of an immigrant worker doing clean-up work at the World Trade Center site. However, OSHA later agreed to reduce the fine to $100, a "mere slap on the wrist for a violation that strikes at the heart of OSHA's ability to protect workers." *Workplace Safety and Health for Immigrant and Low Wage Workers: Testimony Before the S. Subcomm. on Employment, Safety, and Training of the Comm. on Health, Educ., Labor, and Pensions,* 107th Cong. 60 (2002) (statement of Omar Henriquez, Youth and Immigrant Project Coordinator of the New York Committee for Occupational Safety and Health ("NYCOSH")).

52. NAT'L AGRICULTURAL WORKERS SURVEY, *supra* note 7 at 37 (citing data from 1997–1998).

53. 7 U.S.C. §§ 136u, 136w-1 (2000).

54. 2000 GAO REPORT, *supra* note 6, at 20. In 1999, the EPA provided the states with about $20 million total (an average of approximately $400,000 per state) to carry out pesticide enforcement activities. Two million dollars of this money was specifically allocated for enforcing the Worker Protection Standard. *Id.*

55. *Id.*

56. *Id.* at 5. The steps recommended by the report were: 1) promulgating a clear definition of what constitutes a worker protection inspection for the purposes of the cooperative agreements; 2) establishing goals for minimum numbers of inspections for states to conduct annually; 3) examining whether the states dedicate adequate resources to carry out their roles under the cooperative agreement; 4) clarifying the roles and responsibilities of the EPA's regional offices in order to achieve national consistency; and 5) taking steps to obtain and analyze data obtained by

Specifically, the GAO found three main areas of inconsistent enforcement among the EPA's regions. First, only three of the EPA's ten regions set a target number of worker protection inspections for states under their oversight.[57] The importance of such goal-setting is underscored by the actual number of inspections occurring in states. In fiscal year 1998, five states reported conducting no routine worker protection inspections, while eleven states conducted fewer than ten routine inspections.[58] The target set for the EPA's Atlanta region for fiscal year 1999 was between 60 and 100 inspections per state per year. The previous year, two states in the region, Alabama and Tennessee, had conducted only five and four inspections, respectively.[59] Second, the EPA did not provide a consistent definition of what constituted a worker protection inspection, even for states in the same EPA region.[60] For example, EPA regional officials from Dallas indicated that some states reported a worker protection inspection even if only a single question was asked about worker protection during a more comprehensive agricultural inspection; in other states, only "comprehensive" worker protection inspections were reported as such.[61] Third, the regions' supervision and monitoring of state enforcement activities varied greatly. The FIFRA Enforcement Coordinator from one region admitted that the regional office did not know what factors states checked during worker protection inspections.[62] Three of the regions admitted that no one from the regional offices accompanied state officials on any worker protection inspections conducted throughout the year.[63] As a result, the regions had little or no information regarding the results of state worker protection inspections, including state responses where violations of the Worker Protection Standard were discovered.[64] Many regions cited resource constraints as the reason for the lack of joint inspections.

Data from other sources confirm the GAO findings. In Colorado, the EPA did not routinely conduct worker protection inspections on farms until 2001. That year, in response to worker demands, the EPA conducted a total of twenty-

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the states in their worker protection inspections, including the states' responses to violations of the Worker Protection Standard. *Id.* at 24.

57. *Id.* at 20–21.

58. *Id.* at 21. This data includes only inspections conducted under the EPA/state cooperative agreements. States can conduct additional worker protection inspections with state resources, but EPA officials reported that they generally did not receive data regarding these inspections, if indeed any took place. *Id.*

59. *Id.*

60. Six regions reported that the states in the region had varying requirements. Four regions had established guidance requiring worker protection inspections to address all the requirements contained in the Worker Protection Standard. *Id.* at 21–22.

61. *Id.* at 22.

62. *Id.*

63. *Id.* In the states in these regions, EPA oversight was limited to reviews of files, meetings and discussions with state officials, and mid and end of year reports. *Id.*

64. *Id.* at 23.

two worker protection investigations in the state. Twenty of the twenty-two employers who were inspected were found to be violating pesticide laws and regulations, producing a total of eighty-six violations.[65] The EPA did not issue any fines or penalties for the violations.[66] The employers were only punished with warning letters.

The results of a study of Florida's enforcement efforts are consistent with the findings in Colorado.[67] In the approximately five and one-half years between January 1992 and May 1997, the state completed forty-six investigations pursuant to complaints of pesticide illness or injury by agricultural workers, or less than one per month. Violations were found in thirty-one cases, but only two fines were issued.[68] Even in the case of repeat offenders, the state did not necessarily issue fines.[69] Where it did, the fines were often clearly out of proportion to the nature of the violation and/or the repeat offender status of the employer.[70]

In California, the story is much the same. From fiscal years 1991–1992 to 1995–1996, 15,028 fieldworker inspections were conducted throughout the state, with 2,888 safety violations recorded during the inspections. Only 216 violations, or approximately seven percent, resulted in fines.[71] Despite the existence of EPA-mandated REIs,[72] field residue exposure incidents are still common among farmworkers in California, indicating that the regulations are inadequate, underenforced, or both.[73]

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65. Kimi Jackson, Hidden Costs: Farm Workers Sacrifice their Health to Put Food on Our Tables 16 (2002) (unpublished report, on file with the author). Sixty-eight percent of inspected employers failed to provide pesticide training to their workers; fifty percent did not provide information about what to do in case of a pesticide emergency; and thirty-six percent did not provide soap or handwashing water. *Id.*

66. *Id.*

67. Shelley Davis & Rebecca Schleifer, Indifference to Safety: Florida's Investigation into Pesticide Poisoning of Farmworkers, at i (1998) (unpublished report, on file with author). The EPA has delegated responsibility to the state of Florida to enforce the Worker Protection Standard.

68. *Id.* at 5–6. In twenty-seven of the thirty-one cases where violations were found, there were multiple violations. *Id.* at 37. In the twenty-nine cases where a fine was not issued, one employer received a warning letter, while the remainder simply received a letter notifying them of the violation. *Id.* at 37–38. Follow-up investigations to determine subsequent compliance were rare. *Id.* at 38.

69. *Id.* at 20. In one case, investigators found serious violations of state and federal pesticide laws at one farm on three different occasions within approximately one year, yet failed to issue any fine. *Id.* at 20–21.

70. One employer who had received written warnings on at least four prior occasions and who had previously been fined $1,200 for pesticide violations settled a pending matter regarding multiple serious violations by agreeing to pay a $1,500 fine. *Id.* at 39–40.

71. FIELDS OF POISON, *supra* note 9, at 29.

72. REIs dictate the amount of time that must pass after application of a particular pesticide before workers can reenter the field and vary depending on the pesticide applied. 40 C.F.R. § 170.112 (2002).

73. FIELDS OF POISON, *supra* note 9, at 15–16 (stating 33.4% of reported agricultural pesticide poisonings in California from 1991 to 1996 occurred as a result of exposure to residue in fields).

C. *Further Policy Reasons Support Using AWPA's Private Right of Action to Enforce Statutory Requirements from Schemes Designed to Protect Farmworker Health*

As discussed above, farmworkers face greater safety risks than most other categories of workers in the United States.[74] This alone might justify the use of AWPA's private right of action to remedy employer violations of health and safety regulations that are implemented for the express benefit of farmworkers. When considered together with the extra barriers to collective action faced by farmworkers, a private right of action assumes even greater significance.

One of the primary avenues through which workers have traditionally addressed grievances related to their employment conditions, including health and safety risks, is collective bargaining and other forms of self-organization. The National Labor Relations Act of 1935 ("NLRA"), which was designed to address the inequality of bargaining power between employees and employers,[75] protects employee organizing, the formation of labor organizations, the right to collectively bargain with employers through employee-chosen representatives, and the right to engage in other concerted activities for "mutual aid and protection."[76]

Under the Act, it is an unfair labor practice for an employer to interfere with these employee rights or to discriminate against employees on the basis of membership in a labor organization.[77] Farmworkers, however, are excluded from the organizing and collective bargaining protections provided by the NLRA.[78] Although a few states provide some collective bargaining protections to farmworkers, there is a disparity in protections from state to state which frustrates the organizing process among migrant and seasonal workers, who often cross state lines to work.[79] Thus, under current state and federal laws, farmworkers are effectively barred from using collective action to further group goals, such as increased employer compliance with health and safety regulations. Since they are denied this basic, collective right of workers in the United States,

74. *See* discussion *supra* Part I.A.

75. 29 U.S.C. § 151 (2000).

76. *Id.* § 157.

77. *Id.* § 158(a)(1).

78. *Id.* § 152(3) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer."). For an argument that the anomalous exclusion of farmworkers from the protections of the Act is inconsistent with the Act's purposes and the practical realities of the agricultural industry and should be reconsidered by Congress, see generally Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489 (1999).

79. *See* LeRoy & Hendricks, *supra* note 78, at 492–93. New Jersey, Massachusetts, Wisconsin, Oregon, Kansas, Arizona, and California have extended, to varying degrees, some collective bargaining protections to farmworkers. *Id.* at 513. Several states, including Colorado, Minnesota, Pennsylvania, and New York, supplement the NLRA's regulation of private sector collective bargaining but continue to exclude farmworkers from coverage. *Id.* at 513, 517.

the individual private right of action under AWPA assumes even greater importance.

The fact that farmworkers' personal health and safety are at stake means that monetary compensation after the fact is a second-best result. Deterring agricultural employers from violating the law is of primary importance. Enforcing health and safety regulations as part of the working arrangement that employers make with farmworkers and are required to comply with under AWPA can stimulate deterrence. Indeed, AWPA's private right of action was enacted with this in mind.

Courts have recognized that the purpose of the private right of action is "not restricted to compensation of individual plaintiffs. It is designed also to promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market."[80] Under AWPA's private right of action, courts may award either actual damages or statutory damages of up to $500 per plaintiff per violation.[81] Enforcing the obligations imposed on employers by the OSH Act and FIFRA under AWPA's working arrangement provisions will motivate agricultural employers to comply with the regulations. These regulatory regimes do not require intense compliance costs. In 1987, when the Field Sanitation Standard was enacted, OSHA estimated that, at the high end, compliance would cost an employer approximately $1.26 per worker per day.[82] Even recognizing that legal counsel is not readily available to all farmworkers covered by AWPA, the threat of suit may be enough to deter violations.[83]

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80. Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985) (discussing FLCRA, AWPA's predecessor, and citing S. REP. NO. 93-1295 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6441). A more recent case under AWPA echoed the *Beliz* court's analysis. Martinez v. Shinn, No. C-89-813-JBH, 1991 WL 150184, at *2 (E.D. Wash. July 31, 1991), *aff'd*, 992 F.2d 997 (9th Cir. 1993).

