U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

AZZANO FARMS, INC. and WAFLA, aka WASHINGTON FARM LABOR ASSOCIATION,

RESPONDENTS.

ARB CASE NO. 2020-0013

ALJ CASE NO. 2019-TAE-00002

DATE: March 30, 2023

Appearances:
For the Respondents:
Leon R. Sequeira, Esq.; *LRS Law*; Prospect, Kentucky

***For the Administrator, Wage and Hour Division*:**
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Sarah K Marcus, Esq.; Katelyn J. Poe, Esq.; *U.S. Department of Labor*, *Office of the Solicitor*; Washington, District of Columbia

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges; BURRELL, Administrative Appeals Judge, Concurring in Part and Dissenting in Part

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises out of the H-2A provisions of the Immigration and Nationality Act (INA), as amended,[1] and the U.S. Department of Labor

[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188.

(Department) implementing regulations found at 20 C.F.R. Part 655, Subpart B and 29 C.F.R. Part 501 (collectively, the H-2A program).[2] The INA's H-2A program allows employers to hire foreign, nonimmigrant workers to temporarily fill agricultural positions in the United States.

On March 15, 2018, the Administrator of the Wage and Hour Division (Administrator or WHD) sent Azzano Farms (Azzano) and Washington Farm Labor Association (WAFLA) a Notice of Determination of Back Wages and Assessment of Civil Monetary Penalties (Notice of Determination).

An Administrative Law Judge (ALJ) held a hearing on June 4 and June 5, 2019. On October 2, 2019, the ALJ issued a Decision & Order (D. & O.), finding that WAFLA was not a joint employer for H-2A purposes, and reversing all civil monetary penalties (CMPs) against WAFLA. The Administrator timely filed a Petition for Review.

For the reasons set forth below, we find that WAFLA was a joint employer of the employees, along with Azzano. We further find that WAFLA and Azzano are each liable for CMPs for their failures to satisfy the poster and housing standard requirements of the H-2A program, and assess the appropriate CMPs *de novo* consistent with our findings. Accordingly, we **REVERSE** the ALJ's findings on WAFLA's status as an employer, **REVERSE** the ALJ's related finding on CMPs, and assess CMPs against WAFLA for housing and safety violations. In addition, we **REVERSE** the ALJ's finding that there was no H-2A poster violation and assess CMPs against both parties for this violation.

BACKGROUND

Azzano is a family owned and managed tree fruit farm in the state of Washington.[3] WAFLA is an agricultural association that provides human resources, visa support and compliance, and other support for its member farms.[4] WAFLA filed a master application for H-2A guest workers indicating it was a joint employer

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[2] This case arises under the H-2A regulations that were in effect from 2010 to 2020, and all cites herein are to the 2010 regulations. 20 C.F.R. §§ 655.100-.655.185; Temporary Agricultural Employment of H-2A Aliens in the United States (2010 Final H-2A Rule), 75 Fed. Reg. 6884 (Feb. 12, 2010). The Department proposed new regulations for the H-2A program in 2019, with new final regulations taking effect in 2020 and 2022.

[3] ALJ Decision and Order (D. & O.) at 2.

[4] *Id.*

with Azzano and other growers for a period of employment from June 1, 2017 to October 31, 2017.[5]

In the March 15, 2018 Notice of Determination, the Administrator found that both Azzano and WAFLA "failed to comply with Section 218 of the INA and applicable regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501."[6] Azzano was assessed CMPs of $13,692.80 and WAFLA was assessed CMPs of $16,461.90.[7]

The table below gives a summary of each alleged violation and the assessed CMP, including any percentage reduction for mitigation factors.

Regulation	*Violation*	*Azzano Penalty*	*WAFLA Penalty*
20 C.F.R. §655.122(d)(2)	Housing failed to meet Safety and Health Requirements	$4060.80 ($5076 base penalty, 20% mitigation)	$5076.00
20 C.F.R. §655.122(h)(4)	Transportation failed to meet Safety Requirements	$1353.60 ($1692 base penalty, 20% mitigation)	$1692.00
20 C.F.R. §655.122(q)	Failed to comply with requirement that copy of work contract be provided	$1015.20 ($1692 base penalty, 40% mitigation)	$1353.60 ($1692 base penalty, 20% mitigation)
29 C.F.R. §501.7	Failed to Cooperate with Investigation	$4556.00 ($5695 base penalty, 20% mitigation)	$5125.50 ($5695 base penalty, 10% mitigation)
20 C.F.R. §655.153	The employer failed to contact prior U.S. Workers	$1353.60 ($1692 base penalty, 20% mitigation)	$1522.80 ($1692 base penalty, 10% mitigation)
20 C.F.R. §655.135(1)	Employer failed to post H-2A poster	$1353.60 ($1692 base penalty, 20% mitigation)	$1692.00
Total		**$13,692.80**	**$16,461.90**

[5] *Id.*

[6] Administrator's Notice of Determination at 1, 8-9; D. & O. at 7.

[7] Administrator's Notice of Determination at 2; *see also* 29 C.F.R. § 501.19(b) (listing CMP assessment factors).

The Administrator cited both WAFLA and Azzano as joint employers for these violations and assessed penalties against both entities.[8] According to the Administrator, WAFLA and Azzano filled out the H-2A application and provided supporting materials as joint employers.[9]

The Administrative Law Judge (ALJ) held a hearing on June 4 and June 5, 2019.[10] On October 2, 2019, the ALJ issued a Decision & Order (D. & O.), finding that WAFLA was not a joint employer for H-2A purposes and reversing the Administrator's assessment of CMPs against WAFLA in their entirety.[11] The ALJ further found that the Administrator's assessed CMPs against both employers exceeded the regulatorily allowed maximum amounts.[12] The ALJ affirmed WHD's assessment of CMPs against Azzano for its failure to cooperate with the investigation, housing safety and health violations, failure to provide the work contract to workers, and failure to contact former U.S. workers.[13] The ALJ reversed WHD's assessment of CMPs against Azzano related to transportation safety and display of the H-2A poster, concluding that Azzano had not violated either requirement.[14] The ALJ concluded that WAFLA was not responsible for any of these violations and could be not held liable for them.[15]

The ALJ affirmed the remainder of the Administrator's Notice of Determination.[16] The Administrator timely filed a Petition for Review. The Board accepted the following issues for review:

- Whether the ALJ erred by concluding that WAFLA is not a joint employer under the H-2A program.

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8 Administrator's Notice of Determination at 1-2.

9 D. & O. at 4-5.

10 *Id.* at 1.

11 *Id.* at 3, 4-5, 14-17.

12 *Id.* at 15.

13 *Id.* at 8, 9, 12, 13.

14 *Id.* at 11, 14.

15 *Id.* at 16.

16 *Id.* at 17.

- Whether the ALJ erred by failing to assess CMPs up to the regulatory maximum amount against both WAFLA and Azzano for each violation of the terms and conditions of H-2A employment.

On appeal, the Administrator argues that, by participating in the application process as a joint employer, WAFLA is correctly held to the obligations of a joint employer. The Administrator argues that WAFLA's voluntarily applying for a master application as an association, combined with its signing the employer declaration and filing all the necessary forms for the H-2A program, renders the association a joint employer "as a matter of law."[17] The Administrator further argues that WAFLA is estopped from arguing that it is not responsible as a joint employer after taking advantage of the benefits offered by filing a master application.[18] According to the Administrator, because WAFLA is an employer, WAFLA can be held liable for violations and assessed CMPs. WAFLA, on the other hand, argues that it is not a joint employer because it had no control over the employees that worked at Azzano and did not meet the regulatory definition of employer, that it may not be held liable as a joint employer because it justifiably relied on the Administrator's prior interpretations and years of non-enforcement, and that the Administrator cannot impose CMP liability on WAFLA in this case under the H-2A statute and regulations.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated the authority to review this matter to the Board.[19] The regulations governing H-2A enforcement allow a party to appeal to an ALJ for a *de novo* review, and appeal to the ARB for review of the ALJ's decision.[20] The ARB, on review from the ALJ, reviews the record *de novo*, including the CMP assessment.[21]

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17 Administrator's (Adm'r) Brief (Br.) at 9.

18 Adm'r Petition for Review at 6.

19 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

20 29 C.F.R. §§ 501.41(b), (d), 501.42.

21 5 U.S.C. § 557(b); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Three D Farms, LLC*, ARB Nos. 2016-0092, -0093, ALJ No. 2016-TAE-00003, slip op. at 5 (ARB Feb. 12, 2019); *see Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Pegasus Consulting Grp., Inc.*, ARB No. 2005-0086, ALJ No. 2004-LCA-00021, slip op. at 7 (ARB Apr. 28, 2009) (citations omitted); *see also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Elderkin Farm*, ARB Nos.

DISCUSSION

This case brings an issue of first impression before the Board. While we have addressed joint employment in the H-2A program in the case of two individual employers, we have not addressed joint employment and its attendant responsibilities when an association is applying with member-farms on a master application. When we last considered joint employment, the factual circumstances were quite different from this case. In *Wage & Hour Division v. Seasonal Ag Services*, we addressed whether two employers with overlapping employee lists and supervisors were joint employers for H-2A purposes.[22] In that case, we adopted the common law definition of agency to determine the relationship between the parties.[23]

The key issue before us in this case is whether an association is a joint employer as a matter of law—and therefore subject to all the responsibilities of an employer under the H-2A program—when it applies on a master application as a joint employer. Because the history and purpose of the H-2A program requires holding applicants accountable for compliance with the conditions attached thereto, and the Department explicitly requires agricultural associations to certify themselves as joint employers when they complete the H-2A application and job order, we conclude that applying as a joint employer on a master application renders the association liable as a joint employer, as a matter of law. Furthermore, consistent with our practice in other cases, we find that WAFLA is estopped from disclaiming liability as a joint employer after accepting the benefits of the program.

Consistent with our recognizing WAFLA's obligations as an employer, we further find that WAFLA cannot claim justifiable reliance to avoid liability and that both WAFLA and Azzano can be assessed CMPs, up to the regulatory maximum. When an association is a joint employer, as is the case when it applies on a master application with member farms, the association also assumes responsibility to ensure compliance with the H-2A regulations, and therefore is liable for violations.

1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 12 (ARB June 30, 2000) (clarifying that *de novo* review means the Board may substitute its judgment for the ALJ's on civil money penalties).

[22] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Seasonal Ag Servs., Inc.*, ARB No. 2015-0023, ALJ No. 2014-TAE-00006 (ARB Sept. 30, 2016).

[23] *Id.*

1. WAFLA is a Joint Employer as a Matter of Law

The H-2A program was created in the Immigration and Control Act of 1986, which amended the INA.[24] The H-2A program's roots trace back to earlier temporary foreign worker programs, which often inadequately protected non-immigrant and domestic workers.[25] The earlier programs' failures inform much of the current H-2A structure, which has continued to evolve since its creation.[26] The H-2A program places the obligations of compliance on the employer that is bringing temporary foreign workers into the country.[27] The program itself is designed to fill gaps in the labor market while protecting domestic workers, as reflected by the statutory and regulatory requirements for recruiting U.S. workers, wage rates that are set to avoid driving down wages for domestic workers, and safeguards to ensure that temporary foreign workers return to their home countries at the end of their employment.[28] Due to the demands of agricultural work, H-2A workers face uniquely difficult working conditions as compared to other temporary foreign workers, and much of the program's regulation focuses on protecting worker safety and ensuring humane living conditions.[29] Thus, an employer's obligations under the program are both up front, in assuring that the workers are necessary and will not harm the domestic labor market, and ongoing, in assuring that the temporary foreign workers and the domestic workers who are hired under corresponding employment are paid correctly and that their working and living conditions are safe

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[24] The Immigration Reform and Control Act of 1986 (IRCA) amended the INA to establish a separate H-2A visa classification for agricultural labor under INA sec. 101(a)(15)(H)(ii)(A). Public Law 99-603, Title III, 100 Stat. 3359 (Nov. 6, 1986).

[25] *See* INA, Pub. L. No. 82-414, 66 Stat. 163, 166 (1952) (establishing the non-immigrant visa H-2A program and defining as a non-immigrant "an alien having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country").

[26] *See* 132 Cong. Rec. E3276-78 (daily ed. Sept. 25, 1986) (statement of Rep. Richardson). *See also* 132 Cong. Rec. H10527-32, 132 Cong. Rec. H10583-99 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

[27] *See* Pub. L. No. 82-414, 66 Stat. 163, 189.

