



LEGAL SERVICES CORPORATION

LSC AGRICULTURAL WORKER POPULATION ESTIMATE UPDATE

LSC Management Report to LSC Board of Directors

January 30, 2015

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SECTION I INTRODUCTION AND OVERVIEW

LSC Funding of Legal Services to Agricultural Workers

LSC has provided grants to serve migrant and other agricultural workers (generally referred to as “Migrant Grants”) with appropriated funds since the 1970s. In a study, mandated by Congress in 1977, LSC found that that agricultural workers have unique, special needs related to their status, in particular “the type and conditions of work in which they are engaged and their cultural and ethnic background.”¹ Since 1996, funds appropriated for “Basic Field Programs” have been allocated to each state, territory, and the District of Columbia via a per-capita funding formula based on data from the U.S. Census Bureau regarding the size and location of the poverty population. The entire state, territory, or District of Columbia is a single “geographic area” within which LSC may designate one or more “service areas” for grants. Within most of these geographic areas, LSC distributes those funds through general-purpose “Basic Field—General” grants and through separate “Basic Field—Migrant” grants.² The amount of the Migrant Grant in each geographic area is based on the migrant population of that area, which is deducted from the total poverty population for that area for purposes of calculating the general-purpose Basic Field—General grant.

Over the last forty years, through direct work with and service to agricultural workers, grantees with Migrant Grants (“Migrant Grantees”) have gained a deep understanding of those workers’ legal needs and have developed delivery models designed to address those needs. Migrant Grantees have adapted those models over time to respond to the changing circumstances of

¹ LEGAL SERVICES CORPORATION, SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, MIGRANT AND SEASONAL FARM WORKERS, NATIVE AMERICANS, PEOPLE WITH LIMITED ENGLISH-SPEAKING ABILITY, AND INDIVIDUALS IN SPARSELY POPULATED AREAS (“1007(h) Study”) 34 (1979). The LSC Act required the Corporation to conduct a study on whether eligible clients who are migrants and seasonal farmworkers or members of other subpopulations (veterans, Native Americans, persons with Limited English-Speaking ability and those living in rural areas) “have special difficulties of access to legal services or special legal problems which are not being met.” Pub. L. 95-222, § 13, adding § 1007(h) of the LSC Act, codified at 42 U.S.C. § 2996f(h). The shared legal needs of migrants and seasonal farmworkers and the need for specialized legal assistance are addressed on pp. 40-42 and pp. 313-315 of the 1007(h) Study. The 1007(h) Study’s full analysis of these issues is set forth in Chapter I, Section III, D, and Chapter V.

² There are Migrant Grants covering 43 states and Puerto Rico. There is no more than one migrant service area in a state. Services to migrants in six New England states (CT, MA, ME, NH, RI, and VT) are provided by Pine Tree Legal Assistance through a single service area (under a single Migrant Grant). Service to migrants in seven Southern states (AL, AR, KY, LA, MS, TN, and TX) are provided by Texas Rural Legal Assistance through a single service area (under a single Migrant Grant). FY14 grant amounts for service areas in individual states ranged from \$24,318 (DE) to \$2,585,613 (CA).

agricultural workers, new developments in agricultural labor markets, and evolving best practices in legal aid delivery.

LSC's funding of specialized grants to serve migrant and other agricultural workers and their dependents parallels the approach Congress has taken in funding a range of programs to address the particular needs of migrant and other agricultural workers, and their dependents, in areas such as education, health services, housing, and job placement and training.³

When referring to the population served by Migrant Grantees, this report will use the term, "agricultural worker," unless the context intends a more specific reference to workers who are indeed "farmworkers." One of the recommendations of this report is that the population of workers to be served with this specialized funding should be formally defined to include livestock and certain forestry workers, as well as migrant and seasonal crop workers.⁴ Thus, the broader term "agricultural worker" is more accurate.

During the history of service to these workers, various terms have been used to refer to the population. For example, from 1985 to 1995, Congress referred to "migrant programs" in LSC's appropriation, although both migrant and non-migrant seasonal workers were served with that funding. The term, "Migrant Grants," is still used in LSC's grantmaking, and will occasionally be used in this report. LSC and the Migrant Grantees themselves have often referred to the grantees as "Farmworker Programs" to reflect the broader populations served. This report will, therefore, occasionally use the term "Farmworker Programs," when it is historically appropriate.