81. 29 U.S.C. § 1854(c)(1) (2000).

82. Field Sanitation, 52 Fed. Reg. 16,078 (May 1, 1987) (codified at 29 C.F.R. pt. 1928). This accounts for a day when the sanitation facilities have to be moved. The cost is lower, $0.92, if the facilities do not have to be moved. *Id.*

83. This article does not contend that the ability of farmworkers themselves to enforce existing federal health and safety regulations enacted for their protection through AWPA's private right of action will eliminate the health problems that farmworkers face as a result of daily labor in fields saturated with pesticides; rather, this private right of action is but one front on which farmworkers can wage the battle against dangerous working conditions. Commentators have suggested other solutions to the problem of unsafe working conditions for farmworkers. Some believe that FIFRA needs to be enhanced, for example through a more stringent initial registration process for pesticides, in order to adequately protect farmworkers' health. Shannon Adair Tool, *Farmworkers and FIFRA: Laboring Under the Cloud*, 31 SW. U. L. REV. 93, 117 (2001). There is some research suggesting that incidents that do not fall under the scope of the EPA regulations constitute a significant proportion of pesticide exposure incidents among farmworkers. FIELDS OF POISON, *supra* note 9, at 15. Additionally, children are not adequately protected by the existing requirements of the EPA Worker Protection Standard because their lower body weight is not taken into account when setting the standards, even though EPA has acknowledged that young children are often present or working in the fields. 2000 GAO REPORT, *supra* note 6, at 16, 19. With

II.
INCLUDING MANDATORY HEALTH AND SAFETY OBLIGATIONS IMPOSED ON EMPLOYERS BY DISTINCT STATUTORY AND REGULATORY SCHEMES AS PART OF AWPA'S WORKING ARRANGEMENT IS CONSISTENT WITH CONGRESSIONAL INTENT AND JUDICIAL INTERPRETATIONS OF AWPA

The working arrangement provisions of AWPA provide that "[n]o farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association" with any migrant or seasonal agricultural worker.[84]

Only two courts, the Eastern District of Michigan and the District of New Mexico, have been squarely presented with the question of the applicability of AWPA's working arrangement provisions to health and safety regulations promulgated under separate statutory regimes for the benefit of farmworkers. In *Elizondo v. Podgorniak*, the plaintiffs, migrant farmworkers from Texas who harvested pickling cucumbers on the defendants' farm in Michigan,[85] alleged, among other things, that the defendant employers failed to make available in the fields water for drinking and handwashing and accessible toilet facilities.[86] The Eastern District of Michigan granted summary judgment for plaintiffs on the ground that their employers' violations of the Field Sanitation Standard

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respect to OSHA, the Field Sanitation Standard covers only workers on farms where there are more than eleven farmworkers working in the fields. In 1987, when the standard was adopted, this captured only thirty-six percent of all agricultural workers. Field Sanitation, 52 Fed. Reg. at 16,054. To the extent, however, that advocates argue for and gain more stringent statutory or regulatory requirements to protect farmworkers, the chronic underenforcement of such schemes may mean that enforcement through AWPA's private right of action is one of the only realistic ways to force agricultural employers to comply with any new protective measures.

84. 29 U.S.C. §§ 1822(c), 1832(c) (2000). A migrant agricultural worker, according to AWPA, is "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." *Id.* § 1802(8)(A). A seasonal agricultural worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation." *Id.* § 1802(10)(A).

85. 70 F. Supp. 2d 758, 761 (E.D. Mich. 1999).

86. *Id.* at 778. The plaintiffs in *Elizondo* resided at a labor camp owned and operated by the defendants. During the two seasons at issue in the case, the defendants had been cited by the Michigan Department of Public Health, Bureau of Environmental and Occupational Health a number of times for health violations at the camps. Several of the plaintiffs and their children developed shigellosis, a disease spread through human waste, during the 1997 season. *Id.* at 764.

constituted a violation of AWPA's working arrangement provision.[87] The court held that "the term 'working arrangement' includes those aspects of the working relationship that are required by law," and found the obligations imposed on the employers by the Field Sanitation Standard to be a "mandatory term of the 'working arrangement' Defendants had with Plaintiffs."[88] The court's analysis of this issue was brief, relying mainly on the fact that "[c]ourts have held that § 1822(c) liability can arise when a term of employment is required to be part of the working arrangement."[89]

The plaintiffs in *Sedano v. Mercado*[90] were farmworkers recruited to work in the chile fields of southern New Mexico, who sought a permanent injunction forbidding the defendants from violating AWPA.[91] Among other things, the plaintiffs claimed that the defendants had violated AWPA's working arrangement provision by failing to follow the Field Sanitation Standard; specifically, defendants failed to provide adequate toilet facilities or any handwashing facilities.[92] The court, finding at least one defendant aware that the sanitary facilities he provided were inadequate under both state and federal law, granted plaintiffs' request for a permanent injunction against the violation of the working arrangement.[93] Beyond pointing to the "very specific" nature of federal regulations governing sanitary facilities in the fields, the court did not address why it found the Field Sanitation Standard to constitute a part of the working arrangement under AWPA.[94]

This section argues that the approach taken and ultimate outcome reached by the courts in *Elizondo* and *Sedano*, though cursorily analyzed, reflects the correct understanding of the scope of the working arrangement provisions of AWPA with respect to health and safety regulations that benefit farmworkers and should be followed by other courts deciding similar claims.

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87. Elizondo v. Podgorniak, 100 F. Supp. 2d 459, 463 (E.D. Mich. 2000). In its 1999 opinion, the *Elizondo* court erroneously lumped violations of the OSHA Field Sanitation Standard into plaintiffs' claims regarding violations of 29 U.S.C. § 1823(a), which provides that persons owning or controlling housing for migrant agricultural workers must ensure that the housing complies with federal and state safety and health standards applicable to the housing. *Elizondo*, 70 F. Supp. 2d at 778–79. A subsequent decision by the same court, however, clarified that violations of the Field Sanitation Standard should have been analyzed under § 1822(c). *Elizondo*, 100 F. Supp. 2d. at 463.

88. 100 F. Supp. 2d at 463.

89. *Id.* In support of this proposition, the court cited Donaldson v. U.S. Dep't of Labor, 930 F.2d 339, 349–50 (4th Cir. 1991) and Colon v. Casco, Inc., 716 F. Supp. 688, 694 (D. Mass. 1989). For discussion of these cases, *see infra* Part II.D.

90. 124 Lab.Cas. (CCH) ¶35,756 (D.N.M. 1992).

91. *Sedano*, ¶35,756. The plaintiffs in this case sought only injunctive relief. The court held the damages remedy inadequate because "the daily nature of this type of farm work in southern New Mexico makes it impossible to seek damages every time a violation occurs." *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

A. History of AWPA

AWPA was preceded by the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), which was "enacted to protect agricultural workers whose employment had been historically characterized by low wages, long hours and poor working conditions."[95] Specifically, FLCRA dealt with the problems farmworkers had encountered with farm labor contractors, individuals who acted as middlemen and provided laborers to growers for a price. Specifically, Congressional hearings had revealed that farm labor contractors were perpetrating a number of abuses against farmworkers, including misrepresenting the nature and availability of work, providing inaccurate information about wages, transporting farmworkers in uninsured, unsafe vehicles, forcing farmworkers to buy necessary supplies from them at inflated prices, and providing inadequate and unsafe housing.[96] In 1974, in response to concerns about a lack of enforcement, FLCRA was amended to include, among other things, a private right of action for farmworkers injured by a farm labor contractor's failure to abide by the provisions of the Act.[97]

The main impetus for replacing FLCRA with AWPA in 1983 was the failure of FLCRA to regulate any actor other than the farm labor contractor. Because of this scheme, the focus of FLCRA enforcement had come to center on deciding who precisely fit the definition of farm labor contractor. As Congress described it:

> [C]ase law shows a history of opposing parties attempting to either expand the definition of farm labor contractor to cover as many types of organizations, including fixed-situs agricultural employers and activities as possible . . . or to avoid farm labor contractor obligations through exclusion from coverage under the Act. While these definitional issues have become paramount under FLCRA, worker protections have often been relegated to a secondary status.[98]

Congress ultimately concluded that FLCRA, as amended, had "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers and that a completely new approach must be advanced."[99] The new approach implemented by Congress was AWPA.[100]

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95. H.R. REP. NO. 97-885, at 1 (1982).

96. Donald B. Pedersen, *The Migrant and Seasonal Agricultural Worker Protection Act: A Preliminary Analysis*, 37 ARK. L. REV. 253, 254 (1984).

97. S. REP. NO. 93-1295, at 3, 20–21 (1974). For discussion of Congress' reasons for adding a private right of action, see discussion *infra* Part III.A.

98. H.R. REP. NO. 97-885, at 2.

99. *Id.* at 3.

100. In addition to its working arrangement protections, AWPA provides protections to farmworkers relating to the timing and nature of information about the terms and conditions of employment provided to them by employers, employer compliance with wage obligations and

B. *Statutory Text and Structure of AWPA*

Despite the fact that the working arrangement provisions comprise a substantial part of the protections provided to farmworkers under AWPA, neither the Act itself nor the regulations promulgated under authority of the Act define working arrangement.[101] The provisions are found in a section titled "Wages, supplies, and other working arrangements," indicating that a working arrangement comprises obligations and terms outside of those explicitly enumerated in the other subsections of § 1822 and § 1832, which cover timely payment of wages and prohibit employers from requiring farmworkers to purchase goods or services solely from the employer.[102] Indeed, § 1822(c) and § 1832(c) would be redundant if they merely reiterated protections already enumerated in subsections (a) and (b) of § 1822 and § 1832. The Supreme Court's reluctance to treat statutory terms as mere "surplusage" supports the proposition that the working arrangement provisions have meaning apart from the terms and conditions of employment regarding wages and supplies.[103]

Other provisions of AWPA demonstrate that Congress, in drafting the Act, intended for the term working arrangement to be broadly interpreted. First, there is explicit confirmation in the Act that working arrangement must mean more than a written agreement. Section 1844, providing that farm labor contractors shall not violate the terms of certain "written agreements" made with agricultural employers or associations, demonstrates that, had Congress intended that § 1822(c) and § 1832(c) only apply to written agreements, it knew how to make this limitation clear.[104]

Additionally, had Congress wished to limit the working arrangement concept, it could easily and explicitly have done so by reference to other

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other work arrangements, housing and transportation safety, and registration of farm labor contractors. *See generally* 29 U.S.C. §§ 1800–1872 (2000).