[28] *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a); 8 U.S.C. 1188(a)(1); 20 C.F.R. § 655.120-655.122 (2010).

[29] *See generally* 29 C.F.R. Part 655, Subpart B; 2010 Final H-2A Rule, 75 Fed. Reg. 6884.

and humane.[30] The Department's regulations are designed to further the program's goals, consistent with the statute and Congress's intent.

To determine the role and responsibilities of an association applying as a joint employer on a master application, we begin with the statute. The INA allows associations to participate in the H-2A program, permitting a "petition to import an alien as a temporary agricultural worker, and an application for a labor certification with respect to such a worker," to "be filed by an association of agricultural producers which use agricultural services."[31] The INA allows associations to file a petition in one of several roles—either as employers, joint employers or agents.[32] When applying with member farms on a master application, the association is a joint employer, as stated in the statute:

> If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any of its producer members and such workers may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted.[33]

Thus, the INA itself intends for associations to act as employers, either on their own or as joint employers.

The regulations are consistent with the statute. The definition of "joint employment" in the 2010 regulations applicable to this case makes clear that a worker can be deemed an "employee" of more than one "employer" for purposes of the employer obligations in the H-2A regulations.[34] The regulations allow agricultural associations to act as employers or agents for their member-employers.[35] The association can act as agent for the employer in preparing the H-2A certification materials, without assuming the obligations of a joint employer.[36]

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30 *See* 20 C.F.R. § 655.100-655.185.

31 8 U.S.C. § 1188(d)(1).

32 *Id.* § 1188(d)(2), (c)(3)(B)(iv).

33 *Id.* § 1188(d)(2).

34 20 C.F.R. § 655.103(b) (definition of "joint employment").

35 *Id.* (definition of "agricultural association").

36 *Id.* § 655.133.

However, they cannot apply on behalf of multiple employers on a master application acting as an agent—instead their only option is to apply as a joint employer.[37] Thus, under the regulation, associations must choose one status or the other, and that choice controls:

> If an association files an Application for Temporary Employment Certification, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.
> (a) Individual applications. Associations of agricultural employers may file an Application for Temporary Employment Certification for H–2A workers as a sole employer, a joint employer, or agent. The association must identify in the Application for Temporary Employment Certification in what capacity it is filing. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final Determination, or in the event of an audit.
>
> (b) Master applications. An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. An association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the Application for Temporary Employment Certification and all employer-members are located in no more than two contiguous States. The association must identify on the Application for Temporary Employment Certification by name, address, total number of workers needed, and the crops and agricultural work to be

[37] *Id.* § 655.131(b).

> performed, each employer that will employ H–2A workers. The association, as appropriate, will receive a certified Application for Temporary Employment Certification that can be copied and sent to the United States Citizenship and Immigration Services (USCIS) with each employer-member's petition.[38]

To understand why a master application requires an association to apply as a joint employer, we look to the policy reasons underlying the program. When the Department promulgated new H-2A regulations in 2010, the Notice of Proposed Rulemaking (NPRM) stated:

> The Department proposes to retain the long-standing requirement that a master application may be filed only by an association acting as a joint employer with its members; the Proposed Rule reiterates this joint responsibility by requiring that the association identify all employer-members that will employ H–2A workers. *The Application must demonstrate that each employer has agreed to the conditions of H–2A eligibility.*[39]

Thus, the Department was clear that the proposed rule would continue the "long-standing" requirement that associations filing a master application do so as a joint employer and agree to the H-2A program's requirements. Upon issuing the 2010 Final H-2A Rule, the Department again emphasized that the choice for associations between acting as an agent or a joint employer on a master application is a long-standing one:

> In addition, the Final Rule continues to require a single date of need as a basic element for a master application, as well as a longstanding requirement that master applications may only be filed by an association acting as a joint employer with its members. *The Department highlights joint responsibility of the association and its employer-members* by requiring that the association identify all employer-members that will employ H–2A workers [. . .] Although associations may be required to

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38 20 C.F.R. § 655.131.

39 Temporary Agricultural Employment of H-2A Aliens in the United States (2009 Proposed H-2A Rule), 74 Fed. Reg. 45906, 45916 (proposed Sept. 4, 2009) (emphasis added).

> prepare greater numbers of applications, the requirement is intended to make it easier for them to track compliance with the terms and conditions.[40]

The Department also indicated that associations should be involved with member-farms to ensure program compliance. The Department's desire to hold associations accountable, and have them actively involved with compliance, is consistent with the policy purposes of the H-2A program and its history. Again, from the Department, upon adoption of the 2010 Final H-2A Rule:

> The Department proposed to continue allowing associations to file on behalf of their members. The NPRM clarified the role of associations as filers (sole employer, joint employer or agent), in order to assist the association and employer-members in understanding the obligations each party is undertaking with respect to the Application. As in the past, an association will be required to identify in what capacity it is filing, so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint). This requirement is a continuation from both the 1987 Rule and 2008 Final Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members.[41]

As the NPRM and preamble to the 2010 regulations show, the Department intends to require associations to be employers and assume responsibility for compliance when a master application is filed. All of this is consistent with the language of the INA itself, which in addition to allowing associations to apply as joint employers, anticipates liability for compliance failures based on what an employer agrees to and authorizes the Department to enforce the employee protections:

> The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure

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40 2010 Final H-2A Rule, 75 Fed. Reg. at 6918 (emphasis added).

41 *Id.* at 6917.

> employer compliance with terms and conditions of employment under this section.[42]

We turn now to the application process itself. The H-2A program application, Form ETA-9142A, allows an agricultural association like WAFLA to check whether it is applying as a "sole employer," "joint employer," or an "agent."[43] WAFLA checked the box for "joint employer." WAFLA's representative also signed the form under the "Employer Declaration" section, and WAFLA identified itself in the section for "Employer Information" and included its own employee's information as the "Employer Point of Contact."[44]

In addition to Form ETA-9142A, applicants file additional forms with the Department of Labor Employment and Training Administration (ETA) and comply with U.S. Citizen and Immigration Services and State Department requirements to secure the H-2A visas for their workers. ETA Form 790, known as the "job order," is completed by the employer and includes all of the relevant and required information about the temporary agricultural job, including job duties, working hours, housing and transportation information, and all other terms of the job.[45] The approved job order must be provided to job applicants, unless another written contract is provided, and it serves to inform the workers of the terms and conditions of their employment.[46] The regulations require that employers include specific content—"[m]inimum benefits, wages and working conditions"—in any job order.[47] When an employer signs the job order, it certifies a list of conditions of employment, which outline the regulatory requirements of the H-2A program. The employer also certifies its "knowledge of and compliance with applicable Federal, State, and local employment related laws and regulations."[48] The employer further signs, at the end

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42 Section 218(g)(2) of the INA, as amended, codified at 8 U.S.C. § 1188(g)(2).

43 *See* Dep't of Labor Form, ETA-9142A, H-2A application for temporary employment certification, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA_Form_9142A.pdf.

44 Adm'r Hearing Exhibit (Ex.) 2 at 2, 14. In contrast, WAFLA left the "Attorney or Agent Declaration" fields blank. *Id.* at 3, 12.

45 20 C.F.R. § 655.130(a); Dep't of Labor Form, ETA-790, Agricultural Clearance Order, https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf.

46 20 C.F.R. § 655.103(b) (definition of "job order" and definition of "work contract").

47 *Id.* § 655.122(c); *see also Id.* § 655.122(d-q).

48 Dep't of Labor Form, ETA-790, Agricultural Clearance Order, https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf; *see also* 20 C.F.R. §655.122(d-q).

of the job order, under penalty of perjury, that the information contained in the job order is "true and accurate."[49] WAFLA prepared and filed the ETA Form 790 as the "Employer" as part of an "association application . . . on behalf of its member(s), using the joint employer format" and signed all the relevant attestations.[50]

After WAFLA successfully completed the application, the Department issued a temporary labor certification. WAFLA advertised for and recruited domestic and H-2A workers, assisted H-2A workers in obtaining visas, designated specific work sites for each worker, and arranged and reimbursed travel for H-2A workers to Washington.[51] Sixteen of 37 workers on the master application worked at Azzano. The workers' housing was owned and maintained by Azzano and WAFLA was not involved in the operations of the farm.[52] In a footnote in the Decision & Order, the ALJ described WAFLA's role as follows:

> Azzano Farms hired wafla as an agent to facilitate the recruitment of workers, complete applications for H-2A contracts, and transport workers to the farm. wafla posted the required advertisements regarding the job positions in newspapers in Washington, Oregon, and Idaho. wafla contracted with a separate entity based in Mexico, CSI Visa Processing, which recruited workers, processed paperwork, and transported workers from Mexico. wafla issued checks to reimburse the workers for their inbound transportation. Once the workers arrived on the farm, wafla no longer had any involvement. wafla had no control over Azzano Farms' housing or vehicles, and no ability to enter upon Azzano Farms' property. wafla did not direct, control, train, pay, discipline, or fire the workers at Azzano Farms, and did not have access to workers' personnel files. Michael Azzano, an owner and operator of Azzano Farms, testified he hires the H-2A workers once they arrive at the farm and complete documentation, such as I-9 and W-4 forms. wafla had no role in selecting the workers ultimately hired by Azzano Farms. Katherine Walum, the lead Wage and Hour investigator, testified wafla did not: engage in

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49 Dep't of Labor Form, ETA-790, Agricultural Clearance Order, https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf.

50 Adm'r Hearing Exhibit 1.

51 D. & O. at 4 n.4.

52 *Id.*; Hearing Transcript (Tr.) at 190, 192-96 (testimony of Michael Azzano).

> the business of farming, complete any I-9 forms for workers, pay the workers for their work, assign workers to housing, supervise workers, set the start and stop times, instruct workers on how to complete their jobs, assign daily tasks, supply workers with equipment, discipline any workers, or maintain workers' production records.[53]

In his decision, the ALJ found that WAFLA was not an employer because WAFLA did not have a common law agency relationship with the employees, citing the regulations and the Board's decision in *Seasonal Ag*. The ALJ concluded that WAFLA operated more as a "headhunter" rather than an employer.[54] Noting that WAFLA checked the "joint employer" box on the application, the ALJ stated this was at the direction of ETA. The ALJ emphasized that the decision was for the sole purpose of this case, and not for other contexts. The ALJ stated,

> the resolution of this case does not require me to decide whether Azzano and WAFLA are, or are not, joint employers for all purposes, and I make no such decision. Nevertheless, I conclude, on the record before me, that they are not joint employers for purposes of the violations the Director alleges in this case.[55]

The ALJ incorrectly applied the common law test for agency in determining that WAFLA was not a joint employer. That test is reserved for situations such as the one we addressed in *Seasonal Ag*, where there is not an application in which the applicant attested to its status as a joint employer and attendant employer responsibilities. The regulatory definition of an employer, in addition to requiring that an employer have a place of business in the United States and a valid Federal Employer Identification Number (FEIN), states that an entity must "have an employer relationship" with an H-2A worker. [56] But that definition and the common law agency test do not resolve the question of whether WAFLA was a joint employer. Instead, the ALJ should have analyzed what we look to now: the statute, regulations and their implementing documents—taken together—and WAFLA's

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53 D. & O. at 4 n.4 (internal citations omitted).

54 *Id.* at 5.

55 *Id.*

56 20 C.F.R. § 655.103(b) (definition of "employer"). No party disputes that WAFLA has a U.S. address and a FEIN.

own attestations in the course of completing the H-2A application and job order. Together, the statute, regulations and the Department's guidance as laid out in the NPRM and preamble to the 2010 regulations show that, when an association applies on a master application with member-farms, it is applying as a joint employer.[57] In such instances, the association does have an employer relationship with the H-2A workers, as set forth in the definition of employer under the regulation, because the association attested to ETA that it is in that relationship with its member-farms.

Turning to the master application at hand, WAFLA's own attestations on its application materials show that WAFLA swore to comply with the H-2A program requirements and signed, under penalty of perjury, that it was an employer of the employees hired under the job order. At this point, the analysis of WAFLA's role is complete. The application process is not a simple one, where an association could fail to realize what it was attesting to in the course of correctly completing it. While it is uncontested that WAFLA did not engage with Azzano to assist with compliance, that cannot relieve WAFLA of its liabilities. That fact, instead, underscores that WAFLA did not fully engage with its responsibilities as a joint employer. WAFLA, as a joint employer, had an obligation to ensure compliance, and can be held liable for any failure to do so. Accordingly, we conclude that WAFLA is a joint employer as a matter of law.