The Need to Update the Population Estimate on which "Migrant Funding" Is Based⁵

The population estimates used to allocate Migrant Grants need to be updated for two reasons. First, the data on which the current allocation is based have not been substantially updated since Fiscal Year 1996 (FY96). Data are available to provide more accurate estimates of the current size and distribution of the population used to allocate funding for services to the agricultural worker population. Second, the population used to allocate funding does not match the population of agricultural workers and dependents that require specialized legal assistance and that have long been served by Migrant Grantees. These workers include not just migrant farmworkers, but also seasonal farmworkers who do not migrate, livestock workers, and forestry workers.

³ See Section III below.

⁴ See Section VIII below.

⁵ Section III below discusses LSC's funding of specialized services to farmworkers over the past 40 years. Section IV discusses in more detail the reasons the population estimates on which such funding has been based need to be updated.

LSC management informed the LSC Board of Directors at its October 2013 meeting that the population data which provide the basis for allocating Migrant Grants need to be updated and that management would analyze the pertinent issues and present the Board with a set of recommendations to address them.⁶ LSC management has investigated and analyzed these issues over the course of the past 15 months and contracted with the U.S. Department of Labor to provide updated data regarding the current population of agricultural workers and their dependents eligible for LSC-funded services. Based on that work, management recommends to the Board that LSC seek public comment on a proposal to (1) use the new Department of Labor data for grants beginning in January 2016, (2) phase in the funding changes to provide intermediate funding halfway between the old and new levels for 2016 and to fully implement the new levels for 2017, and (3) update the data every three years on the same cycle as LSC updates poverty population data from the U.S. Census Bureau for the distribution of LSC's Basic Field—General grants.

Study Methodology⁷

LSC's analysis of these issues had two components. The first component focuses on identifying the population of agricultural workers and their dependents, if any, that face similar barriers to access to the civil justice system and whose legal needs can be addressed most effectively and efficiently by specialized legal assistance and delivery approaches. LSC conducted this part of the analysis itself based on data from sources including:

- Internal LSC data regarding grantee staffing, funding, and case services as well as reports from grantee reviews conducted by LSC staff and grantees' funding applications;
- Relevant government reports, academic and other research publications as well as reports and publications of groups with subject-matter expertise;⁸
- Interviews with current and former staff of government agencies, academics and other researchers, and staff of organizations with subject-matter expertise;⁹
- A survey of LSC's Migrant Grantees (Migrant Grantee Survey) with a 100% response rate and a survey of LSC's Grantees that do not receive Migrant Grants (Basic Field Grantee Survey) with a response rate of 68.6%;¹⁰

⁶ "Funding of Legal Assistance for Migratory and Other Farmworkers," memorandum from Ronald S. Flagg, Gen. Counsel; Mark F. Freedman, Senior Assistant Gen. Counsel; and Bristow Hardin, Program Analyst, Office of Program Performance to the LSC Board Operations and Regulations Comm. (Oct. 8, 2013) (the full memorandum can be found in Appendix B of this paper).

⁷ See Section II below.

⁸ See Appendix C for a list of works cited in this Report.

⁹ See Appendix D for a list of persons interviewed.

¹⁰ See Appendices E and F for copies of the survey instruments.

- Consultations with the Executive Directors and staff of LSC grantees, members of the National Legal Aid and Defender Association (NLADA) Agricultural Workers Group Project, and managers and staff of other providers of legal services to agricultural workers and their dependents; and
- Consultations with staff of the U.S. Department of Labor (DOL) Employment and Training Administration (ETA) and ETA contractors.

The second part of the analysis was the development of an estimate of the size and distribution of the population of agricultural workers and their dependents that are eligible for LSC-funded services (LSC-eligible population). LSC contracted with the Department of Labor’s Employment and Training Administration (ETA) to perform this task. ETA contracted with JBS International (JBS) to use Department of Labor and other government data to develop these estimates. Section IX presents the ETA estimates. Details regarding methodology and estimates are set forth in Section II and Appendix A of the Management Report.