101. *See id.* § 1802 (failing to include a definition of working arrangement in the definitions provision of the Act); 29 C.F.R. § 500.20 (2003) (failing to include a definition of working arrangement in definitions section of regulations implementing the Act). The implementing regulations define "without justification" as it is used in the working arrangement provisions and provide that "[w]ritten agreements do not relieve any person of any responsibility that the person would otherwise have under the Act or these regulations," but do not define the term working arrangement. 29 C.F.R. § 500.72.

102. With respect to AWPA, the term "employer" will be used to denote any farm labor contractor, agricultural employer, or agricultural association. Unless otherwise noted, AWPA's requirements extend to all three types of employers.

103. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98 (1995) (citation omitted) (finding that petitioner reasonably construed the word "harm," used in a regulation to further define the meaning of "take" in the Endangered Species Act, to encompass indirect as well as direct harm to endangered or threatened species; otherwise, "harm" would have added no meaning to the word "take").

104. *See* 29 U.S.C. § 1844(a) (2000). The language of § 1844(a), "No farm labor contractor shall violate, without justification," tracks the beginning language of §§ 1822(c) and 1832(c): "No farm labor contractor shall violate, without justification...."

provisions of the Act governing the initial interaction between agricultural worker and employer. For example, § 1821(a) and § 1831(a) impose written disclosure requirements on recruiters of agricultural workers.[105] They must disclose the place of employment; the wage rates to be paid; the crops and kinds of activities for which the worker may be employed; the period of employment; the transportation, housing, and any other benefit to be provided, and any costs to be charged for any of the aforementioned benefits; the existence of a strike or other concerted work stoppage, slowdown, or interruption by employees; the existence of any arrangements with any establishment in the area of employment under which the farm labor contractor, agricultural employer, or agricultural association will receive a commission or other benefit resulting from any sales by such establishment to the workers; and whether workers' compensation insurance is provided, and, if so, details of such coverage.[106] Had Congress intended to limit the concept of working arrangement, one way it could have done so would have been to limit it to the terms required to be disclosed by § 1821(a) and § 1831(a). However, there is no congruence of terminology between §§ 1822(c) and 1832(c) and §§ 1821(a) and 1831(a), indicating that Congress did not contemplate such a limitation.

Congress did use the disclosure requirements of § 1821(a) and § 1831(a) as reference points in other provisions dealing with terms and conditions of farmworker employment. Section 1821(f) provides that employers of migrant and seasonal agricultural workers cannot knowingly provide false or misleading information to such workers concerning the "terms, conditions, or existence of agricultural employment" required to be disclosed by §§ 1821(a)–(d).[107] The Act also provides that farm labor contractors must obtain a written statement of the "conditions of . . . employment as described in sections 1821(b) and 1831(b)[108] of this title" from each place of employment and make it available for inspection to each worker he contracts to employ.[109] That Congress chose not to tie the working arrangement provisions to the disclosure provisions indicates that the working arrangement provisions are meant to encompass terms and conditions of employment beyond those explicitly provided for in the disclosure provisions.

It is true that, in contrast to certain other provisions of AWPA, § 1822(c)

105. *Id.* §§ 1821(a), 1831(a). The only difference between these two provisions is that § 1821(a) mandates written disclosures to migrant agricultural workers in every instance, while § 1831(a) mandates written disclosures to seasonal agricultural workers only upon a worker's request.

106. *Id.* §§ 1821(a), 1831(a).

107. *Id.* §1821(f).

108. The written statement to which the statute refers is a statement that an agricultural employer must post the rights and protections of farmworkers under AWPA, including the right of a worker to be provided with a written disclosure statement, as described in § 1821(a) and § 1831(a). *Id.* §§ 1821(b), 1831(b).

109. *Id.* § 1843.

and § 1832(c) do not specifically spell out that AWPA's working arrangement includes obligations imposed upon employers of migrant and seasonal agricultural workers by separate statutory schemes and provisions. For example, AWPA specifically mandates that individuals who own or control property that houses farmworkers comply with federal and state safety and health standards applicable to that housing.[110] Additionally, employers who use or cause to be used a vehicle for providing transportation to migrant or seasonal agricultural workers must ensure that the vehicle complies with applicable federal and state safety standards.[111]

In *Medrano v. D'Arrigo Bros. Co. of California*,[112] the court addressed the issue of whether the explicit authorization of importation of obligations from distinct statutory schemes in the transportation and housing provisions meant that the working arrangement provisions, without such explicit language, were not intended to import outside obligations. It rejected this interpretation under the case law that had grown up around AWPA. Namely, the court relied upon the near-universal acceptance of the idea that § 1832(a), mandating that employers pay farmworkers their wages owed when due, imports obligations from the Fair Labor Standards Act. It concluded that explicit language authorizing importation in the transportation and housing provisions was not indicative of an intent to preclude the importation of other statutory terms into other sections of the Act, including the working arrangement provisions.[113]

C. Legislative History

The working arrangement provisions date back to Congress' enactment of FLCRA in 1963. FLCRA provided that the Secretary of Labor could refuse to issue, suspend, or revoke a farm labor contractor's certificate of registration if he "fail[ed] to comply with working arrangements made with migratory workers."[114] In 1983, when AWPA was enacted, Congress chose to continue to protect farmworkers from employer violations of the terms of working arrangements made under the Act.[115]

Congress was largely silent as to the precise meaning of the working arrangement provisions, both in FLCRA and in AWPA. What is clear from the legislative history, however, is that Congress took its obligation to farmworkers seriously. It saw farmworkers as "the most abused of all workers in the United States."[116] From the inception of Congress' regulation of the employment

110. *Id.* § 1823(a).
111. *Id.* § 1841(b)(1)(A).
112. 125 F. Supp. 2d 1163 (N.D. Cal. 2000).
113. *Id.* at 1167.
114. H.R. REP. NO. 88-358, at 5 (1963).
115. *See* 29 U.S.C. §§ 1822(c), 1832(c) (2000); H.R. REP. NO. 97-885, at 28–29 (1982).
116. H.R. REP. NO. 97-885, at 2.

relationship between agricultural workers and those who controlled their labor, the focus has been on remedying a history of injustice. The House of Representatives, in considering the original FLCRA in 1963, found the hearing record "replete with statements indicating serious abuses perpetrated upon vulnerable migrant farmworkers by contractors for agricultural labor."[117] It recognized a need to protect these workers from "exploitation by unscrupulous and irresponsible contractors and crew leaders."[118] By 1974, it had begun to be apparent that FLCRA had not had much effect on worker exploitation; in fact "abuse of workers by the contractor/crew leader appear[ed] more the rule than the exception."[119] Congress took steps to increase the efficacy of FLCRA by strengthening its enforcement provisions and creating a private right of action for aggrieved workers.[120] Later, when it became clear that worker protections had often been "relegated to a secondary status" under FLCRA because of disputes over who fit into the definition of a farm labor contractor, Congress took action and enacted AWPA in an attempt to reach out to regulate more employers in order to reverse the historical trend of exploitation and abuse of farmworkers.[121] Against the backdrop of exploitation and intense Congressional interest in remedying what it saw as the problems farmworkers faced, the working arrangement provisions can best be understood as a Congressional attempt to provide expansive protections to farmworkers across a range of circumstances.

D. Judicial Interpretations of the "Working Arrangement" Provisions

The Supreme Court has acknowledged that "[i]t has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"[122] In interpreting AWPA, as well as its predecessor, FLCRA, courts have recognized that the remedial nature of these two schemes qualifies them for broad construction.[123] This kind of broad construction "'comports with the Act's humanitarian purpose to protect all those hired . . . to toil in our nation's fields, vineyards and orchards.'"[124]

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117. H.R. REP. NO. 88-358, at 3.

118. *Id.* at 3.

119. H.R. REP. NO. 93-1493, at 5 (1974).

120. *Id.* at 1.

121. H.R. REP. NO. 97-885, at 3 (1982).

122. Sutton v. United Air Lines, 527 U.S. 471, 504 (1999) (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

123. *See, e.g.*, Antenor v. D&S Farms, 88 F.3d 925, 933 (11th Cir. 1996) (interpreting AWPA); Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1505 (11th Cir. 1993) (interpreting AWPA); Bracamontes v. Weyerhaeuser Co., 840 F.2d 271, 276 (5th Cir. 1988) (interpreting AWPA); Rivera v. Adams Packing Ass'n, 707 F.2d 1278, 1281 (11th Cir. 1983) (interpreting FLCRA); Soliz v. Plunkett, 615 F.2d 272, 275 (5th Cir. 1980) (interpreting FLCRA); Marshall v. Coastal Growers Ass'n, 598 F.2d 521, 525 (9th Cir. 1979) (interpreting FLCRA).

124. *Soliz*, 615 F.2d at 275–76 (quoting Usery v. Coastal Growers, Inc., 418 F. Supp. 99, 101 (C.D. Cal. 1976) (referring to FLCRA)).

Though there are certainly cases arising under AWPA's working arrangement provisions where the violation found related to a term explicitly agreed on by employer and employee,[125] courts have not limited the working arrangement concept to only these cases. In *Aviles v. Kunkle*, the court described working arrangement under AWPA as "the understandings of the parties, given their mutual knowledge and conduct, as to the expected terms and conditions of employment."[126] This definition, with its emphasis on expectations of the parties, anticipates that implied terms can constitute part of AWPA's working arrangement.[127] Other courts interpreting AWPA's working arrangement provisions have recognized as much.