Although Judge Burrell concurs that WAFLA is a joint employer by virtue of filing a master application, he appears to fundamentally disagree with this aspect of the 2010 regulation.[58] First, he signals disapproval of what he calls "check the box" employer status; although he begrudgingly accepts that an association filing as a joint employer thereby signs on for *some* employer liability, he also states that joint employer status is only for "purposes of the certification."[59] Second, he appears to be suggesting that the rule includes or should have included a liability apportionment standard.[60] But the rule is *not* unclear—it does not include any hint that liability should be "distributed" among joint employers and the Board does not have

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[57] Preambles can serve as administrative guidance, just as other written, non-regulation materials produced by the Department aid with compliance in other areas. *See* Kevin M. Stack, *Preambles as Guidance*, 84 Geo. Wash. L. Rev. 1252 (2016).

[58] Concurring and Dissenting Opinion at 34.

[59] *Id.* at 34.

[60] *Id.* at 35 (asserting that the "2010 regulations are unclear as to how to distribute liability among joint employers for particular violations under the H-2A framework.").

authority to re-write the regulation to do so.[61] In sum, the Board does not have authority to apportion or distribute liability among joint employers.[62]

2. Estoppel Prevents WAFLA from Disclaiming Joint Employer Liability

Principles of estoppel also prevent WAFLA from disclaiming joint employer liability. The Board has long held that entities cannot take advantage of the benefits of temporary workers and subsequently claim that they are not liable for the consequences of their violations, even when they may have erroneously been granted the benefits of the program to begin with.[63] In *WHD v. Fargo VA Medical Center*, the Veterans Administration (VA) argued that it was not liable for violations because its application never should have been approved initially. In rejecting that argument, the Board stated, "an entity that has secured all the

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[61] *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020) at (5)(b)(69) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.").

[62] To the extent Judge Burrell wants to ensure that the Administrator considers employer "culpability" in joint employer situations, there is no need to engage in a convoluted jurisprudential exercise that disavows strict liability and vicarious liability, and imports common law agency principles into an apportionment-of-liability standard. There is already a regulation that lists applicable mitigation factors. *See* 29 C.F.R. § 501.19(b); *see also* 2010 Final H-2A Rule, 75 Fed. Reg. at 6944 (responding to commentator concerns of excessive liability by explaining Administrator will continue to rely upon the Section 501.19(b) factors and "common sense" in imposing CMPs). Further, there is no "strain on adjudication regarding the putative employer" when we view liability through this *existing* regulatory lens; the ALJ and ARB have authority to review the reasonableness of the Administrator's CMP assessment and application of the Section 501.19(b) mitigation factors. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Peroulis*, ARB Nos. 2014-0076, -0077, ALJ No. 2012-TAE-00004, slip op. at 9 (ARB Sept. 12, 2016) (citing 29 C.F.R. §501.41(b) (providing for "*de novo* hearing" before the ALJ)). ALJs routinely engage in the CMP review and have not heretofore seen the need to invent new standards. Indeed, Judge Burrell concludes that he "would affirm the ALJ's denial of WAFLA's vicarious liability for Azzano Farms' housing violations under a § 501.19(b) culpability analysis." Concurring and Dissenting Opinion at 46 n.198. However, Judge Burrell does not walk through his mitigation factor analysis to explain which factor(s) he believes merit a 100 percent mitigation.

[63] *U.S. Dep't of Lab., Wage & Hour Div., Emp. Standards Admin. v. Dallas Veterans' Affs. Med. Ctr.*, ARB Nos. 2001-0077, -0081, ALJ No. 1998-LCA-00003, slip op. at 5 (ARB Oct. 30, 2003); *see also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Fargo Veterans' Affs. Med. Ctr.*, ARB No. 2003-0091, ALJ No. 2002-LCA-00013, slip op. at 5 (ARB Sept. 30, 2004).

benefits available to an employer under the H-1B program, namely, the ability to employ nonimmigrant aliens, is estopped from subsequently denying that it is an employer."[64] While the instant case deals with the H-2A program rather than the H-1B program, substantively WAFLA is arguing just what the VA argued—that it is not an employer and should not be held liable for its failures. WAFLA argues that it does not benefit from the H-2A program, but this is directly contradicted by the record, which shows that WAFLA charges member-farms for its services.[65] Earning money from participation in the program is a clear benefit. Consistent with our past holdings, we find that WAFLA is estopped from disclaiming liability after reaping the rewards of the H-2A program.

3. Justifiable Reliance Insufficient to Avoid Liability

WAFLA argues that it justifiably relied on the Administrator's long-standing practice of non-enforcement against associations, and that reliance now prevents WHD from enforcing for a member-employer's violations. Although the investigator testified during the hearing that it was WHD policy to assess CMPs against both the member-employer and the association in cases such as this one, WAFLA provided testimony that it had not been subject to enforcement in its earlier eight years applying for the H-2A program. WAFLA therefore argues that WHD's changing its alleged enforcement policy to hold WAFLA liable for the violations of its members would cause significant financial distress and risk.

WAFLA relies, in part, on *Christopher v. SmithKline Beecham Corp.*, wherein the Supreme Court addressed the Department's attempt to enforce its interpretation of the term "sale" in an FLSA regulation.[66] In *Christopher*, the Court found that while in general it is appropriate to defer to an agency's interpretation of its own regulation, the Court will withhold that deference when the agency changes its interpretation of an ambiguous regulation without notice.[67] WAFLA's reliance on *Christopher* is misguided. *Christopher* dealt with an agency's policy change that was announced via amicus brief. Here, the regulations, statute, and the Department's statements consistently support WHD's position. WAFLA's main argument is that

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64 *Fargo Veterans' Affs. Med. Ctr.*, ARB No. 2003-0091, slip op. at 5.

65 Tr. at 193 (testimony of Michael Azzano, explaining that WAFLA was hired to complete the H-2A process for Azzano and other member farms).

66 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

67 *Christopher*, 567 U.S. at 156-57.

because it had not generally been held liable before when a member-farm committed a violation, it could not ever be held liable. Agencies, however, are free to promulgate new rules and policies, so long as they follow appropriate procedures.[68] "The mere fact that an agency interpretation contradicts a prior agency position is not fatal."[69]

Here, the dispute is not about a written non-enforcement policy, or a change to the regulation. In fact, the regulations and their preambles have stated since the inception of the H-2A program that associations can be joint employers and that employers may be held responsible for failures to comply with the regulations.[70] There has been no policy change announced via litigation as was the case in *Christopher*. In fact, WAFLA has not pointed to any written policy at all. Here, WAFLA argues that the mere fact that it has not been held liable for past violations, despite being party to past investigations, means that it cannot now be held liable for violations.[71] That, without more, is far from a sufficient ground to find that WAFLA should be relieved of liability in this case.

4. Joint Employer Status Renders WAFLA Liable for CMPs

To enforce the employee-protection provisions under the H-2A program, the Secretary of Labor "is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer

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68 *Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996).

69 *Id.*

70 2010 Final H-2A Rule, 75 Fed. Reg. at 6917 ("As in the past, an association will be required to identify in what capacity it is filing, so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint). This requirement is a continuation from both the 1987 Rule and 2008 Final H-2A Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members.")

71 The concurrence and dissent implies that WHD changed its policy in 2017 by creating a new theory of vicarious liability. Concurring and Dissenting Opinion at 38 & n.154. Cited support for this assertion is primarily WAFLA's own testimony about its understanding of WHD policy—the WHD investigator repeatedly stated that the law had not changed, that WHD's position is that associations are joint employers and are jointly liable, and that WHD assesses CMPs and applies mitigation factors to associations. Tr. at 169-75 (testimony of Katherine Walum).

compliance with terms and conditions of employment under this section."[72] Here, the Administrator chose to enforce the employee-protection provisions by imposing CMPs. WAFLA claims that because it had no control over the employees at Azzano, it cannot be held liable for Azzano's actions. WAFLA further argues that by fining both Azzano and WAFLA, the Administrator exceeded the regulatory maximum penalty because penalties for both parties, when totaled, exceed the regulatory maximum amount.[73]

To begin, we address WAFLA's argument that it cannot be held liable for Azzano's actions. WAFLA provided testimony at the hearing indicating that CMPs are typically assigned so "that the party responsible for the violation is liable for the violation."[74] The statute grants the Secretary of Labor significant berth to impose penalties and seek other remedies for H-2A violations, stating, "[t]he Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section."[75]

The regulations state that employers of H-2A workers must agree in the H2-A application process "that it will abide by the requirements of" the regulations and make additional enumerated assurances.[76] As discussed above, WAFLA filed the application and made the appropriate assurances.[77] WAFLA also had an obligation to aid in compliance of its member-farms. WAFLA admitted in this case that it did not consistently do that.[78] To the extent that WAFLA did aid in compliance by, for instance, intervening when the WHD investigator was initially turned away at Azzano property, that raises a question of the appropriateness of a given CMP, which we discuss more below.

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72 8 U.S.C. § 1188(g)(2).

73 WAFLA Br. at 21.

74 Tr. at 229 (testimony of Daniel Fazio).

75 8 U.S.C. § 1188(g)(2).

76 20 C.F.R. § 655.135.

77 WAFLA also argues that it names itself on ETA From 790 because it was instructed to by ETA. Tr. at 231.

78 *See generally* testimony of Dan Fazio describing WAFLA's role with Azzano Farms and the compliance services it provided, Tr. at 220-320.

Next, we turn to WAFLA's argument that assessing penalties against both parties exceeds the regulatory maximum and results in a "double penalty."[79] In his decision, the ALJ focused on the language of the regulation. Specifically, WAFLA argues that the maximum penalty set by regulation is "for each violation" and that assessing the maximum against two employers leads to double assessment because, even though multiple parties may be involved, only one violation of the regulations occurred.[80] The language of the regulation is helpful, but not dispositive, in determining the intent of the maximum amount:

> A civil money penalty may be assessed by the WHD Administrator for *each* violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part. *Each* failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part constitutes a separate violation.[81]

The word "each" in the regulation does not mean that one violation requires splitting the CMP maximum between employers when there is a joint employment situation. Instead, CMPs are assessed per violation which, in the instance of joint employment, means that each joint employer committed a violation, rendering each joint employer liable for the violation it committed.

This is no different than multiple individuals committing a crime and all individuals getting individually sentenced for the crime. Criminal courts do not look at sentencing guidelines and allocate the sentence among the parties who are found guilty. Instead, each party is sentenced for its participation in the crime. The same concept applies to CMPs. For example, when one worker is not provided with a work contract, and there are multiple employers who should have ensured compliance, then each employer has violated the requirement to provide a work contract. While WAFLA argues that applying the regulation in this way serves to double the assessed CMPs and exceed the maximum allowed, WAFLA is incorrect. CMPs are not assessed like damages or back wages, where a total amount may be appropriately allocated between parties. The question of how much to assess for a

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79 WAFLA Br. at 20-21.

80 D. & O. at 15; WAFLA Br. at 20-21.

81 29 C.F.R. § 501.19 (emphasis added).

given CMP is a separate question from whether an employer violated a statute with which they agreed to comply. It is the violation itself that triggers CMP liability—and that liability runs to each employer for each violation, subject to the amounts set forth in the regulations.

5. The ALJ Erred in the CMP Analysis

The CMP maximum varies based on the nature of the violation. CMPs can be assessed on a per-employee or per-violation basis and can be reduced based on relevant factors (commonly known as mitigation factors), which are outlined in the regulation.[82] The factors that may be considered include, but are not limited to, the following:

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;
>
> (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
>
> (3) The gravity of the violation(s);
>
> (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part;
>
> (5) Explanation from the person charged with the violation(s);
>
> (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188;
>
> (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.[83]

The preamble to the 2010 Final H-2A Rule discussed CMPs and how they are to be assessed. "[T]he assessment of a particular penalty (or of an enhanced penalty

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82 *Id.* § 501.19 (2017).

83 *Id.* § 501.19(b).

for a repeat or willful violation) is not mandatory, but guided by consideration of the seven [mitigation] factors listed in paragraph (b), the facts of each individual case, and by common sense."[84] In the NPRM, the Department further stated that the ability to assess the penalties would provide the Department with "more effective tools to discourage potential abuse of the program . . . ."[85] In short, the Department's comments on CMPs emphasize that they are a compliance tool and that there is discretion in applying CMPs to any individual case.

Turning to the violations in dispute in this case, the Administrator filed a Petition for Review asking the Board to accept as an issue, "[w]hether the ALJ erred by failing to assess CMPs up to the regulatory maximum amount against both WAFLA and Azzano Farms for each violation of the terms and condition of H-2A employment."[86] Upon briefing however, the Administrator limited the CMP dispute to two of the violations and did not dispute with any specificity the ALJ's holdings on the remaining violations. Specifically, the Administrator briefed on whether the ALJ erred in reversing WHD's assessment of CMPs: (1) against WAFLA and Azzano for their failure to post the H-2A poster at a conspicuous location in the place of employment; and (2) against WAFLA for its failure to provide housing for H-2A workers that met applicable safety and health requirements.[87] Thus, we will not discuss in detail the other violations that the ALJ reversed against WAFLA and Azzano.

A. Failure to Post H-2A Poster

The Administrator charged WAFLA and Azzano with failing to appropriately display the required H-2A poster. The regulation states:

> The employer must post and maintain *in a conspicuous location at the place of employment, a poster* provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and

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84 2010 Final H-2A Rule, 75 Fed. Reg. at 6944.

85 *Id.*

86 Petition for Review at 2.

87 Adm'r Br. at 22-27.

> protections for workers employed pursuant to 8 U.S.C. 1188.[88]

The ALJ reversed the penalties against both Azzano and WAFLA for failure to display the H-2A poster. The ALJ found that because the regulation required only *a* poster, and Azzano had displayed a single poster at a housing location used by the H-2A workers, Azzano and WAFLA had not violated the regulation.[89]

The ALJ was correct that the regulation and preamble reference is to a single poster. In the preamble to the 2010 Final H-2A Rule, however, the Department explained that the purpose of the H-2A poster requirement is to ensure that all workers are aware of their rights, including corresponding workers who may not be aware that they are eligible for the terms and conditions of H-2A employment.[90] Thus, focusing on the *number* of posters overlooks the critical inquiry as to whether the poster was in a *conspicuous location* at the *place of employment*.

Here, the record shows that the Miller Road address of the housing facility where the H-2A poster was displayed is the same address listed for Azzano on its H-2A application materials.[91] However, the record also shows that H-2A workers were also housed at a second housing facility on Root Lane, and that the H-2A and corresponding employees did not always work at the Azzano address.[92] The investigator testified at the hearing that:

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88 20 C.F.R. § 655.135(l) (emphasis added).

89 The hearing testimony is somewhat unclear as to when an H-2A poster was displayed. The investigator testified that the poster was not displayed at the housing location or the orchards. Tr. at 157 (testimony of Katherine Walum). However, the record contains pictures of an H-2A poster displayed on a large board, along with other required notices, at the housing facility offered to H-2A workers, and Michael Azzano testified that the poster was displayed at the time of the investigation. Tr. at 189-90 (testimony of Michael Azzano). The ALJ found that the poster was there at the time of the investigation, crediting Michael Azzano's testimony and finding that the investigator's testimony was not inconsistent. D. & O. at 14; Adm'r Hearing Ex. 16 (Housing Safety and Health Checklist dated 7/12/2017).

90 2010 Final H-2A Rule, 75 Fed. Reg. at 6926. Rather than using the term "place of employment," the preamble refers to the "worksite." The ALJ focused on the use of the term "worksite" to reject any assertion that multiple posters must be placed at all worksites, but as we explain, the relevant regulatory inquiry does not look at the number of posters, it looks to whether it was conspicuously displayed at the place of employment.

91 Tr. at 158-60 (testimony of Katherine Walum).

92 *Id.* at 157-58 (testimony of Katherine Walum).

> If [employees are] working at different orchard sites, like was the case here, the posters need to be at those different orchard sites. So, the workers, during their work day, including the U.S. workers, can see that poster and see what number, for example, they can call if they feel that their rights have been violated.[93]

Michael Azzano similarly testified that Azzano has several different orchards, and that workers move around the property.[94] He further testified that after the investigation, upon guidance from the investigator, he attached several H-2A posters to a sign that would move with the workers, so that the posters were always on display where the workers were working.[95] Thus, the ALJ's focus on the number of posters misses the point; while the investigator argued for a poster at each orchard, the mobile poster that eventually was placed by Michael Azzano on a moving signpost could be both a single poster and be visible anywhere a worker is working, i.e., *conspicuously* located at the *place of employment*, not in a housing facility where only *some* H-2A workers, and no corresponding U.S. workers, could see it.[96]

Accordingly, we reverse the ALJ's findings regarding this violation[97] and assess Azzano and WAFLA's responsibility in light of the mitigation factors outlined in the regulations to determine the appropriate CMP.

B. CMPs For Failure to Post H-2A Poster

Starting with the maximum penalty of $1,692 for this violation, the Administrator applied the mitigation factors to reduce the CMP assessment against Azzano by 10 percent under Factor 1 (no prior history of violations) and 10 percent

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93 *Id.* at 83 (testimony of Katherine Walum).

94 *Id.* at 190 (testimony of Michael Azzano).

95 Azzano has several orchards, ranging in size. *Id.* at 190-91.

96 Because the workers here lived and worked in multiple locations, we need not opine on whether a single H-2A poster at one housing unit might be sufficient in other circumstances.

97 D. & O. at 14. The ALJ also found that the violation against WAFLA was improper because even if there had been a violation of the poster requirement, WAFLA was not liable because it had no control over the orchards. *Id.*

under Factor 6 (commitment to future compliance).[98] The Administrator assessed the maximum penalties against WAFLA because it had a history of violations and refused to commit to future compliance with the poster requirement.[99]

The ALJ reversed the penalties against both Azzano and WAFLA, as discussed above, and therefore did not assess the reasonableness of the Administrator's penalty assessments. Having reversed the ALJ on the poster violation, and having found WAFLA to be a joint employer, we now assess *de novo* the appropriate penalties considering the mitigation factors outlined in the regulation.[100] We find as follows.

i. WAFLA

Under Factor 1, we apply a 5 percent mitigation factor for WAFLA's limited violation history. Although the investigator testified that WAFLA had multiple prior violations, she was only able to recall one violation where WAFLA was assessed a CMP, in the Sakuma Farms case.[101]

Under Factor 2 (the number of affected employees), we apply a 10 percent mitigation factor because twelve of approximately sixteen H-2A workers used the

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98 Tr. at 85 (testimony of Katherine Walum). As a matter of national policy, the Administrator begins her assessment by applying the maximum penalty for each violation and then mitigates the penalty in 10 percent intervals for each applicable factor. Although this matrix is not published in a regulation or sub-regulatory guidance, the Board has previously agreed with this approach. *See generally Peroulis*, ARB Nos. 2014-0076, -0077, slip op. at 9 (ARB Sept. 12, 2016).

99 Tr. at 136-41 (testimony of Katherine Walum). Ms. Walum referred to at least one other citation against WAFLA, *id.*, which is the citation at issue in another appeal currently pending before the ARB. She was unable to articulate whether WAFLA was actually cited in each case. As a threshold matter, we note that this mitigation factor only refers to "violations," not final Secretarial decisions or uncontested violations, and thus allows consideration of WHD's findings of violations following an investigation.

100 *See Peroulis*, ARB Nos. 2014-0076, -0077, slip op. at 9. Azzano did not appeal the housing violation CMPs, so we do not address those.

101 Tr. at 136-41 (testimony of Katherine Walum). The Administrator also presented evidence of another contemporaneous violation. *See* Consent Findings and Order, *In re WAFLA*, No. 2018-TAE-00011 (Nov. 9, 2018), Adm'r Post-Hearing Br., Appendix A. WHD issued the Notice of Determination in that case in April 2017, so WAFLA had been assessed CMPs for H-2A violations in at least two cases by the time WHD assessed penalties in this case.

housing facility where the poster was displayed, and there is no clear testimony regarding the number of corresponding employees affected.[102]

Under Factor 3 (gravity of the violation), we do not apply any mitigation factor because the notice is necessary to ensure worker protections and program integrity. WAFLA could have entered the property and ensured compliance with this requirement, or otherwise provided compliance assistance to Azzano.[103]

Under Factor 4 (good faith efforts to comply with the H-2A regulation), we apply a 10 percent mitigation factor for WAFLA's efforts to cooperate with the WHD investigation.[104]

Under Factor 5 (WAFLA's explanation for the violations), we apply a 30 percent mitigation factor. WAFLA explained that it relied on Azzano to comply with onsite requirements, and although WAFLA could have entered the property and provided compliance assistance with the poster display,[105] it believed the single poster was in compliance.[106] WAFLA's director, Mr. Fazio, also explained that he had a subjective belief that WAFLA would not be held liable for the violations committed by its members.[107] While this incorrect understanding of the law does not create a cognizable reliance interest that precludes penalty assessment in this case,[108] it is a credible explanation for purposes of this mitigation factor.

Under Factor 6 (commitment to future compliance), we do not apply any mitigation factor because Ms. Walum's uncontroverted testimony was that WAFLA would not make such a commitment regarding the poster.[109]

Under Factor 7 (financial gain or potential loss/injury to workers), there is no evidence of concrete savings to WAFLA from the violations. Although there was

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102 Tr. at 124-25 (testimony of Katherine Walum). The Administrator bears the burden of proof regarding reasonableness of the penalty assessment. 5 U.S.C. 556(d).

103 Tr. at 62-63 (testimony of Katherine Walum).

104 *Id.* at 164 (testimony of Katherine Walum).

105 *Id.* at 84 (testimony of Katherine Walum).

106 *Id.* at 189-90.

107 *Id.* at 229-30 (testimony of Dan Fazio).

108 *See supra* Section 3, "Justifiable Reliance Insufficient to Avoid Liability."

109 Tr. at 85 (testimony of Katherine Walum).

potential financial loss to the workers when they were not properly informed of their rights,[110] this violation was promptly rectified when the poster was conspicuously displayed. Hence, we apply a 10 percent mitigation factor here.

	Mitigation factor	*Dollar amount*
		$1,692 (base penalty)
Factor 1 (history of violations)	5 percent	$84.60
Factor 2 (number of affected employees)	10 percent	$169.20
Factor 4 (good faith)	10 percent	$169.20
Factor 5 (explanation)	30 percent	$507.60
Factor 7 (gain or loss)	10 percent	$169.20
Total		**$592.20**

ii. Azzano

Under Factors 1 and 6, we agree with the Administrator's assessment of a 10 percent mitigation factor for each factor due to Azzano's lack of a violation history and commitment to future compliance.[111]

Under Factor 2 (the number of affected employees), we apply a 10 percent mitigation factor because twelve of approximately sixteen H-2A workers used the housing facility where the poster was displayed, and there is no clear testimony regarding the number of corresponding employees affected.[112]

Under Factor 3 (gravity of the violation), we do not apply any mitigation factor because the notice is necessary to ensure worker protections and program integrity.[113]

Under Factor 4 (good faith efforts to comply with the H-2A regulation), we do not apply any mitigation factor.[114]

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110 2010 Final H-2A Rule, 75 Fed. Reg. at 6926.

111 Tr. at 85 (testimony of Katherine Walum).

112 *Id.* at 124-25 (testimony of Katherine Walum). The Administrator bears the burden of proof regarding reasonableness of the penalty assessment. 5 U.S.C. 556(d).

113 Tr. at 82-83 (testimony of Katherine Walum).

114 *Id.* at 62-63 (testimony of Katherine Walum).

Under Factor 5 (explanation for the violations), we apply a 10 percent mitigation factor. Azzano explained that it believed the single poster was in compliance.[115]

Under Factor 7 (financial gain or potential loss/injury to workers), there is no evidence of concrete savings to Azzano from the violations. Although there was potential financial loss to the workers when they were not properly informed of their rights,[116] this violation was promptly rectified when the poster was conspicuously displayed. Hence, we apply a 10 percent mitigation factor.

	Mitigation factor	*Dollar amount*
		$1,692 (base penalty)
Factor 1 (history of violations)	10 percent	$169.20
Factor 2 (number of affected employees)	10 percent	$169.20
Factor 5 (explanation)	10 percent	$169.20
Factor 6 (commitment to comply)	10 percent	$169.20
Factor 7 (gain or loss)	10 percent	$169.20
Total		**$846.00**

C. Housing Violations

The regulations at 20 C.F.R. Part 655, Subpart B, require employer-provided housing facilities under the H-2A program to meet health and safety standards under 29 C.F.R. §1910.142.[117] Here, Respondents housed the H-2A workers in two housing facilities, both owned by Azzano.[118] The Administrator assessed CMPs against both Azzano and WAFLA for failing to meet three applicable safety and health standards.[119] Specifically, one of the housing facilities did not have adequate outdoor lighting, lacked batteries in the smoke detectors, and lacked fire

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115 *Id.* at 189-90.