In *Colon v. Casco, Inc.*, employers were held liable for a violation of the working arrangement even where the term with which the employers failed to comply, optional weekend work, was not explicitly communicated to employees at the beginning of their employment.[128] The employers acknowledged, however, the "general knowledge of this policy among the workers, including plaintiffs."[129] The court held that "given the undisputed mutual knowledge of and reliance on this policy, it would not be fair or proper in consideration of the goal of protecting . . . agricultural workers to exclude this understanding from the 'working arrangement.'"[130]

Allowing health and safety laws to be enforced under AWPA's working arrangement provision because of the knowledge and reliance factors highlighted by the *Aviles* and *Colon* courts comports with the underlying purposes of the Act. Employers have or should have knowledge that there are federal and state

125. *See, e.g.*, Cardenas v. Benter Farms, 141 Lab.Cas. (CCH) ¶34,148 (S.D. Ind. 2000) (denying defendants' motion for summary judgment because record, with all reasonable inferences drawn for plaintiffs, supported finding that recruiter's unfulfilled oral promises constituted a working arrangement with plaintiffs); Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 612–13 (W.D. Tex. 1999) (finding violation of § 1822(c) where workers were promised free housing and transportation and employers did not provide such housing and transportation); Alba v. Gonzales, 124 Lab.Cas. (CCH) ¶35,755 (D.N.M. 1992) (holding farm labor contractor's failure to honor his explicit promise to take workers to a "first quality" field constituted a violation of § 1832(c)); Maldonado v. Lucca, 636 F. Supp. 621, 626–27 (D.N.J. 1986) (holding agricultural employers violated §§ 1822(c) and 1832(c) by failing to provide housing and transportation for duration of season when recruiter who provided employers with workers promised this to the workers).

126. 765 F. Supp. 358, 366 (S.D. Tex. 1991), *vacated on grounds of lack of personal jurisdiction*, 978 F.2d 201 (5th Cir. 1992).

127. The *Aviles* case itself did not deal with terms implied from distinct statutory schemes; rather, it addressed the question of whether there was a working arrangement between plaintiffs and defendants relating to the particular tract of land to be harvested by plaintiffs each day. *Id.* at 366.

128. 716 F. Supp. 688, 693–94 (D. Mass. 1989) (considering allegations by plaintiffs that when they were fired mid-season for refusing to work on a weekend employer violated working arrangement.

129. *Id.* at 693.

130. *Id.* at 693–94.

laws arising out of their employment relationship with farmworkers that they must follow during the course of this relationship. Although workers may not know the precise details of the laws protecting them, it is not unrealistic to infer that they expect that an employer knows and will comply with those laws. If a worker thought an employer would either fail to pay her in accordance with the law or would jeopardize her health through substandard working conditions, this would certainly play a part in the decision to accept employment with that employer. The *Aviles* and *Colon* courts essentially articulated that AWPA allows farmworkers to rely on their legitimate expectations of legally mandated employer behavior.

Most courts that have squarely considered the question of whether the working arrangement provisions can be construed to encompass substantive requirements imposed on employers by separate statutory schemes have answered the question affirmatively.[131] In fact, some courts seem to accept this as such a well-settled point of law that, in holding that employers have violated a working arrangement by engaging in acts that violate other statutory schemes, they engage in no discussion about what actually constitutes a working arrangement under § 1822(c) or § 1832(c).[132]

The leading case on importation of terms into AWPA's working arrangement provisions is *Donaldson v. U.S. Department of Labor*.[133] In *Donaldson*, the plaintiffs were U.S. agricultural workers who sought to enforce regulations promulgated under the Wagner-Peyser Act[134] by the Department of Labor ("DOL") for the H-2 visa program.[135] At the time the events in *Donaldson* took place, agricultural employers could petition for permission to employ foreign workers pursuant to the H-2 provisions of the Immigration and

131. In fact, my research indicates that there is only one published case that squarely limited working arrangement to express terms. *See* Sanchez v. Overmyer, 845 F. Supp. 1183, 1187 n.3 (N.D. Ohio 1993) ("This Court is inclined to read Section 1822(c) as relating to express terms of a working arrangement as opposed to those implied by law."). In some cases, courts have been able to rest on a narrower holding without reaching the broader question of whether the working arrangement provisions impute substantive obligations from distinct statutory schemes. *See* Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1269, 1287 (M.D. Fla. 1999) (finding that defendants created a working arrangement, which they subsequently violated, by posting an official Department of Labor poster informing workers of their rights to receive at least $4.25 per hour; therefore court did not have to expressly hold that the minimum wage obligation was imported from the Fair Labor Standards Act). *But see* discussion *infra* note 156 and accompanying text (arguing that the *Wales* decision is difficult to understand under the court's stated rationale).

132. *See* Hardy v. Ross, 114 Lab. Cas. (CCH) ¶35,326 (D.S.C. 1990) (holding that failure to pay FICA and FUTA taxes due on or deducted from wages paid to the plaintiffs constituted a violation of § 1822(c)); Cox v. Bissette, No. 87-570-CIV-5, 1988 WL 122053, at *2 (E.D.N.C. 1988) (same as *Hardy*).

133. 930 F.2d 339 (4th Cir. 1991).

134. 29 U.S.C. §§ 49–49*l*-1 (2000). The Wagner-Peyser Act was enacted in 1933, and established the U.S. Employment Service "[i]n order to promote the establishment and maintenance of a national system of public employment offices." *Id.* § 49.

135. *Donaldson*, 930 F.2d at 341–42.

Nationality Act ("INA") where there existed a domestic labor shortage.[136] Under this scheme, employers were required to obtain a certification from the DOL that there were no domestic workers available to perform the jobs they sought to fill and that employing foreign workers would not adversely affect the wages and working conditions of similarly employed U.S. workers.[137] To facilitate the requirement that employers first attempt to hire domestic labor, a system of regulations was established under the Wagner-Peyser Act that established an interstate clearance system for recruitment of workers from other states to meet employers' labor demand.[138] As part of the domestic recruitment process, employers had to file a "job offer" at their local employment service office, detailing the terms and conditions of employment.[139] Under the Wagner-Peyser Act's regulations, the wages offered to workers in this job offer could not be less than the "prevailing wages" of similarly employed agricultural workers in the area of employment.[140] The farmworkers in *Donaldson* alleged that the defendants violated this regulation.[141]

Initially, the farmworkers sought to enforce the regulation through the Wagner-Peyser Act directly, arguing that the Act implied a private right of action for U.S. workers adversely affected by violations of its provisions.[142] After cataloguing the decisions on this point by other circuit and district courts and reviewing the Wagner-Peyser Act under the test for implying a private right of action articulated by the Supreme Court in *Cort v. Ash*,[143] the court declined

136. *Id.* at 341. The relevant INA provision was located at 8 U.S.C. § 1101(a)(15)(H)(ii). *Donaldson*, 930 F.2d at 341. Subsequently, Congress passed the Immigration Reform and Control Act (IRCA), which divided H-2 workers into two categories: 1) temporary agricultural workers (H-2A workers); and 2) non-agricultural workers (H-2B workers). Vega v. Nourse Farms, Inc., 62 F. Supp. 2d 334, 335 (D. Mass. 1999).

137. *Donaldson*, 930 F.2d at 341 (citing 8 C.F.R. § 214.2(h)(3) (1986)).

138. *Id.* (citing 20 C.F.R. pt. 655 (1986)).

139. *Id.*

140. *Id.* at 342 (citing 20 C.F.R. § 653.501(d)(4) (1986)).

141. *Id.* at 342. The basis for this claim was the employers' payment of workers on a flat-rate plus bonus scale. In previous seasons, employers in the apple industry had paid a piece rate to workers. However, during the season at issue in *Donaldson*, the DOL was under a permanent injunction to enforce an increase in the piece rate proportional to any increase in the adverse effect wage rate, which is the rate which the DOL determines must be paid to both foreign and U.S. workers by an employer who seeks to hire H-2 workers in order not to depress the wages of similarly employed U.S. workers. *Id.* (citing 20 C.F.R. § 655.207(c) (1986)). In response, growers implemented the flat-rate plus bonus pay scale to avoid increasing the piece rate. The workers alleged that this scale violated the requirement in the regulations to pay a wage equivalent to the prevailing wage rate in a particular region and industry. Here, workers alleged that, under the piece rate system, they earned approximately $6 per hour. The flat hourly rate proposed by the growers at the beginning of the season at issue was $4.72 for Virginia workers and $4.49 for West Virginia workers. *Id.*

142. *Id.* at 347.

143. 422 U.S. 66 (1975). In *Cort v. Ash*, the Supreme Court articulated a four-factor test for deciding whether a statute implied a private right of action. The four factors enumerated by the Court were: 1) whether the plaintiff was one of the class for whose benefit the statute was enacted,

to infer a private right of action under the Wagner-Peyser Act in this context.[144] The reason it could avoid a decision squarely on this point, the court indicated, was that the workers could advance their claims of violations of the H-2 regulations under the working arrangement provision of AWPA.[145] The court concluded that although the effect of "allowing [plaintiffs'] claims to be made under the private right of action conferred by § 504 of [AWPA] is to incorporate into §§ 202 and 302 of [AWPA] the substantive obligations imposed upon agricultural employers by relevant provisions of Wagner-Peyser and INA and their implementing regulations, we are satisfied that this is necessarily contemplated by the interrelated structures of these separate statutory regimes."[146]

Addressing the defendants' argument that to allow enforcement under AWPA of obligations imposed under Wagner-Peyser was "simply to bootstrap a private right of action into Wagner-Peyser where none exists by express creation or implication," the court found that "[n]o principle of statutory construction prevents a private right of action conferred by one statutory regime from drawing substance from provisions of another regime which does not provide such a right of action."[147] It is important to note that, though statutorily required to do so, the employers here had never offered or agreed to the term that formed the basis of the workers' claim under the working arrangement provision. The obligation enforced in *Donaldson* arose solely out of the H-2 regulations, and not from any express offer or arrangement made by the employers. In this respect, *Donaldson* stands for an even broader reading of AWPA's working arrangement provisions than do cases where courts have enforced, under the working arrangement provisions, terms explicitly enumerated in the H-2 clearance orders that employers are required to circulate to U.S. workers before hiring temporary foreign workers.[148]

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2) whether the legislature intended to create such a right or deny it, 3) whether it is consistent with the purposes of the statutory scheme to imply a private right of action, and 4) whether the cause of action is one traditionally relegated to state law such that it would be inappropriate to infer a cause of action based solely on federal law. *Id.* at 78.

144. *Donaldson*, 930 F.2d at 347–49.

145. *Id.* at 349–50. The workers had tried to amend their complaint to add this cause of action, but the district court had denied them leave to do so on the ground that the amendment would be futile. *Id.*

146. *Id.* at 350 (citing Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1341–42 (5th Cir. 1985) and Frederick County Fruit Growers Ass'n v. McLaughlin, 703 F. Supp. 1021, 1031 (D.D.C. 1989)).

147. *Id.* at 350 n.13.