116 2010 Final H-2A Rule, 75 Fed. Reg. at 6926.

117 *See* 20 C.F.R. § 655.122(d)(1)(i).

118 D. & O. at 9.

119 Tr. at 66 (testimony of Katherine Walum).

extinguishers in all units.[120] The other facility lacked operable smoke detectors because they had no batteries.[121]

Starting with the maximum penalty of $1,692 for each violation, the Administrator multiplied it by three to account for the number of violations.[122] The Administrator then applied the mitigation factors, reducing the CMP assessment against Azzano by 10 percent under Factor 1 (no prior history of violations) and 10 percent under Factor 6 (commitment to future compliance).[123] The Administrator assessed the maximum penalties against WAFLA because it had a history of violations and refused to commit to future compliance with the housing standards.[124]

The ALJ upheld all CMPs against Azzano, but reversed them against WAFLA, stating that "WAFLA did not own the housing, was not in charge of it, and had no legal right to enter the property or make changes."[125] For the reasons discussed above, WAFLA is a joint employer and had an obligation to ensure compliance with the regulations. Accordingly, we reverse the ALJ on the violations and assess *de novo* the appropriate penalties against WAFLA, considering the mitigation factors outlined in the regulation.[126] We find as follows.

Under Factor 1, we apply a 5 percent mitigation factor for WAFLA's limited violation history, as discussed above.[127]

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120 *Id.* at 59-60, 66 (testimony of Katherine Walum).

121 *Id.* at 66 (testimony of Katherine Walum).

122 Notice of Determination at 8.

123 Tr. at 66-67 (testimony of Katherine Walum).

124 *Id.*; *see also supra* footnote 99.

125 D. & O. at 9. The concurrence and dissent makes the same argument as the ALJ, namely that holding WAFLA jointly responsible for this violation "essentially imposes vicarious liability on WAFLA for the conduct of its members." Concurring and Dissenting Opinion at 46 (quoting D. & O. at 9). As explained, *supra*, this analysis ignores WAFLA's status as a joint employer; indeed, it is difficult to reconcile the concurrence and dissent's analysis with his conclusion that WAFLA is a joint employer.

126 Azzano did not appeal the housing violation CMPs, so we do not address those.

127 Tr. at 136-41 (testimony of Katherine Walum).

Under Factor 2 (the number of affected employees), we do not apply any mitigation factor because all twelve workers using the two housing facilities were affected.[128] Similarly, under Factor 3 (gravity of the violation), we apply no mitigation because the violations were a direct safety threat to all the workers housed in the facilities.

Under Factor 4 (good faith efforts to comply with the H-2A regulation), we apply a 10 percent mitigation factor for WAFLA's efforts to cooperate with the WHD investigation.[129]

Under Factor 5 (explanation for the violations), we apply a 30 percent mitigation factor. WAFLA relied on Azzano to provide housing and comply with the housing standards, and although WAFLA could have entered the property and provided compliance assistance,[130] checking smoke detector batteries and operability of outdoor lighting is a recurring task that Azzano was best positioned to perform. For example, Azzano testified that workers removed the smoke detector batteries when cooking,[131] and the onsite housing provider, Azzano, was best positioned to perform regular checks to rectify that situation. As discussed in regard to the poster violation, we also credit Mr. Fazio's explanation of his subjective belief that WAFLA would not be held liable for the violations committed by its members.

Under Factor 6 (commitment to future compliance), we do not apply any mitigation factor because Ms. Walum's uncontroverted testimony was that WAFLA would not make such a commitment regarding housing.[132]

Under Factor 7 (financial gain or potential loss/injury to workers), there is no evidence of concrete savings to WAFLA from the violations. There was potential for injury to the workers from the safety violations, particularly the potentially devastating risk of a fire going undetected and spreading through the housing facilities due to the absence of smoke detector batteries and fire extinguishers.

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128 *Id.* at 124-25 (testimony of Katherine Walum).

129 *Id.* at 164 (testimony of Katherine Walum).

130 *Id.* at 62-63 (testimony of Katherine Walum).

131 *Id.* at 180 (testimony of Michael Azzano).

132 *Id.* at 66-67 (testimony of Katherine Walum).

However, these violations were promptly rectified,[133] and therefore we apply a 10 percent mitigation factor.

	Mitigation factor	*Dollar amount*
		$5076.00 (base penalty)
Factor 1 (history of violations)	5 percent	$253.80
Factor 4 (good faith efforts to comply)	10 percent	$507.60
Factor 5 (explanation)	30 percent	$1522.80
Factor 7 (gain or loss)	10 percent	$507.60
Total		**$2,284.20**

CONCLUSION

We conclude that the ALJ's finding that WAFLA is not a joint employer is erroneous and **REVERSE** that finding.

In accordance with WAFLA's status as an employer, we **REVERSE** the ALJ's assessment of no CMPs against WAFLA.

In addition, we conclude that the ALJ's analysis regarding the H-2A poster violation CMPs is erroneous and **REVERSE.** We find that both Azzano and WAFLA should be assessed CMPs and assess WAFLA $592.20 and Azzano $846.00.

We further assess WAFLA $2,284.20 for the housing and safety violations.

In all other respects, the ALJ's decision is **AFFIRMED**.

SO ORDERED.

[redacted]

SUSAN HARTHILL
Chief Administrative Appeals Judge

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

133 Adm'r Hearing Ex. 17.

BURRELL, Administrative Appeals Judge, concurring in part, dissenting in part:

1. Joint-Employer Status Under the 2010 H-2A Regulations

I concur with the majority that WAFLA is a joint employer under its H-2A Application for Temporary Employment Certification Form 9142A. The H-2A statute authorizes associations to file certifications on behalf of member farms employing H-2A employees.[134] If the association filing a certification is a joint or sole employer, the association's member employers may use the master certification to transfer workers among members under terms of the certification.[135] WAFLA filled out and signed Form 9142A, which includes a box for agricultural associations to check whether they are sole employers, joint employers, or agents for member farms.[136] WAFLA checked the box indicating that it was an "Association – Joint Employer."[137] The member employers participating in the certification were included on the form.

The 2010 H-2A regulatory definitions of employer and joint employer muddy the water by failing to refer to the 9142A Form and by having a definition of joint employer tied into "indicia" of employment, which is associated with common law definitions:

> Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

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134 8 U.S.C. § 1188(d)(1).

135 *Id.* § 1188(d)(2):

> (d)(2) Treatment of associations acting as employers
>
> If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any of its producer members and such workers may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted.

136 Adm'r Hearing Ex. 2, Section C, Box 17; Tr. at 49.

137 *Id.*

> (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
>
> (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; and
>
> (3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).
>
> . . . .
>
> Joint employment. Where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.[138]

If this were the complete picture, I might agree that the regulatory definition seemingly provides an additional layer for joint-employer status beyond Form 9142A's box by reference to common law principles (the ability to hire, pay, fire, supervise or otherwise control the work of employee).[139] However, the H-2A regulations also have a separate section concerning master applications that reinforces the Administrator's position that associations must choose one status or the other, and that choice controls:

> If an association files an Application for Temporary Employment Certification, in addition to complying with all the assurances, guarantees, and other requirements

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138 20 C.F.R. § 655.103(b) (2010).

139 For example, consider the guidance in the preamble to the 2008 Final H-2A Rule: "The definition of "joint employer" is modified slightly from the concept that appeared in the NPRM [Notice of Proposed Rulemaking] to clarify that the two or more employers must each have sufficient indicia of employment to be considered the employer of the employee in order to meet the test for joint employment." Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process & Enf't (2008 Final H-2A Rule), 73 Fed. Reg. 77110, 77115, 2008 WL 5244078 (Dec. 18, 2008).

> contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.
>
> (a) Individual applications. Associations of agricultural employers may file an Application for Temporary Employment Certification for H–2A workers as a sole employer, a joint employer, or agent. The association must identify in the Application for Temporary Employment Certification in what capacity it is filing. . . .
>
> (b) Master applications. An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. . . . The association must identify on the Application for Temporary Employment Certification by name, address, total number of workers needed, and the crops and agricultural work to be performed, each employer that will employ H–2A workers. The association, as appropriate, will receive a certified Application for Temporary Employment Certification that can be copied and sent to the United States Citizenship and Immigration Services (USCIS) with each employer-member's petition.[140]

An agricultural association filing a master application and checking the box "joint employer" is a joint employer for purposes of the certification. In context, the master application constitutes a stand-alone basis for joint-employer status separate from the general definition of joint employment, which would be applicable to other potential employers.[141]

2. Liability for Joint Employer Associations

A. Joint Employer Status Without a Common Law Control or Agency Test

The 2010 H-2A regulations provide that agricultural associations filing a master application are joint employers with the member farms where the actual

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140 20 C.F.R. § 655.131 (2010).

141 The 2022 regulation provides more clarity but is not applicable to these proceedings. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States (2022 Final H-2A Rule), 87 Fed. Reg. 61660-01, 2022 WL 6741769 (Oct. 12, 2022).

employment takes place.[142] Establishing that the association is a joint employer does not resolve the issue of liability. And this is where I part from the majority. The 2010 H-2A Regulation's check-the-box joint-employer status creates or affirms a potential for liability, defeating an agricultural association's bright-line defense of no liability due to the absence of an employer-employee relationship.[143] The 2010 regulations are unclear as to how to distribute liability among joint employers for particular violations under the H-2A framework. Form 9142A and Form 790, which is filed with the state workforce agency, establish employer obligations, but these are one-size-fits-all forms applicable to obligations as a whole and not informative of the issue of responsibility for penalties between the association and member employers for the violations they commit respectively, if any.[144]

The H-2A statute authorizes the Secretary of Labor to "take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure

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142 The 9142A Form requires that master applicants list all the employers that will be part of the H-2A employment process. Adm'r Hearing Ex. 2, Section C (Employer Information); D. & O. at 2 (WAFLA listed five farms in an addendum). Each member includes the certified master application in its petition to the Department of Homeland Security. 20 C.F.R. § 655.131.

143 *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973) (analyzing joint-employer doctrine as a form of creating liability despite independent contractor status); *Cardenas v. Benter Farms*, 2000 WL 1372848 (S.D. Ind. Sept. 19, 2000) (citing MSPA legislative history: "[E]ven if a farm labor contractor is found to be a bona fide independent contractor, that this status does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer of the harvest workers and jointly responsible for the contractor's employees.").

144 For many of the H-2A activities covered under the forms, agricultural associations filing master applications for member farms may have no role in the activity. For other activities, agricultural associations may have a direct role. WAFLA, for example, was involved in recruiting and transporting the H-2A workers to Azzano Farms. D. & O. at 4 n.4. WAFLA itself has a small number of H-2A employees in actual employment outside of Azzano Farms. Tr. at 300 (apparently under a different H-2A 9142A Form). WAFLA owns agricultural housing in the area of employment but had no role in housing at Azzano Farms. Tr. at 337.

The 790 Form at issue in this case includes language indicating that the Employer and Association agree to abide by the regulations of 29 C.F.R. Part 655 Subpart B. Adm'r Hearing Ex. 1, at 7. But it also states that "This is an association application filed by wafla on behalf of its member(s), using the joint employer format. 'Employer' refers to fixed site employer(s) listed herein." *Id.* "Wafla is a nonprofit agricultural association, as defined at 20 CFR 655.103(b), that consists of fixed site farmers (employer members) in the Pacific Northwest. **The Employer owns or operates all of the locations listed in this application.**" *Id.* (emphasis in original).

employer compliance with terms and conditions of employment under this section."[145] Congress did not provide guidance as to how the Secretary should impose appropriate penalties to ensure employer compliance, especially for multiple-employer situations. The only statutory language addressing treatment of violations expressly rejects strict liability for the joint-employer association due to members' violations and vice versa, unless the counterpart had knowledge of or was culpable in the violation.[146] But Congress's discussion is limited to debarment. The statute is silent as to liability of joint-employer associations for lesser violations under the Secretary's authority to impose appropriate penalties such as those at issue here.

The lack of statutory guidance is compounded by the Administrator's divergence from general common law principles. Typically, "joint employer" status is a piercing tool and found through some level of control, either common law principles, economic realities test, or a derivative thereof.[147] Consistent with this practice, the 2010 H-2A regulations, for example, define joint employer by referring

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145 8 U.S.C. § 1188(g)(2).