148. *See, e.g.*, Bernett v. Hepburn Orchards, Inc., No. JH-84-991, 1987 WL 16939 (D. Md. 1987) (holding that defendant's discriminatory treatment of non-H-2 U.S. workers, specifically its reliance on a subjectively evaluated "ladder test" not mentioned in the job clearance order, constituted a violation of §§ 1822(c) and 1832(c) since discrimination was expressly prohibited in the job order); Caugills v. Hepburn Orchards, Inc., No. JH-84-989, 1987 WL 47376 (D. Md. 1987) (holding that termination before the end of the season violated the three-quarter work guarantee expressed in the H-2 clearance order, and consequently constituted a violation of § 1822(c) of

In *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, the Fifth Circuit came to the same conclusion as the *Donaldson* court in interpreting an almost identical provision of FLCRA, AWPA's predecessor.[149] The court found that defendant growers violated FLCRA's working arrangement provision by failing to give plaintiffs work for at least three-quarters of the period for which they were to be employed.[150] The so-called three-quarter work guarantee was required by the DOL's H-2 program regulations, which did not themselves create a private right of action. Nevertheless, the court found that this obligation could be enforced through FLCRA's private right of action.[151] It is important to note that, as in *Donaldson*, despite the regulations requiring them to do so, the employers in this case failed to offer the three-quarter work guarantee when they recruited the workers.[152] Thus, the holding in this case cannot be justified on a narrower theory that the provision of the working arrangement in question was actually offered to workers and subsequently reneged upon. The term at issue was brought into play solely through the H-2 regulatory scheme. Though the court admitted that it had no appellate authority to guide it in making this decision, "given the purpose of certification and the employment conditions set by DOL's H-2 regulations of ensuring that foreign workers are employed on terms that will not adversely affect the employment available to similarly situated U.S. workers," it found the argument that FLCRA permitted substantive obligations from the H-2 regulations to be enforced through its private right of action to be the more plausible interpretation of the Act.[153]

The *Donaldson* and *Salazar-Calderon* holdings were extended outside the H-2 context by a Florida district court in *Denis v. New Hope Sugar Co.*[154] The plaintiffs in *Denis* were black Haitian nationals who claimed they were illegally fired mid-season or not rehired by defendant employers. The plaintiffs' working arrangement claims under AWPA arose from two sources: 1) an alleged agreement between the plaintiffs and defendant regarding priority recall and regular reemployment; and 2) an allegation that the firing and failure to rehire were motivated by race and national origin discrimination, contrary to federal law. The court upheld the plaintiffs' working arrangement claims against a

AWPA); Clarke v. Gardenhour Orchards, Inc., No. JH-84-4419, 1987 WL 48234 (D. Md. 1987) (holding that defendant's failure to provide free housing to his workers, as expressly offered in the H-2 clearance order, constituted a violation of § 1822(c)).

149. 765 F.2d 1334 (5th Cir. 1985). FLCRA provided that a farm labor contractor's certificate of registration could be revoked if the contractor "failed, without justification, to comply with the terms of any working arrangements he has made with migrant workers." 7 U.S.C. § 2044(b)(4) (1982) (repealed 1983).

150. *Salazar-Calderon*, 765 F.2d at 1342–43 (5th Cir. 1985).

151. *Id.* at 1341–43. The three-quarter work guarantee was set out in 20 C.F.R. § 602.10a(h). *Id.* at 1342.

152. *Id.* at 1339.

153. *Id.* at 1341.

154. 44 Fair Empl. Prac. Cas. (BNA) 1548 (S.D. Fla. 1987).

motion to dismiss, first finding that the priority recall and regular reemployment allegations involved questions of fact to be proven at trial. Second, the court indicated, ostensibly in reference to the plaintiffs' claim that a prohibition against discrimination on the basis of race or national origin could be imported into AWPA through the working arrangement provision, that "AWPA includes protection against violation by employers of rights secured by other federal statutes."[155]

Although another federal district court analyzed the working arrangement provision somewhat differently, its ultimate decision can nonetheless be seen to have implicitly endorsed the *Salazar-Calderon* and *Donaldson* line of cases. The court in *Wales v. Jack M. Berry, Inc.* held that defendant employers violated their working arrangement with their farmworker employees by failing to pay them $4.25 an hour, the statutorily mandated minimum wage.[156] The court did not explicitly rest its holding on the rationale that the Fair Labor Standards Act ("FLSA") requires employers to pay their employees minimum wage, and that this obligation is imported into AWPA through the working arrangement provision; rather, the court held that the working arrangement was created by the employer's posting of a DOL poster informing workers of their right to receive at least $4.25 an hour for their work.[157]

It seems the court was trying, through the fact of the employer's posting of the minimum wage requirements, to avoid a broader holding that importation of substantive obligations from distinct statutory schemes is contemplated under AWPA. However, the result is difficult to understand under the narrower holding. First, the employer was required to post the notice, pursuant to a regulation providing that every employer subject to the minimum wage provisions of FLSA must post a notice explaining the Act in a conspicuous place.[158] Therefore, every employer subject to FLSA's minimum wage provisions should have such a poster in its workplace. The posting does not set terms unique to the employment relationship between this particular employer and employee and the very fact of its existence is mandated by a statutory

155. *Id.* The court's order in this case is very short. There is some ambiguity regarding the court's analysis of the plaintiffs' working arrangement claims. The exact language used in the opinion is as follows: "Whether the alleged early termination of Plaintiffs violated § 1832(c) and whether priority recall and regular re-employment were working arrangements made with Plaintiffs are questions of fact to be proven at trial. Furthermore, AWPA includes protection against violation by employers of rights secured by other federal statutes. *See Salazar-Calderon v. Presidio Valley Farmers' Assoc.*, 765 F.2d 1334, 1343 (5th Cir. 1985), construing the AWPA predecessor statute—Farm Labor Contractor Registration Act. Accordingly, the Motion to Dismiss will be denied in its entirety." *Id.* The reference to *Salazar-Calderon* and to rights secured by "other federal statutes" seems to indicate that the court is referring to a claim by plaintiffs that discriminatory firing violated the terms of their working arrangement with defendant because it violated federal law.

156. Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1269, 1287 (M.D. Fla. 1999).

157. *Id.*

158. 29 C.F.R. § 516.4 (2003).

scheme apart from AWPA. Second, the standard poster available from the DOL merely sets out the federal minimum wage, along with information about overtime, child labor and enforcement.[159] The poster does not communicate to workers that their employer explicitly agrees to pay the minimum wage, however strong that inference is as a result of the posting. Consequently, it is difficult to understand how the *Wales* court could rely solely on the fact of the posting of the poster, without some reliance on the underlying minimum wage law under FLSA, in holding that there had been a violation of the working arrangement. In addition, it would create extremely perverse incentives under AWPA to hold that employers who complied with the posting requirements of FLSA were liable for violations of AWPA's working arrangement provisions if they failed to pay minimum wage, whereas employers who flaunted the posting requirements could escape liability under AWPA for minimum wage violations.

E. Judicial Interpretations of Other AWPA Provisions Permitting Importation of Substantive Terms from Distinct Statutory Regimes

Outside of the working arrangement context, courts have interpreted other provisions of AWPA, as well as FLCRA, to allow importation of obligations imposed by separate statutory schemes. Prior to AWPA, courts had held that a farm labor contractor's failure to pay employees the minimum wage and failure to pay social security taxes and make unemployment insurance contributions on behalf of employees constituted violations of FLCRA.[160] The obligations to pay minimum wage and Social Security taxes, as well as to make unemployment insurance contributions, did not themselves arise out of FLCRA; rather, they were imported from distinct statutory schemes.

Since AWPA's enactment, other courts have followed *Donaldson* in finding that certain provisions of AWPA were meant to draw substance from distinct statutory schemes outside of AWPA. The issue has primarily arisen in interpreting AWPA provisions requiring agricultural employers to pay workers

159. Standard U.S. DOL poster *available at* http://www.dol.gov/esa/regs/compliance/posters/pdf/minwagebwP.pdf (last visited January 8, 2004). The court indicated that the poster defendants posted in *Wales* was "an official Department of Labor poster that notified workers of their right to receive at least $4.25 for each hour worked in the workweek." *Wales*, 192 F. Supp. 2d at 1287. It is not clear, however, whether the poster was from the state or federal DOL.

160. *See* Bonhomme v. Massaline, 101 Lab. Cas. (CCH) ¶ 34,566 (S.D. Fla. 1984) (holding that farm labor contractor's failure to pay FICA taxes and make unemployment insurance contributions pursuant to distinct statutory schemes violated 7 U.S.C. § 2045, which requires that the farm labor contractor "promptly pay or contribute when due to the individuals entitled thereto all moneys or other things of value entrusted to the farm labor contractor"); Certilus v. Peeples, 101 Lab. Cas. (CCH) ¶ 34,587 (M.D. Fla. 1984) (holding that a farm labor contractor's failure to pay employees the minimum wage pursuant to 29 U.S.C. § 206(a)(1) (Supp. 1978) and failure to pay FICA taxes pursuant to 26 U.S.C. §§ 3101–02, 3111 (1976) constituted a violation of 7 U.S.C. § 2045(g)).

"wages owed . . . when due."[161] Generally, courts have held, as they did in the FLCRA context, that an agricultural employer's failure to pay workers the statutorily mandated minimum wage, as well as failure to deduct and pay applicable Social Security taxes and failure to make unemployment insurance compensation payments, constitute a violation of the obligation to pay wages owed when due.[162] In *Cruz v. Vel-A-Da, Inc.*, the court went one step further, linking the wages owed when due and working arrangement provisions.[163] It held that defendants' failure to pay the minimum wage and failure to properly deduct and pay applicable Social Security taxes constituted both a violation of § 1822(a) and, because there was no justification for the defendants' actions, a violation of § 1822(c) as well.[164]

The most complete analysis of the issue was offered by the court in *Medrano*.[165] At issue in *Medrano* was whether the employer's failure to pay compulsory travel time, as required by state law, constituted a violation of § 1832(a), requiring employers to pay workers their wages owed when due. Both parties in the case agreed that § 1832(a) was violated when an employer violated FLSA and other federal wage and hour laws.[166] The defendant asserted, however, that § 1832(a) did not incorporate state law, such as substantive provisions of state wage and hour laws. Canvassing other cases dealing with obligations imported into AWPA through distinct statutory schemes, the court concluded that "the Act certainly does not indicate that an employer's obligation to pay may arise only from the AWPA itself."[167] In ultimately deciding that § 1832(a) of AWPA does incorporate substantive provisions of state law, the court

161. 29 U.S.C. §§ 1822(a), 1832(a) (2000).