146 *Id.* § 1188(d)(3) Treatment of violations:

> (A) Member's violation does not necessarily disqualify association or other members
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> If an individual producer member of a joint employer association is determined to have committed an act that under subsection (b)(2) results in the denial of certification with respect to the member, the denial shall apply only to that member of the association unless the Secretary determines that the association or other member participated in, had knowledge of, or reason to know of, the violation.
>
> (B) Association's violation does not necessarily disqualify members
>
> (i) If an association representing agricultural producers as a joint employer is determined to have committed an act that under subsection (b)(2) results in the denial of certification with respect to the association, the denial shall apply only to the association and does not apply to any individual producer member of the association unless the Secretary determines that the member participated in, had knowledge of, or reason to know of, the violation. . . .

See also 29 C.F.R. § 501.20(f), (h) (2010).

147 *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 467-68 (3d Cir. 2012) (FLSA test for joint employer); *cf. Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (explaining that where Congress does not provide a definition of "employee" or "employer," courts will apply the common-law definition of those terms).

to "definitional indicia of employment" for the general joint-employer test (the test applicable except for associations filing master applications and checking the box).[148] The regulations define the H-2A employment relationship as, among others, the ability "to hire, pay, fire, supervise or otherwise control the work of employee."[149]

When one of these control-type tests are utilized to establish joint employment, the attachment of liability might flow through without much additional consideration. Courts and legislators have held entities vicariously responsible in a variety of contexts: *respondeat superior* establishing vicarious liability of an employer for the acts of employees acting in the scope of employment or *res ipsa loquitur* where the act occurred and the defendant had control over the premises or instrument.[150]

Establishing joint-employer status as a matter of law by checking the box without any ownership, control, or agency places a strain on adjudication regarding the putative joint employer that is not the actual employer, not the owner of the farm, and not involved in the operations of the farm.[151] A given application against a passive agricultural association with little to no actual employment responsibilities may approach strict or no-fault liability.[152] The H-2A statutory text

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[148] 20 C.F.R. § 655.103(b) ("Joint employment. Where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.").

[149] *Id.* (definition of employer).

[150] Jeffrey H. Kahn & John E. Lopatka, *Res Ipsa Loquitur: Reducing Confusion or Creating Bias?* 108 KY. L. J. 239, 244-49 (2020); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996).

[151] The Administrator claims that WAFLA received the benefits of filing as an association, describing those as the ability to transfer workers among farms and streamlining filing, recruitment, and advertising. Adm'r Br. at 12. WAFLA counters that these are benefits to the member employers as opposed to a benefit of the association. Tr. at 237, 275-76 (discussing the high expense associated with filing and the inability of small growers to pay the fee). WAFLA claims the benefit it receives is the filing fee for filling out the application. Respondent's (Resp.) Br. at 16. WAFLA would benefit financially from not filing a master application but filing individual applications. *Id.* at 16-17.

[152] Strict liability is defined as liability without fault or scienter. William L. Humes, *The Application of Strict Liability in Tort to the Retailers of Used Products: A Proposal*, 16 OK. CITY U. L. REV. 373, 381-82 (1991) (defining strict liability and discussing its origins in several contexts). For examples and background on historical uses of communal responsibility, see Russell Glazer, *The Sherman Amendment: Congressional Rejection of*

and implementing regulations do not indicate any language imposing strict liability on agricultural associations—an omission that carries some weight as the issue of H-2A joint employer has received a significant amount of attention in the past several years.[153] As noted above, the only statutory discussion disavows strict liability. Adding to the confusion, the 2010 H-2A regulations were not enforced against agricultural associations in the form of absolute liability for violations by member farms until a change in internal guidance in 2017.[154] Before that time, the Administrator assessed CMPs for violations by agricultural associations based on their role in the violation.[155]

In a similar field, Congress, in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), broadly defined "employer" following the definitions found in the Fair Labor Standards Act (FLSA).[156] Both statutes have a joint-

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Communal Liability for Civil Rights Violations, 39 UCLA L. REV. 1371, 1377-94 (1992) (reviewing ancient communal responsibility frameworks as background for analysis of Civil-War era legislation).

[153] Several recent revisions to DOL's H-2A regulations have focused on the joint employer issue. 73 Fed. Reg. at 77115, 2008 WL 5244078 (2008 Final H-2A Rule); 75 Fed. Reg. 6884-01, 2010 WL 471437 (Feb. 12, 2010) (2010 Final H-2A Rule); 2019 H-2A Regulations, 84 Fed. Reg. 36168, 36174, 2019 WL 3338413 (July 26, 2019) (2019 NPRM); 87 Fed. Reg. at 61672-74, 2022 WL 6741769 (2022 Final H-2A Rule). The preamble to the 2022 H-2A regulation contains a stronger description of potential joint liability for associations filing a master application but not strict liability as it puts the ultimate question back to application of the § 501.19(b) factors and culpability analysis on a case-by-case basis.

[154] Resp. Br. at 24-28. WAFLA points to the Administrator's testimony discussing a change in internal guidance concerning assessing or enforcing liability against agriculture associations. Tr. at 170-75; *see also id.* at 229-30, 268-70, 307-16, 327-28 (WAFLA's testimony concerning distribution of liability in prior cases and the 2017-2018 change in policy). WAFLA argues that it relied on the Administrator's non-enforcement. In another case in 2017-2018, the Administrator modified a CMP against WAFLA from $750 (travel related) to $124,000 based on a new theory extending vicarious liability to WAFLA for a member farm's violation. Tr. at 311; Resp. Br. at 24; *see also Washington Farm Lab. Ass'n*, ALJ No. 2018-TAE-00013 (ALJ Aug. 25, 2021). WAFLA claims the change in enforcement created an "unfair surprise" citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). The Administrator responds it has discretion in enforcement and the fact that it did not enforce the authority it had against agricultural associations does not create an unfair surprise. Adm'r Reply Br. at 21-26.

[155] *Supra* note 154.

[156] The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) fixed problems in the Farm Labor Contract Registration Act of 1963 (FLCRA) by broadening the protections for workers. *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 587-88 (W.D. Tex. 1999). MSPA follows the FLSA's definition of "employ." 29 U.S.C. § 1802(5).

employer test. MSPA's implementing regulations disavow strict liability but favor a case-by-case basis including culpability analysis.[157] The implementing MSPA regulations specify situations where liability will fall to each joint employer or to one employer or the other depending on its role in the violation.[158]

The Department of Labor (DOL) considered the FLSA and MSPA in the 2008 Notice of Proposed Rule Making (NPRM) for the H-2A program.[159] In the 2008 preamble to the 2008 Final H-2A Rule, the DOL noted that it agreed with commentators and chose to modify its NPRM to remove the FLSA definition of

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[157] DOL emphasized that it was not creating a strict liability test for joint employers. 62 Fed. Reg. 11734, 11737-38, 1997 WL 105846 (Mar. 12, 1997); 29 C.F.R. § 500.20(h)(5)(iv) ("The analysis as to the existence of an employment relationship is not a strict liability or per se determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor. The factors set forth in paragraphs (h)(5)(iv)(A) through (G) of this section are illustrative only and are not intended to be exhaustive; other factors may be significant and, if so, should be considered, depending upon the specific circumstances of the relationship among the parties.").

[158] *See, e.g.*, 29 C.F.R. § 500.70 (scope of worker protections under various contexts); *see also* § 500.130 ("Each person who owns or controls a facility or real property which is used as housing for any migrant agricultural worker must ensure that the facility or real property complies with all substantive Federal and State safety and health standards applicable to such housing. If more than one person is involved in providing the housing for any migrant agricultural worker (for example, when an agricultural employer owns it and a farm labor contractor or any other person operates it), both persons are responsible for ensuring that the facility or real property meets the applicable Federal and State housing standards.").

Courts in MSPA cases have examined culpability-based fault in assessing damages notwithstanding MSPA's comprehensive joint employment test. *See Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 591-92 (W.D. Tex. 1999) (finding, under MSPA, that farm and independent contractor were joint employers of migrant and seasonal workers hired by contractor for work at joint employer's farm but analyzing the implication of that joint employment separately).

Regulatory and judicial concern for potential overreach in the MSPA area is particularly telling because the agricultural association or employer seeking to avoid liability often owns the farm and the independent farm contractor and its employees work on the owner's farm. In the case of an association like WAFLA, it neither owns the farm, operates the farm, nor has any dealings with employees beyond the initial phase. Yet, under the Administrator's theory, it faces strict liability for violations occurring throughout the contract.

[159] Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement (2008 NPRM), 73 Fed. Reg. 8538-01, 2008 WL 370858, February 13, 2008. The 2008 NPRM contains a common-law definition of "employee" following *Darden*. *Id.* 73 Fed. Reg. at 8555.

"employ" to avoid the broad concepts of the FLSA and MSPA in favor of a simpler definition.[160] The commentator also recommended a separate definition of joint employer and a separate section for the respective liabilities of the association and its joint employer members.[161] The 2008 Final H-2A Rule did provide a separate definition for joint employer but did not provide a separate section for joint employer liability. The preamble states that all joint employers must satisfy the indicia test, which reverts to a common-law test.[162]

The preamble to the 2022 Final H-2A Rule, which is not applicable to this certification, indicates that the purpose behind looping agricultural associations into joint-employer status is to incentivize all employers, actual and constructive, to monitor and maintain compliance with H-2A requirements.[163] The heightened concern for compliance is explained by the fact that H-2A workers are a vulnerable population.

B. 29 C.F.R. § 501.19(b)'s Factors for Civil Monetary Penalties (CMP)

In response to concerns about excessive liability in notice and comment, the preamble to the 2010 H-2A regulations explains that the Administrator will

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160 2008 Final H-2A Rule, 73 Fed. Reg. at 77115. The commentator also stated that the status of the employer was defined in the labor certification and visa petition processes. *Id.* In the 2019 NPRM discussion on "joint employer," the Department clarified that the "current H-2A program definitions of employer and joint employment, as well as those the Department proposes herein, are different from the definitions of "employer," "employee," "employ" in the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (FLSA) and the definition of "employ" in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 et seq. (MSPA)." 2019 NPRM, 84 Fed. Reg. at 36174-15.

161 2008 Final H-2A Rule, 73 Fed. Reg. at 77115.

162 2008 Final H-2A Rule preamble: "The definition of "joint employer" is modified slightly from the concept that appeared in the NPRM to clarify that the two or more employers must each have sufficient indicia of employment to be considered the employer of the employee in order to meet the test for joint employment." 2008 Final H-2A Rule, 73 Fed. Reg. at 77115. The 2008 Final H-2A Rule text: "Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a joint employer of that employee." *Id.* at 77210-11.

163 2022 Final H-2A Rule, 87 Fed. Reg. at 61676 (clarifying that "this policy will encourage employer compliance by providing an incentive for associations to disseminate information, make additional inquiries regarding their employer-members' responsibilities to workers under certified H-2A applications, and help to assure that any back wages owed by joint employers will be paid in full.").

continue to rely upon factors at 29 C.F.R. § 501.19(b) and common sense in imposing CMPs:

> Contrary to the assumptions of some commenters, the assessment of a particular penalty (or of an enhanced penalty for a repeat or willful violation) is not mandatory, but guided by consideration of the seven factors listed in paragraph (b), the facts of each individual case, and by common sense. For example, before assessing any penalty, the WHD Administrator must consider the type of violation, its gravity, the number of workers affected, and several mitigating and/or aggravating factors including, but not limited to, the explanation offered by the employer (if any), its good faith or lack thereof, any previous history of violations, and any financial loss, gain or injury as a result of the violation. These safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized.[164]

According to the preamble, § 501.19(b) factors punish intentional, willful, or repeat conduct but not innocent, inadvertent conduct. "Inadvertent" means unintentional or "an accidental oversight."[165] "Good faith" is defined as "a state of mind consisting of honesty in belief or purpose."[166] These considerations are intuitive as a CMP is a penalty.[167] The Supreme Court in *Kokesh v. Securities & Exchange Comm'n* explained that a "'penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its

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164 2010 Final H-2A Rule, 75 Fed. Reg. at 6944.