162. *See Wales*, 192 F. Supp. 2d at 1287 (finding that defendants' failure to pay plaintiffs the statutorily mandated minimum wage constituted a violation of § 1822(a) and § 1832(a)); Antuez v. G & C Farms, Inc., 126 Lab. Cas. (CCH) ¶ 33,015 (D.N.M. 1993) (holding that defendants' failure to pay FICA taxes and make unemployment insurance contributions constitute violations of 29 U.S.C. § 1832(a)); Sanchez v. Overmyer, 845 F. Supp. 1183, 1187 (N.D. Ohio 1993) (holding that defendants' failure to pay FICA taxes for employees violates § 1822(a)); Smith v. Bonds, 1 Wage & Hour Cas. 2d (BNA) 1198 (E.D.N.C. 1993) (holding that "finding of liability on plaintiffs' FLSA claims *ipso facto* leads to the conclusion that defendants . . . also violated Section 1822(a)" of AWPA); Hernandez v. Ruiz, 125 Lab. Cas. (CCH) ¶ 35,828 (S.D. Tex. 1992) (deduction of Social Security taxes from employees and subsequent failure to remit the money to the government constituted a violation of § 1822(c)); Saintida v. Tyre, 783 F. Supp. 1368, 1372 (S.D. Fla. 1992) (holding that defendants' failure to pay FICA taxes withheld from plaintiffs to IRS constituted a violation of § 1832(a)); Martinez v. Shinn, No. C-89-813-JBH, 1991 WL 150184, at *9–11, 17 (E.D. Wash. July 31, 1991), (holding that failure to pay minimum wage to employees when due is a violation of § 1822(a)), *aff'd*, 992 F.2d 997 (9th Cir. 1993); Fields v. Luther, 108 Lab. Cas. (CCH) ¶35,072 (D. Md. 1988) (holding that defendants' failure to pay FICA taxes and make required unemployment insurance contributions violated AWPA's requirement that wages be paid when due).

163. 127 Lab. Cas. (CCH) ¶ 33,074 (N.D. Ohio 1993).

164. *Id.*

165. 125 F. Supp. 2d 1163 (N.D. Cal. 2000).

166. *Id.* at 1166.

167. *Id.* at 1167.

concluded that Congress' intent was clear from the statutory language, refusing to read language limiting the applicability of state law into § 1832(a) because such a reading would "severely limit [the Act's] protections."[168]

In short, a close examination of the text of AWPA itself, Congressional intent in enacting AWPA and its predecessor, FLCRA, and judicial decisions interpreting both AWPA and FLCRA supports a definition of working arrangement that includes health and safety obligations imposed on employers by statutory and regulatory schemes distinct from AWPA. As courts have recognized, this is the only reading of working arrangement that comports with the remedial objectives of AWPA and furthers AWPA's goal of protecting farmworkers from exploitation at the hands of those who control their labor.

III.
ANSWERING POTENTIAL OBJECTIONS

A. Objection #1: Congress Did Not Intend for the Worker Protection Standard or theField Sanitation Standard to be Enforceable by Their Intended Beneficiaries

One potential objection to interpreting AWPA's working arrangement provisions to encompass substantive requirements imposed by other statutory regimes is that by not providing for a private right of action in those statutory schemes themselves, Congress intended that they not be enforced by the beneficiaries of their protections. It is important to note two points in addressing this potential objection. First, this article does not argue that farmworkers have an implied right of action under either FIFRA or the OSH Act to enforce the obligations imposed on the regulated parties under those statutes. Rather, compliance with the obligations imposed on agricultural employers by those statutes constitutes part of the working arrangement that employers make with farmworkers, and violation of this working arrangement can be enforced through AWPA. AWPA is the latest legislative statement from Congress on how best to protect the rights of farmworkers vis-à-vis agricultural employers. In enacting AWPA, and FLCRA before it, Congress decided that since "[m]igrant and seasonal farm workers [had] long been among the most exploited groups in the American labor force,"[169] they needed something more than an administrative

168. *Id.* at 1166–67. In making its decision, the court addressed the defendant's argument that the explicit reference to incorporation of federal and state laws into AWPA's housing and transportation sections precluded incorporation of state law into § 1832(a) since Congress did not explicitly authorize it. The court found that this reading would severely limit AWPA's protections and that, even if the statute might be interpreted in a more narrow manner, previous decisions had consistently construed AWPA broadly in light of its remedial and humanitarian purposes. *Id.* at 1167–68.

169. S. REP. NO. 93-1295, at 1 (1974). In the process of amending FLCRA in 1974, Congress noted that "[a]buse of workers . . . appears more the rule than the exception." H.R. REP. NO. 93-

enforcement scheme in order to adequately protect their rights. Congress recognized as much in 1974 when, in the face of the widespread failure of FLCRA to create change in the pattern of abuse of farmworkers by farm labor contractors, it amended FLCRA to add a private right of action through which aggrieved farmworkers could themselves enforce the rights provided by the Act.[170] It did so because the provisions of FLCRA could not be effectively enforced without a private right of action and other changes. Congress found that the current Act was largely being ignored and was not adequately enforced; in essence, "[n]on-compliance by those whose activities the Act [was] intended to regulate [had] become the rule rather than the exception."[171] The most critical reason for the underenforcement of the Act was the DOL's "shortage of adequate manpower to police the Act."[172] When Congress enacted AWPA and made the decision to revamp the legislative scheme and expand protections for farmworkers, it retained the private right of action created by FLCRA for farmworkers to enforce their rights.[173]

Second, enforcing the substantive obligations mandated by the EPA Worker Protection Standard and the OSHA Field Sanitation Standard through AWPA's private right of action is substantively quite different than implying a private right of action under those statutes themselves. The private right of action conferred by AWPA is "specifically circumscribed in ways which presumably would not confine any right of action" found in the acts themselves.[174] There are three primary distinctions between the enforcement of the private right of action granted by AWPA to farmworkers and enforcement via either the OSH

1493, at 5 (1974). In 1982, while in the process of enacting AWPA, Congress reaffirmed that "migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States." H.R. REP. NO. 97-885, at 2 (1982).

170. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1652, 1657 (codified as amended at 7 U.S.C. § 2050(a)), *repealed by* 29 U.S.C. § 1854(a) (2000); S. REP. NO. 93-1295, at 20–22.

171. S. REP. NO. 93-1295, at 3. Further, Congress notes that "[t]he major purpose of the reported bill is to correct recognized deficiencies in the enforcement of the original legislation by extending coverage of the act by creating stronger provisions for the act's enforcement and by creating a civil remedy for persons aggrieved by violations of the act." H.R. REP. NO. 93-1493, at 1.

172. H.R. REP. NO. 93-1493, at 6.

173. *See* 29 U.S.C. § 1854. Remarks made on the House floor by Senator Ford of Michigan indicated the continuing importance of the private right of action to farmworkers: "It has long been apparent that neither volunteerism on the part of agribusiness nor the puny enforcement efforts of the Department of Labor can be expected to make a significant difference in the working conditions of farmworkers. Like the FLCRA, the AWPA provides for a private right of action and holds out the prospect of large damage awards against agricultural employers who mistreat their workers. This, I am sure, will prove to be the most important deterrent against the continued abuse of migrant and seasonal farmworkers. As budget cuts undermine the Federal Government's ability to enforce the law, farmworkers will depend increasingly on the private bar and legal services organizations to insure that violations are punished and that they are made whole for their losses and suffering." 128 CONG. REC. 32,883 (1982).

174. *See* Donaldson v. U.S. Dep't of Labor, 930 F.2d 339, 350 n.13 (4th Cir. 1991).

Act or FIFRA itself: the size and nature of the group of prospective plaintiffs; the size and nature of the group of prospective defendants; and the range of activities subject to control under the private right of action. The first and most obvious distinction is that only "migrant and seasonal farmworkers" can utilize AWPA's private right of action. This is a much smaller subset of potential plaintiffs than the set of individuals who could feasibly be aggrieved by violations of FIFRA and the OSH Act—namely, all employees whose employers must abide by OSHA standards or all individuals who might be adversely affected by violations of the pesticide standards contained in FIFRA.[175] The pool of prospective defendants is decreased for the same reasons. Defendants must be in an employment relationship with a migrant or seasonal farmworker in order to be subject to AWPA's private right of action. Finally, the range of activities subject to regulation under AWPA's private right of action is much smaller than the entire set of acts regulated under either the OSH Act or FIFRA. The only obligations with which employers have to comply under AWPA are those that regulate the employer's conduct in relation to migrant or seasonal farmworkers. Thus, the fuller range of conduct mandated and proscribed by FIFRA and the OSH Act does not fall under the scope of AWPA's private right of action.

An objection sometimes voiced to implying a private right of action in a statute is that it will lead to excessive deterrence and discourage socially productive conduct outside the scope of the prohibition.[176] Relatedly, there is a concern that Congress may have intended that the administrative agency charged with enforcement determine appropriate levels of enforcement.[177] To the extent that these concerns exist, the limited scope of AWPA's private right of action in the context of the full text of the OSH Act and FIFRA seems to minimize their importance. Congress made a statement with AWPA that it intended to reverse the historic trend of exploitation of migrant and seasonal farmworkers.[178] A private right of action under AWPA that imports the obligations of agricultural employers under FIFRA and the OSH Act does no more than that, and certainly

175. The OSH Act requires all employers engaged in interstate commerce to provide employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" and requires that employers comply with standards promulgated by the Secretary of Labor under authority of the Act. 29 U.S.C. §§ 654, 655 (2000). A blanket private right of action under the OSH Act would mean any employee employed in a business engaged in interstate commerce could bring suit against her employer for violation of the Act or standards. Under FIFRA, a person would not even need to be in an employment relationship with a violator of the Act in order to bring suit if a private right of action existed.

176. RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 842 (4th ed. 1996).

177. *Id.*

178. *See* Martinez v. Shinn, No. C-89-813-JBH, 1991 WL 150184, at *2 (E.D. Wash. July 31, 1991) (holding that purpose of AWPA is to "deter and correct the exploitative practices that have historically plagued the migrant farm labor market") (citing Beliz v. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985)).

does not pervert the enforcement scheme of either of those acts on the whole.

In the case of FIFRA, during the amendment process in 1972 the Senate Commerce Committee proposed adding a provision that would have provided a private right of action in specific circumstances. The proposed "citizen suit" provision would have given an individual the right to bring a civil action for injunctive relief on her own behalf against any person, including the United States or a governmental agency, alleged to be in violation of certain provisions of the amended Act, or against the EPA Administrator where the Administrator failed to perform any non-discretionary act or duty under the Act.[179] Congress chose not to include it. The decision not to enact the provision, however, is not dispositive of whether the Act can be enforced under AWPA's private right of action. The citizen suit provisions that are included in many environmental statutes, and indeed the one that was proposed for FIFRA, are not equivalent to AWPA's conferral of a private right of action.

The effects of the proposed citizen suit provision are altogether distinct from the effect of a private right under AWPA to enforce the substantive obligations imposed on agricultural employers through FIFRA. To understand the distinction, it is important to understand the role of citizen suit provisions in environmental legislation. Beginning around 1970, with the passage of the Clean Air Act, Congress began using citizen suits as a method of enhancing compliance with federal environmental laws.[180] Citizen suit provisions, including the one proposed under FIFRA, typically provide for only injunctive relief and legal costs for successful plaintiffs, rather than money damages for injured parties.[181] The very choice of language for these provisions is instructive. Rather than framing the grantees of the private right of action as "person[s] aggrieved by a violation" of the statute, as Congress framed the grantees in AWPA,[182] the proposed provision in FIFRA broadly allowed "any person" to bring a civil action, without painting the prospective plaintiff as "aggrieved." The provision contemplated that a prospective plaintiff had only to show that the action constituted a "case or controversy" against a person or the

179. S. REP. NO. 92-970, at 4 (1972). The citizen suit provision was patterned after similar provisions of the Clean Air Act amendments of 1970, as well as the Senate-passed Toxic Substances Control Act of 1972 and the Senate-passed Federal Water Pollution Control Act amendments pending in conference. *Id.* at 22.

180. Marisa L. Ugalde, *The Future of Environmental Citizen Suits after* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 8 ENVTL. LAW. 589, 592–93 (2002). The Senate Commerce Committee's proposed citizen suit provision was explicitly modeled on the one contained in the Clean Air Act. S. REP. NO. 92-970, at 22.

181. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 47 (2001). The Clean Water Act and the Clean Air Act, as amended in 1990, are exceptions to this rule. Under those acts, plaintiffs may sue private companies for civil fines payable to the U.S. Treasury. *Id.*

182. 29 U.S.C. § 1854(a) (2000).

EPA Administrator.[183] Liberal standing rulings in the 1970s meant that many environmental groups were permitted to bring suits under citizen suit provisions. Individual plaintiffs with well-documented injuries were not a prerequisite.[184] The Senate Commerce Committee, which proposed the FIFRA citizen suit provision, intended that it be read in a broad manner, allowing "citizens and citizens' groups" to lend support to the EPA's enforcement efforts.[185]

Additionally, one of the main features of the provision was its grant of authority to sue the EPA Administrator for her failure to perform any mandatory act or duty under the Act,[186] a standard feature of environmental citizen suits.[187]

The overall impression that the language and substance of the proposed citizen suit provision of FIFRA leaves is that Congress was not focusing on individual farmworkers directly affected by pesticide misuse. In fact, the provision did not even provide for citizen suits for violations of the requirement to use pesticides consistent with their labeling or for violations of regulations the Administrator promulgated to enforce the Act.[188] It was these provisions that provided the authority for the EPA to issue the farmworker-focused Worker Protection Standard.[189] In short, the citizen suit provision considered by the Senate was a much more broad delegation of authority to the citizenry than AWPA provides. In rejecting the provision, Congress in no way rejected the notion that farmworkers should be able to safeguard their health by holding their employers liable for violations of regulations promulgated under the statute's authority.

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183. S. REP. NO. 92-970, at 4.

184. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 933 (1998). Rulings in the 1970s and 1980s by the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) and *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986) found aesthetic interests and interest in observing and studying whales, respectively, sufficient to meet the injury-in-fact standing requirement. The Supreme Court has subsequently revisited on multiple occasions the issue of standing for private and organizational plaintiffs under environmental citizen suit provisions. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court held that constitutional standing requires, at a minimum, three elements: 1) that the plaintiff suffered an injury-in-fact; 2) a causal connection between the injury and the conduct complained of; and 3) a likelihood that the injury will be redressed by a favorable decision. The Court's latest decision regarding standing in environmental citizen suits, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), "[w]hile professing fealty to the Supreme Court's standing precedents . . . emptied the injury in fact requirement of any real substantive content" by allowing a technical violation of a permit resulting in no measurable impact on water quality to be sufficient to show injury in fact. Adler, *supra* note 181, at 53–55.

185. S. REP. NO. 92-970, at 23.

186. *Id.* at 4.

187. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(a)(2) (2000); Clean Water Act, 33 U.S.C. § 1365(a)(2) (2000); Toxic Substances Control Act, 15 U.S.C. § 2619(a)(2) (2000).

188. S. REP. NO. 92-970, at 4. The citizen suit provision allowed citizen actions for violations of various other provisions concerning registration of pesticides, suspension or cancellation orders, and experimental use permits. *Id.* at 4; H.R. REP. NO. 92-511, at 49, 58 (1971).

189. Worker Protection Standard, 57 Fed. Reg. 38,102 (Aug. 21, 1992) (codified at 40 C.F.R. pt. 170 (2004)).

The Supreme Court recently decided a case which limited the rights of plaintiffs to use the private right of action created in 42 U.S.C. § 1983, which is available for individuals who are deprived of federal and constitutional rights under color of state law, to enforce provisions of federal laws without an explicit private right of action. In *Gonzaga University v. Doe*, the plaintiff sued to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA") through the private right of action under § 1983.[190] FERPA was enacted by Congress under its spending power and conditions the receipt of federal funds by schools on compliance with certain requirements relating to access to and disclosure of students' educational records.[191] The Court ultimately held that the plaintiff did not have a cause of action under § 1983 because FERPA did not create a federal right enforceable by the plaintiff.[192] The Court's decision in *Gonzaga*, however, does not govern the question of ability to enforce employer obligations created by distinct statutory schemes under AWPA's private right of action. The Court's analysis of the plaintiff's § 1983 claim is premised on the fact that § 1983 provides a remedy only; a plaintiff must identify a right elsewhere in the law.[193] "'[O]ne cannot go into court and claim a violation of § 1983—for § 1983 by itself does not protect anyone against anything.'"[194] In contrast, AWPA itself provides the right for farmworkers to enforce the terms of a working arrangement with an employer, as well as the private right of action remedy.[195] The question in the AWPA context, then, is the scope of that right rather than its existence.

B. Objection #2: Traditional Remedies for Workplace Injuries, Such as the Workers' Compensation System or Common Law Tort Actions, Are Adequate to Protect Farmworkers Whose Employers Violate Health and Safety Provisions

Workers are generally required to resort to state workers' compensation systems for remedies for injuries suffered on the job. In the case of farmworkers, AWPA specifically provides that "where a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker, the workers' compensation benefits shall be the

190. 536 U.S. 273, 276 (2002). The plaintiff was a former education student at Gonzaga University who was refused an affidavit of good moral character, required for new teachers in Washington schools, by the university. A representative of the university contacted the state agency responsible for teacher certification, identified the plaintiff by name, and discussed with the agency allegations that the plaintiff had engaged in acts of sexual misconduct against an undergraduate student at the university. *Id.* at 277.

191. *Id.* at 278.

192. *Id.* at 287.

193. *Id.* at 284–85.

194. *Id.* at 285 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

195. 29 U.S.C. §§ 1822(c), 1832(c), 1854(a) (2000).

exclusive remedy" in case of injury or death.[196] The workers' compensation system was initially started as a response to the failure of tort remedies to adequately compensate injured workers. At common law, injured workers could only recover for workplace injuries through a tort lawsuit against an employer.[197] Given that history, why should farmworkers be able to circumvent this well-established system to recover against employers for acts which put their health in danger?

One answer is that the workers' compensation systems established by the states do not always include farmworkers in their coverage. Many states do not mandate workers' compensation coverage for agricultural employees; some states exclude farmworkers altogether,[198] while some allow employers to elect coverage for farmworkers[199] or condition coverage upon a minimum yearly payroll amount of the agricultural employer.[200] A relatively new barrier to coverage for undocumented farmworkers has emerged following the Supreme

196. *Id.* § 1854(d). This strong statement is qualified somewhat by the allowance of statutory damages for violations of the act that result in injury of death, just not recovery of actual damages, which is a remedy expressly contemplated by workers' compensation statutes. *Id.* § 1854(e).

197. Barbara Baum Levine & James M. McCarthy, *Gradual Changes Have Silently Transformed the Adjudication of Workers' Compensation Claims*, N.Y. ST. B. ASS'N J. Oct. 2002, at 40.

198. *See, e.g.*, ALASKA STAT. § 23.30.230(a)(3) (Michie 2000) (excluding "harvest help"); DEL. CODE ANN. tit. 19, § 2307(b) (1995); IND. CODE ANN. § 23-3-2-9(a) (West 2003); KY. REV. STAT. ANN. § 339.210 (Michie 2001); LA. REV. STAT. ANN. § 23:1045(A)(1) (West 1998); MISS. CODE ANN. § 71-3-5 (1972); MO. ANN. STAT. § 287.090(1)(1) (West 2003); NEB. REV. STAT. § 48-106(2) (1998) (excepting farmworkers from the category of hazardous occupations that are covered by Workers' Compensation); N.C. GEN. STAT. § 97-13(b) (2002) (excluding farmworkers from coverage where employer employs fewer than ten full-time non-seasonal farm laborers); OHIO REV. CODE ANN. § 4121.01(A)(2) (West 2001) (defining employment to exclude agricultural pursuits that "do not involve the use of mechanical power"); OKLA. STAT. ANN. tit. 85 § 2.2 (West 1992) (exempting agricultural employees "not engaged in operation of motorized machines"); R.I. GEN. LAWS § 28-29-5 (2000); S.D. CODIFIED LAWS § 62-3-15(2) (Michie 2003); TENN. CODE. ANN. § 50-6-106(1)(B)(3) (1999). Three reasons have been advanced to justify the agricultural exemption from workers' compensation coverage: 1) the work farmworkers perform is not hazardous; 2) farmers should not pass on the costs of the workers' compensation system to their consumers through raising product prices; and 3) farmers are not equipped to handle the administrative requirements of workers' compensation schemes. Nina Krauth, *Do Farmers Reap More Than Their Child Laborers Sow? The Conflict Between the Fair Labor Standards Act and State Workers' Compensation Laws,* 5 SAN JOAQUIN AGRIC. L. REV. 221–22 (1995). For a rebuttal of these justifications, see *id.*; *see also supra* Part I.A. regarding the hazards of agricultural employment.