165 BLACK'S LAW DICTIONARY 762 (7th Ed.).

166 *Id.* at 701. The 2022 preamble uses the term "culpable" five times in reference joint employers and limiting liability under 501.19(b) factors. 2022 Final H-2A Rule, 87 Fed. Reg. at 61672, 2022 WL 6741769; *see also* 2019 NPRM, 84 Fed. Reg. at 36175 ("The Department will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the factors at 29 CFR 501.19(b) when the Department assesses civil money penalties."). "Culpable" is defined as blamable; purposely, recklessly, knowingly; involving the breach of a legal duty or the commission of a fault. BLACK'S LAW DICTIONARY 385 (7th Ed.)

167 The Administrator concedes that CMPs do not go to the H-2A employees. Adm'r Br. at 22 n.3.

laws.'"[168] "[A] pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[169]

Agency adjudication of § 501.19(b)'s non-exhaustive factors allows for the assessment of liability on a fair and just basis, taking into consideration the type of violation and the association's specific role with farms and H-2A employees. For example, liability of an association serving as joint employer will more easily attach where the association was responsible for the violation or had some level of knowledge and control of the instrumentality of the violation.[170] Associations as joint employers cannot divest themselves of responsibilities for their activities in the employment relationship. Associations may be involved in advertising, recruiting employees, arranging/paying for transportation, and moving employees around between member employers if requested.[171] It may be unclear at some point whom the H-2A employee is working for, and ultimate liability for interstitial gaps might fall back on the association. In the 2019 NPRM, the Department emphasized this coverage as a reason why associations must be joint employers.

> The statute specifically contemplates that filers (other than agents) are employers and only expressly permits an entity (i.e., an agricultural association) to transfer H-2A workers when the entity agrees to retain program responsibility with respect to the workers it transfers. Therefore, the Department must require entities that jointly apply for H-2A workers, who they intend to transfer among themselves, to retain program responsibility for the transferred workers and, if applicable, any corresponding workers.[172]

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168 *Kokesh v. Secs. & Exch. Comm'n*, 581 U.S. 455, 461 (2017) (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).

169 *Id.* at 462 (citations omitted).

170 As noted above, the H-2A statute specifies culpability-based responsibility for debarment. 8 U.S.C. § 1188(d)(3).

171 Tr. at 229.

172 2019 NPRM, 84 Fed. Reg. at 36175.

The H-2A statute authorizes the Secretary to enforce obligations only against employers.[173] To fall under the Secretary's enforcement powers, the entity must be identified as an employer.

C. Applying 29 C.F.R. § 501.19 to Azzano Farms and WAFLA

For the 2017 season, WAFLA filed a master application for thirty-seven H-2A employees with five member farms, including Azzano Farms.[174] Sixteen H-2A employees worked on Azzano Farms.[175]

After WAFLA's services were engaged, it placed job advertisements in the relevant newspapers serving the Pacific Northwest region of employment.[176] WAFLA engaged a separate entity in Mexico to recruit workers, process non-immigration visa paperwork, and transport workers from Mexico to the farm.[177] Upon arrival, WAFLA issued reimbursement checks for transportation.[178]

But WAFLA's hand in affairs ends after this initial phase. The ALJ stated:

> Once the workers arrived on the farm, wafla no longer had any involvement. wafla had no control over Azzano Farms' housing or vehicles, and no ability to enter upon Azzano Farms' property. (HT, pp. 181-182, 295-96.) wafla did not direct, control, train, pay, discipline, or fire the workers at Azzano Farms, and did not have access to workers' personnel files.[179]

Mr. Azzano testified that he hired the employees once they arrive, including filling out the I-9 forms and W-4 forms.[180] WHD's investigator testified that

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173 8 U.S.C. § 1188(g)(2) ("The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.").

174 D. & O. at 2.

175 Tr. at 237.

176 D. & O. at 4 n.4, 13.

177 *Id.*

178 *Id.* at 4 n.4. WAFLA claims funding for reimbursement came from Azzano Farms. Resp. Br. at 17.

179 D. & O. at 4 n.4.

180 *Id.* ("wafla had no role in selecting the workers ultimately hired by Azzano Farms.").

> wafla did not: engage in the business of farming, complete any I-9 forms for workers, pay the workers for their work, assign workers to housing, supervise workers, set the start and stop times, instruct workers on how to complete their jobs, assign daily tasks, supply workers with equipment, discipline any workers, or maintain workers' production records.[181]

The Administrator initially assessed Azzano Farms and WAFLA with six violations: (1) failure to cooperate; (2) failure to meet health and safety requirements for H-2A housing; (3) failure to meet transportation safety requirements; (4) failure to provide workers with a copy of the work contract; (5) failure to contact former U.S. workers; and (6) failure to post the required H-2A poster at a conspicuous location at each place of employment.[182]

For these violations, the Administrator assessed CMPs against both Azzano Farms and WAFLA. Azzano Farms received reductions for every violation; WAFLA received three reductions but less than those received by Azzano Farms. WAFLA received no reduction for housing, transportation, or poster violations.[183] The WHD investigator testified that one reason why WAFLA received no reductions was that it claimed it was not responsible for housing and thus would not commit to future compliance.[184] The Administrator claimed that WAFLA, as a joint employer, was liable for the maximum CMP for each and every violation because it was a joint employer.[185]

WAFLA requested a hearing before the ALJ. The ALJ found that all violations were proven against Azzano Farms except the poster violation. The ALJ rejected WAFLA's vicarious liability for any of the violations.[186] The ALJ stated that even if WAFLA were a joint employer under the 2010 H-2A regulation for some purpose, it was not a joint employer (vicariously or strictly liable) for all

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181 *Id.*; Tr. at 192-96.

182 D. & O. at 2.

183 *Id.* at 7.

184 Tr. at 67; *id.* at 72-73 (same for transportation assessment); *cf. id.* at 79 (contacting former U.S. workers), 90-93 (access to facilities).

185 Adm'r Br. at 21.

186 D. & O. at 3.

purposes.[187] WAFLA had no knowledge of, no control over, and no culpability in the cited violations.[188]

On appeal to the ARB, the Administrator challenged the ALJ's denial of the Administrator's assessment of a housing violation against WAFLA because of its status as a joint employer. The Administrator also challenged the ALJ's rejection of the poster violation against both Azzano Farms and WAFLA. The Administrator did not challenge the ALJ's rejection of other assessments against WAFLA.

i. The Administrator's Assessment of a Housing Violation

The Administrator assessed CMPs against both Azzano Farms and WAFLA for violating the safety and health requirements of 20 C.F.R. § 655.122(d)(1). Specifically, the Administrator assessed a violation for inoperable outdoor lighting and two smoke alarms without batteries or with expired batteries in the sleeping units.[189] Mr. Azzano testified he was unaware of the missing batteries because the alarms had batteries when the workers arrived.[190] He testified that he was unaware that a light had gone out.[191] Azzano Farms received a 20% reduction in the CMP; WAFLA received no reduction.[192]

The ALJ affirmed the Administrator's assessment and 20% reduction against Azzano Farms because liability for the safety of housing units on Azzano's premises must be found somewhere.[193] The ALJ reversed liability against WAFLA.[194] The ALJ observed that "[t]here is no evidence to show wafla had any meaningful control over the workers' living or working conditions. What is more, in this case the parties

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187 *Id.* at 3, 5. The 2022 H-2A regulations discuss in the preamble a similar partial joint employment for member farms filing a master application through an association. Those member farms are only in joint employment with the association for the time when it is employing the H-2A workers, citing 8 U.S.C. § 1188(d)(3)(A) (separating strict liability for associations and members for debarment). 2022 Final H-2A Rule, 87 Fed. Reg. at 61675. The 2022 Final H-2A Rule preamble continues that associations are always in joint employment with their member farms.

188 D. & O. at 3, 4 n.4, 11.

189 *Id.* at 9; Tr. at 59, 121.

190 D. & O. at 9.

191 *Id.* at 9.

192 *Id.* at 6 n.5, 7.

193 *Id.* at 9.

194 *Id.*

agree wafla itself committed none of the alleged violations, and Azzano Farms committed all of them."[195] The ALJ continued:

> I find the Administrator's imposition of penalties against wafla unfounded. wafla did not own the housing, was not in charge of it, and had no legal right to enter the property or to make changes. (HT, pp. 127, 181.) Ms. Walum asserted wafla could have "come up and inspected the Azzano Farms housing regularly," or could have provided Azzano Farm with "a checklist of all the things they needed to make sure were in working order." (HT, p. 63.) Under her view, wafla has a legal duty not only to act as a shadow management agency of its member farms, coming on to the properties and investigating every aspect of the operations, but to guarantee its members' performance. This ignores the facts of the relationship between Azzano Farms and wafla, and again essentially imposes vicarious liability on wafla for the conduct of its members. I reverse the finding of housing and safety violations against wafla.[196]

On appeal, the Administrator relies on the fact that WAFLA checked the joint-employment box and was thus a joint employer for the terms and conditions of employment, as was Azzano Farms, the owner and operator of the farm.[197]

I would affirm the ALJ's denial of WAFLA's vicarious liability for the housing violations.[198] As noted above, WAFLA's role as an employer was limited. It handled

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195 *Id.* at 3.

196 *Id.* at 9.

197 Adm'r Br. at 10, 14-15, 25-27. The Administrator offers, in the alternative, that WAFLA would meet the definition of joint employer because it has sufficient indicia of employment because it advertised, recruited, selected, and transported workers to the farm. Adm'r Br. at 20 n.2. I might agree if the violation and CMP attributed to WAFLA centered on this activity, but it is not clear how this extends to responsibility for activities on the farm such as housing and poster violations. Resp. Br. at 5-7.

198 The ALJ analyzed WAFLA's responsibility for the alleged violations by concluding that WAFLA was not a joint employer for purposes of the alleged violations but acknowledged that WAFLA might be a joint employer for other purposes. D. & O. at 3 & n.2, 5. The ALJ's opinion did not engage in a formal CMP analysis using the factors set out in § 501.19(b). However, this analysis was integrated into the Administrator's assessment and discussed extensively at hearing in the form of discounts to maximum CMPs against

the initial phase of the application process and was perhaps a responsible party for these H-2A activities.[199] Once the workers were at the farms, Azzano Farms employed the workers, filled out work contracts, and directed day-to-day operations. WAFLA did not own or operate the farms and had no involvement in Azzano Farms' housing or vehicle inspection and maintenance, among other activities.[200] This is not disputed by the Administrator.[201]

Without guidance establishing strict liability, it is difficult, through a multi-factor test aimed at intentional conduct, to support a civil monetary penalty against an association of members that filed the application but had minimal or no additional roles in the actual employment of the H-2A workers.[202] The

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both Azzano Farms and WAFLA as joint employers. The ALJ provided the underlying factual analysis applicable to WAFLA's vicarious liability. Given the undisputed nature of WAFLA's limited role, I would affirm the ALJ's denial of WAFLA's vicarious liability for Azzano Farms' housing violations under a § 501.19(b) culpability analysis.

[199] Compare the relationship between contractor and farmer under the MSPA where the farmer and contractor may be joint employers of the contractor's workers under the broad factors set out in the MSPA regulations, but courts have declined to extend the joint employment relationship to liability for the farmer for miscommunications by the contractor to the migrant workers before the workers arrived at the farm. *Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1261 (10th Cir. 2020) ("It would make no sense to hold the farmer responsible for promises made to the workers by the broker before the broker and the farmer had any communication, much less a contract, between them. The decision in *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 405 (7th Cir. 2007), is instructive. The appellate court held that the farm was the workers' joint employer "for events that occurred in the fields under its management or in its offices." *Id.* at 409. But it was not responsible for the contractor's unauthorized promise to the workers before arrival at the farm that they would be employed for 70 hours per week for six to eight weeks. *See id.* at 405-06.

[200] D. & O. at 4 n.4; Tr. at 192-94; *cf. Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 592 (W.D. Tex. 1999) (identifying standard that farm and independent contractor are joint employers of migrant and seasonal workers under MSPA and that farm will be held liable for assessments regarding housing if it owns or controls the premises even though an independent contractor operated the housing). Persons are considered to control migrant housing if they manage, supervise or administer the facility, and are responsible for making repairs to the facility. *Renteria-Marin v. Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1328 (11th Cir. 2008); *see also* 29 C.F.R. § 500.130(c) (MSPA's regulatory definitions for control).

[201] *Infra* note 215.