199. *See, e.g.*, ALA. CODE § 25-5-50(a) (2000); MINN. STAT. § 176.041(1a)(a)–(c) (2003) (stating that owners of a farm may elect coverage for themselves, a partnership owning a farm may elect coverage for any partner, and a family farm as defined in § 500.24(2)(c) may elect coverage for any executive officer); N.M. STAT. ANN. § 52-1-6(A)–(B) (1978) (stating that employers of farm laborers can elect coverage).

200. *See, e.g.*, IOWA CODE § 85.1(3)(a) (Supp. 2003) (exempting agricultural employers whose payroll is less than $2,500 per year); VT. STAT. ANN. tit. 21 § 601(14)(C) (Supp. 2003) (creating partial exemption for agricultural employers whose aggregate yearly payroll is less than $2,000).

Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[201] In *Hoffman*, the Court held that the National Labor Relations Board could not award a backpay remedy to an illegally fired undocumented worker because such a remedy contravened federal policy embodied in U.S. immigration laws, specifically the Immigration Reform and Control Act of 1996 ("IRCA").[202] Subsequently, some state courts have begun to interpret their workers' compensation statutes to preclude certain types of coverage for undocumented workers.[203] Since more than half of the farmworkers in the United States lack work authorization,[204] this new exclusion from some workers' compensation systems will negatively impact their ability to recover for work-related injuries.

Even where the scope of a statutory workers' compensation scheme does not exclude farmworkers, farmworkers should nonetheless be able to use AWPA's private right of action to enforce health and safety standards promulgated elsewhere in the law. The injuries caused by violations of the safety regulations described in this paper, such as pesticide exposure injuries, do not always appear immediately after the violation. Proving that these types of injuries were caused by agricultural work performed, in many cases, years ago will be extremely difficult. Although workers' compensation is regarded as a "no fault" remedy, an employee must still show that the injury suffered arose out of and in the course of employment.[205] To recover in tort under a negligence

201. 535 U.S. 137 (2002).

202. *Id.* at 149. IRCA created a system of rules for employers and employees regarding documentation and employment. An employer cannot hire undocumented workers and, if a worker becomes undocumented while employed, the employer must discharge the worker at the time of discovery. Violations of IRCA by employers are punishable by civil fines and potential criminal penalties. IRCA also prohibits unauthorized workers from circumventing the employer verification system by providing false documents. *Id.* at 148.

203. The Michigan Court of Appeals found that undocumented workers were included in the state statutory definition of "employee," however, under a provision prohibiting weekly compensation payments to persons unable to work because of the commission of a crime, the court held the plaintiffs ineligible to receive such payments after their undocumented status had been discovered. Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 516, 521 (Mich. Ct. App. 2003). The court analogized the status and actions of the plaintiffs in the instant action, as well as the appropriate judicial response, to those in *Hoffman*; in both cases, the workers had provided false documentation in order to obtain employment and in both cases weekly benefit payments were discontinued after discovery of the employees' undocumented status. *Id.* at 520. The Supreme Court of Pennsylvania, using a similar rationale, found that undocumented workers were not excluded from the state's workers' compensation scheme as a matter of public policy, but that an employer could petition for a suspension of benefit payments to an undocumented employee because the employee's inability to work resulted from his immigration status, not his work-related injury. Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo), 810 A.2d 99, 105 (Pa. 2002).

204. *See infra* note 11.

205. JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 60 (2d ed. 1990); *see also* FLA. STAT. ANN. § 440.09 (West 2002) ("The employer shall pay compensation or furnish benefits required by this chapter if the employee suffers an accidental injury or death arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability shall be established to

theory for physical harm suffered, a worker must show, among other things, that an employer's breach of a duty of care to the worker caused the worker's injury.[206] In both instances, a failure to prove causation will bar recovery. Therefore, the fact that health problems associated with farm labor are frequently latent and chronic means that traditional workers' compensation and tort remedies are not adequate for farmworkers whose employers violate health and safety laws. Moreover, deterrence will be much less effective where dangerous employer actions are not addressed immediately or ultimately go unredressed because causation cannot be proven.

Comprehensive information about the rate of occurrence of acute and chronic health effects caused by pesticide exposure simply does not exist.[207] Although farmworkers and their children are frequently exposed to potentially carcinogenic pesticides, information on the chronic effects of agricultural pesticide exposure is limited.[208] One reason for the paucity of information is that researchers may perceive methodological difficulties associated with conducting epidemiologic studies among farmworkers, since they are highly mobile, often have little education, may not speak English, and have very complex and lengthy job histories.[209] Another difficulty with these studies is that farmworkers are not able to identify the precise types of pesticides, among the many currently used in the agriculture industry, to which they have actually been exposed in the course of their years of work.[210] In California, nearly a third of the reports made of pesticide-related illnesses do not identify the specific crop associated with the exposure.[211] Even where the crop associated with the exposure is identified, there is often no information on the specific pesticide involved, making it nearly impossible to determine the pesticides associated with reported illnesses.[212] These difficulties have meant that, to date, most cancer epidemiology studies of agricultural populations have focused on farm owners rather than farmworkers.[213] Because the type of work in which farmworkers

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a reasonable degree of medical certainty and by objective medical findings.").

206. RESTATEMENT (THIRD) OF TORTS § 6 cmt. d (Tentative Draft No. 1, 2001).

207. 2000 GAO REPORT, *supra* note 6, at 4.

208. *Id.* at 10.

209. Sheila Hoar Zahm & Aaron Blair, *Assessing the Feasibility of Epidemiologic Research on Migrant and Seasonal Farmworkers: An Overview*, 40 AM. J. OF INDUS. MED. 487 (2001).

210. *Id.* at 487; Mary H. Ward, Jaqueline R. Prince, Patricia A. Stewart & Sheila Hoar Zahm, *Determining the Probability of Pesticide Exposures Among Migrant Farmworkers: Results from a Feasibility Study*, 40 AM. J. INDUS. MED. 538, 539 (2001).

211. FIELDS OF POISON, *supra* note 9, at 13.

212. *Id.* at 14, 18. Compounding this problem is that often more than one pesticide is used at a time and inert ingredients may be responsible for some or all of the observed symptoms. Also, there are not many inexpensive and commonly available tests to determine the specific pesticide used in a poisoning incident. *Id.* at 18.

213. Ward, Prince, Stewart & Zahm, *supra* note 210, at 538. Most studies have focused on white male farm owners in the Midwest engaged in the production of highly mechanized production crops, such as corn, wheat, and soybeans. Mills & Kwong, *supra* note 9, at 597.

engage—harvesting, weeding, and pruning crops that are generally treated multiple times per season with a variety of pesticides—results in exposure exceeding that of even those workers who apply pesticides,[214] the data on farm owners is not likely to correlate exactly with the greater exposure experience of farmworkers.

This absence of information creates a problem for farmworkers seeking to improve working conditions and deter employers from violating regulations that are put in place to secure worker health, especially where the traditional legal remedies require a rigid showing of causation. While there is ongoing research sponsored by, among other entities, the EPA, it will probably be years before there is information on the precise extent and nature of the chronic health effects of long-term pesticide exposure for farmworkers in the United States.[215]

Where the long-term danger to farmworkers is both significant and difficult to accurately assess, deterrence has to be one of the primary goals of any system designed to address occupational risk. Especially with respect to farmworkers protected by AWPA, whose work is by definition seasonal and often requires migration throughout the country, effective risk deterrence depends upon the ability to act quickly when an employer puts workers in danger.[216] Presumably a workers' compensation remedy would be available, where farmworkers are covered, to compensate workers for acute injuries relating to violations of the Worker Protection Standard or Field Sanitation Standard, but for more chronic injuries the remedy will be much less effective. The provision of statutory damages for violations of AWPA addresses the need for deterrence and requires only a showing of a violation of a statute or regulation that can be enforced through the working arrangement provisions. On a mere showing that a working arrangement under AWPA has been violated, a court can award statutory damages that may help to deter employers from engaging in illegal behavior that puts farmworkers at risk and help to foster healthier workplaces for farmworkers.

IV.
CONCLUSION

AWPA represents Congress' attempt to remedy the failings of earlier efforts to effect comprehensive change in the working conditions of migrant and seasonal farmworkers in the United States. The private right of action that AWPA provides to farmworkers is a key ingredient of the remedial protection

214. Ward, Prince, Stewart & Zahm, *supra* note 210, at 539.

215. *Id.* at 23. In fact, an article published in 1990, which reviewed the past twenty-four years of medical literature, revealed that there had been no studies on cancer among migrant farmworkers. G.S. Rust, *Health Status of Migrant Farmworkers: A Literature Review and Commentary*, 80 AM. J. PUB. HEALTH 1213 (1990).

216. The protections of AWPA apply only to "migrant" and "seasonal" agricultural workers, whose work is of a "seasonal or . . . temporary nature." 29 U.S.C. §§ 1802(8)(A), 1802(10)(A) (2000).

that Congress intended. In light of the history of farmworker exploitation chronicled by Congress throughout its consideration of both AWPA and FLCRA, AWPA's working arrangement provisions can be seen as an attempt to hold agricultural employers accountable for the various obligations they owe to their workers, whether imposed by AWPA itself or another statute.[217]

Using AWPA to enforce laws designed to benefit farmworkers takes on special significance in the context of health and safety regulations. The work farmworkers undertake exposes them to risks almost unparalleled among workers in the United States. The agencies charged with protecting their health have largely abandoned that responsibility, leaving to farmworkers themselves the painstaking task of ensuring workplace safety. Farmworkers' power to challenge the creation and perpetuation of health risks in the workplace through collective bargaining and other means is limited in light of their exclusion from the NLRA and the temporary, often migratory, nature of their work. Moreover, because of the dearth of research regarding the serious long-term health risks of sustained pesticide exposure, traditional legal remedies like tort and workers' compensation are ineffective. Faced with these obstacles, it is especially critical that farmworkers are able to use AWPA's private right of action to challenge the unsafe, illegal practices of their employers. Given the general willingness of courts to read AWPA broadly to effect its remedial purposes, the working arrangement provisions may prove to be a place where farmworkers and advocates can wage important campaigns to improve the overall working conditions of farmworkers across a range of contexts.

217. This article has focused on the role of federal health and safety regulations as terms of AWPA's working arrangement. However, many of the same arguments hold true with respect to state health and safety regulations.