[202] Compare the situation here with the historical effort to hold unions responsible for the acts of its members. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 735-36 (1966) (comparing Section 6 of the Norris-LaGuardia Act, which rejects communal responsibility of union, and its officers and members, for unlawful acts of individual officers and members

Administrator claims that WAFLA could have requested permission to access Azzano Farms.[203] But WAFLA's potential influence to encourage compliance is a far leap from the type of ownership or control courts require to hold an employer vicariously liable for violations.[204] WAFLA had no legal right to enter the premises or control or supervise operations.[205]

The justice of this conclusion is affirmed by examining the intricacies of H-2A regulation. H-2A employers are responsible for safe housing in minute detail.[206] Regulations 20 C.F.R. §§ 654.404-417 provide housing restrictions and conditions for drainage, sewage, and nuisances, including proximity to flies, noise, traffic, and similar hazards.[207] Grounds must be free from weeds, brush, and noxious plants such as poison ivy.[208] A water supply must be available. Adequate bathroom facilities must be provided.[209] The regulations go into great detail as to the design and construction of H-2A housing, including: that they must have at least 7-foot ceilings; the number of square feet per person and spacing of beds; the availability of windows in habitable rooms with screens; heating and stove requirements; electricity and lighting requirements; specific requirements for toilets and urinals, bathing, laundry, and hand-washing facilities; and specific regulations for eating

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without proof of actual authorization or participation in such acts, or ratification of such acts after acquiring knowledge with LMRA broadening liability to common law of agency in certain cases); *Agurirre v. Automotive Teamsters*, 633 F.2d 168, 170-72 (9th Cir. 1980) (examining the Norris LaGuardia Act, the LMRA, and the LMRDA in favor of common law of agency standards); *see* 29 U.S.C. § 106.

203 Adm'r Br. at 24; Tr. at 71-72 (WAFLA could have inspected vehicles or distributed checklists and supervised inspections).

204 Compare the joint employer test under other statutes. *Supra* Part II.A, "*Joint Employer Status Without a Common Law Control or Agency Test*."

205 D. & O. at 9; Tr. at 127-28 (WAFLA was not an owner or operator of the farm in question), 180-81, 190 (Azzano Testifying that WAFLA does not have authority to enter Azzano to make changes to housing), 202-03 (cross-examination, Azzano Farms could have allowed WAFLA to inspect the housing and vehicles or shared information with WAFLA if requested), 295 (testimony that WAFLA does not have any control over Azzano Farms' housing; no knowledge of smoke detector violations or vehicle violations), 301-02 (WAFLA employees could come to Azzano Farms if requested; uncertainty about what current status of employer is in regards to in-person visit by WAFLA to farm).

206 D. & O. at 9. H-2A employers are required to maintain applicable ETA standards. 20 C.F.R. §§ 654.404-417. Adm'r Br. at 25.

207 20 C.F.R. § 654.404.

208 *Id.*

209 *Id.* § 654.405.

and food storage facilities.[210] Garbage must be collected at least twice per week or more often if necessary.[211] A 20-gallon garbage container must be provided in a ratio of 1 per 15 persons.[212] Housing must be free of insects, rodents, and other vermin.[213] The regulations also provide specific requirements for fire extinguishers and first-aid facilities.[214]

Had WAFLA owned, operated, or controlled the premises, its responsibility for violations of the above requirements would be an issue familiar to courts. It is undisputed that WAFLA possesses none of these criteria.[215]

Moreover, it is difficult to see how an agricultural association like WAFLA could manage a third-party farm environment to avoid liability or potential liability. Compliance with such a comprehensive regulation would involve more than merely a one-time inspection.[216] It is commonplace for violations of cleanliness and sanitary conditions to manifest because of improper employee use. An agricultural association would have to maintain rigorous on-site monitoring throughout the duration of the contract. WAFLA serves as an association of more than 500 member farms.[217]

ii. The Administrator's Assessment of a Poster Violation

Under H-2A laws, employers are required to post notices of employee rights and resources in a conspicuous place, in English and Spanish.[218] The applicable H-2A regulation states:

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210 *Id.* §§ 654.406-654.412.

211 *Id.* § 654.414.

212 *Id.*

213 *Id.* § 654.415.

214 *Id.* § 654.417.

215 Tr. at 111-16 (WAFLA was not involved in any aspect of the workers' employment paperwork, housing, daily assignments, supervision; WAFLA did not provide equipment; and WAFLA and Azzano Farms were separate entities); *id.* at 302-03 (WAFLA did not have the ability to hire, fire, or control the workers on Azzano Farms).

216 *Dantran, Inc. v. U.S. Dep't of Lab.*, 171 F.3d 58, 65 (1st Cir. 1999) (The Court found that the agency's interpretation of its regulation created "anomalous situations.").

217 D. & O. at 2; Adm'r Br. at 3.

218 D. & O. at 13-14.

> The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.[219]

Azzano placed an H-2A poster at a signboard outside one of the two housing locations.[220] The Administrator concluded that posters must be placed at the orchard where farmers worked as well.[221]

The ALJ found that neither Azzano Farms nor WAFLA violated the H-2A's posting requirement.[222] The ALJ reasoned that there is no statutory or regulatory basis for the Administrator's conclusion that posters are required at every location where the workers work as opposed to a central location where employees begin and end their workday.[223] WAFLA received no reduction for the assessed poster violations.[224] Even if Azzano Farms violated the poster requirement, the ALJ would, for the same reasons above, deny WAFLA's liability. For the same reasons above, I would affirm the ALJ's finding as to WAFLA's liability. Azzano Farms did not appeal the ALJ's decision.

iii. The Administrator's Other Assessments that Were Not Appealed

Although not part of the appeal to the ARB, the Administrator's additional assessments illuminate the problems with holding the association liable for member employer violations. The potential for manifest injustice is apparent by how the Administrator handled the CMPs for "failure to cooperate." The Administrator charged WAFLA with higher CMPs than it charged Azzano for Azzano's failure to cooperate even though WAFLA did not have any control over the situation. In fact, WAFLA attempted to *intervene* to counsel Azzano Farms to comply yet was assessed with the full CMP for Azzano Farms' failure to comply. The ALJ:

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219 20 C.F.R. § 655.135(*l*).

220 D. & O. at 14.

221 *Id.* at 14; Tr. at 83.

222 D. & O. at 13-14.

223 *Id.* at 14.

224 *Id.* at 6 n.5; Tr. at 296-97.

The investigators arrived at the farm around 7:30 a.m., and approached the Azzanos' residence, which was listed as the business address. (HT, p. 35.) Mrs. Maxine Azzano answered the door, and Ms. Walum proceeded to identify herself, show her credentials and badge, and give her a business card. (HT, p. 36.) The investigators could also see Mr. Gary Azzano standing behind her, using a walker. (HT, p. 36.) Ms. Walum explained the investigators were there to conduct an investigation of the farm under the H-2A regulations. (HT, p. 37.) Mrs. Azzano appeared distraught and informed them they could not perform the investigation at that time, and asserted they would need a warrant. (HT, p. 37.) She closed the door, and the investigators left the property, and went to a nearby location to attempt to contact their Assistant District Director. (HT, p. 39.)

Approximately two hours later Ms. Walum received a voicemail from Daniel Fazio, the CEO of wafla, apologizing for the incident with Mrs. Azzano and providing the phone number of her son, Michael Azzano, who would be the point of contact for the investigation. (HT, pp. 39-40.) Mr. Fazio had called Michael Azzano and directed him to call the investigators back and to participate in the investigation (HT, p. 184; *see also* HT, pp. 297-299.) Michael Azzano had taken over the farm from his parents, and was in charge of the farm's operation. (HT, p. 183.) After receiving Mr. Fazio's message, the investigators contacted Michael Azzano and met him adjacent to his home, where they conducted the initial conference. (HT, p. 42.) At the hearing, Ms. Walum admitted the imposition of fines on wafla for failure to cooperate was based entirely on the conduct of Mrs. Azzano, and that wafla did nothing on its own to hinder the investigation. (HT, pp. 92-93.)

Although she may not have clearly understood her obligations, I find Maxine Azzano's conduct constitutes a failure to cooperate. I uphold the assessed violation and

> penalty, including a 20% reduction based on no history of H-2A violations and commitment to future compliance, against Azzano Farms.
>
> As to wafla, the penalty is unwarranted. Rather than failing to cooperate in the investigation, wafla in fact facilitated the investigators' access to Azzano Farms. (HT, p. 164.) In fact, the evidence suggests wafla did in this case precisely what the Administrator should have wanted it to do – resolved the standoff, and arranged for the inspection to go forward that same day, without further delay. Here, the Administrator seeks to penalize wafla for the conduct of a member, when in fact wafla did not know about the conduct, did not encourage the conduct, did not condone the conduct, and acted immediately to rectify it as soon as it learned what had happened (HT, pp. 297-299). I cannot imagine why the Administrator would want to punish wafla for doing that, or to discourage wafla from ever doing it again. I reverse the Administrator's finding wafla violated 29 C.F.R. § 501.7 because there are no facts to support the conclusion wafla failed to cooperate. On the contrary, the parties agree it did.[225]

The Administrator also assessed a violation for missing rearview mirrors in one of Azzano Farms' transportation vehicles. The ALJ reversed this because the mirror was not required by applicable regulations.[226] Even if there had been a violation, the ALJ would have denied the Administrator's assessment against WAFLA for the above-stated reasons.[227] The Administrator did not appeal the ALJ's denial of this assessment.

The Administrator charged both Azzano Farms and WAFLA for failure to give workers their H-2A contracts.[228] Azzano Farms received reductions for various

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225 D. & O. at 7-8.

226 *Id.* at 10.

227 *Id.* at 11.

228 *Id.*

mitigation factors, but WAFLA's reductions were less than Azzano's.[229] Denying the assessment, the ALJ indicated that once the workers arrived on the farm, WAFLA had no involvement with their contracts or personnel folders.[230]

The Administrator also assessed penalties against Azzano Farms and WAFLA for failure to contact Azzano's U.S. workers from prior seasons.[231] The ALJ affirmed the assessment against Azzano Farms but rejected it against WAFLA. The ALJ explained that the record provides no foundation that WAFLA had applications for H-2A employees with Azzano Farms in prior years. The ALJ observed that "[i]n explaining why she assessed the violation against wafla, [the WHD investigator] asserted wafla 'could have been in communication with Azzano Farms . . . to get the contact information for those former U.S. workers or notify Azzano that Azzano needed to get in touch with those former U.S. workers to invite them back.' (HT, p. 155.)."[232]

In sum, I concur with the majority that the 2010 H-2A regulations provide that agricultural associations such as WAFLA that file master applications are joint employers.[233] However, the statute and regulations do not provide for strict liability. Rather, the regulations provide for a case-by-case basis of liability based on a number of factors including inadvertent conduct and good faith explanations.[234] The record shows that WAFLA had limited involvement in the H-2A employment before, and no involvement in H-2A employment after, the workers arrived at the farms. Thus, I would affirm the ALJ's finding that WAFLA was not vicariously liable for the CMP assessments related to housing and placement of H-2A posters.

I appreciate that H-2A workers are a vulnerable population easily exploited by employers. This is why the H-2A program has special requirements and

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229 *Id.* at 7.

230 *Id.* at 11-12.

231 *Id.* at 12-13.

232 *Id.* at 12.

233 The H-2A's statutory scheme at 8 U.S.C. § 1188(g)(2) is silent on maximum amount per penalty. The statute gives to the Administrator the authority to apply "appropriate penalties." DOL regulations provide "[a] civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part will not exceed $1,500 per violation . . . ." 29 C.F.R. § 501.19(c). The ALJ found that the Administrator's combined assessments against both Azzano Farms and WAFLA exceeded the maximum amount permitted by the regulations. Because I would affirm the ALJ's rejection of WAFLA's liability, I would not reach this issue.

234 29 C.F.R. § 501.19(b).

remedies above and beyond the civil remedies available to other workers. Without careful application, however, a tribunal runs the risk of trading one injustice for another.[235] The Administrator might counter that holding agricultural associations responsible is necessary for the efficiency of the program. Further, Wage and Hour investigators are unable to effectively monitor and enforce compliance at various locations. The agricultural association might have very similar complaints. It is undisputed that WAFLA is an association handling consulting and filing work for more than 500 farms.[236] As noted above, it is difficult to see how the association can engage in such minute supervision of its members' actions, premises, and instrumentalities of the H-2A program.

THOMAS H. BURRELL
Administrative Appeals Judge

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235 Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw The Line*, 70 OKLA. L. REV. 359, 359 (2018) ("Civil and criminal laws have long been premised on the fundamental principle that one is responsible only for his or her own misdeeds. The wickedness of the wicked will be charged solely to them.").

236 D. & O. at 2; Adm'r Br. at 3.