Legal Needs of the Agricultural Worker Population¹¹

A combination of factors creates the legal needs of the agricultural worker population. Several of these factors are rooted in the nature of agricultural work. Government data show that agriculture is the most dangerous industrial sector in the U.S. – in 2012, it had the highest fatal and non-fatal occupational injury rates of all private industries. Agricultural work is insecure, temporary, and low-paid. A labor surplus of 2 to 2.5 farm workers for each year-round equivalent job contributes to high unemployment. The seasonality of work means that very few workers have year-round work. The industry median wage is only 55% that of all full-time wage and salary workers.

The legal needs of agricultural workers arise in the context of laws and regulations, some of which that apply solely to agricultural workers and others that exclude agricultural workers from some of the legal protections generally afforded to other workers. In the latter category, for example, the Fair Labor Standards Act (FLSA) requires employers to pay workers for all hours they work and to pay workers at least the federal minimum wage. However, farms with fewer than 11 employees – which employ nearly half (46%) of all hired workers – are exempt from the federal minimum wage requirement. FLSA also exempts agricultural employers from paying overtime and from child labor requirements that apply to other employers. Provisions of the Occupational Health and Safety Act (OSHA) require employers to meet field sanitation standards (*e.g.*, drinking water and toilets) and temporary labor camp housing standards and to provide safety equipment. However, appropriations riders prohibit federal health and safety inspections at small farms without temporary labor camps and also exempt those establishments from OSHA’s worker protection provisions. Agricultural employers are also exempt from the National Labor Relations Act (NLRA), which protects workers’ rights associated

¹¹ See Section V below.

with collective bargaining to improve terms and conditions of employment. At the same time, other laws create a legal framework unique to agriculture. One federal law, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), is designed specifically to protect the rights of agricultural workers. Section H-2A of the Immigration and Nationality Act authorizes growers to hire “temporary, nonimmigrant” guest workers (H-2A workers) when they demonstrate that there are not sufficient U.S. workers qualified and available to perform the needed work.

As described in Section V, LSC Migrant Grantees and other farmworker legal aid programs not funded by LSC report that the most pressing areas of legal need for their clients include: non-payment of wages or violations of minimum wage laws, issues arising under the AWPA (including claims involving substandard housing and employment contract disputes), violations of occupational safety and health laws, violations of field sanitation standards, sexual abuse and sexual harassment, and human trafficking.

Factors Creating Access Barriers and Exacerbating the Unique Legal Needs of the Agricultural Worker Population¹²

Government resources to enforce the legal rights of agricultural workers in the areas listed above are limited. Accordingly, the surveys of LSC grantees and other sources of information indicate that agricultural workers often require the assistance of legal services lawyers to enforce their rights in these areas. A combination of factors, however, creates barriers to access to legal services to address the legal needs of the agricultural worker population. The agricultural worker population is isolated from sources of assistance. This population is often geographically isolated given the remote locations of job sites and employer-provided housing. Even off-farm housing in urban areas is often located in enclaves isolated from non-farmworker communities. Agricultural workers are often isolated by limited transportation and many must rely on their employers or farm labor contractors for transport.

Social and cultural isolation compounds geographic isolation. Compared to the total U.S. population, agricultural workers are far more likely to be Latino/Hispanic (76%) and foreign born (71%). Only 39% have schooling beyond the ninth grade. Only 33% report they can speak English “well” and nearly as many (27%) report they cannot speak English at all. Many are from southern Mexico (*e.g.*, Oaxaca, Chiapas) where the native language is not Spanish.

Specialized Expertise and Services Provided by Migrant Grantees¹³

LSC farmworker programs employ a variety of techniques to address most effectively and efficiently the barriers to civil justice and unique legal needs of the LSC-eligible agricultural worker population. These include:

¹² See Section V below.

¹³ See Section VII below.

- Employing bilingual and multilingual staff with the necessary cultural competency to communicate effectively and credibly with the agricultural worker population;
- Using special intake procedures, maintaining flexible staff work hours, and making extensive use of technology (such as special toll-free lines, cell/text phones, laptops) to serve clients in remote areas;
- Conducting outreach at labor camps and other places workers live as well as at locations other than workers' job sites and homes;
- Performing extensive community legal education; and
- Maintaining partnerships with community organizations and agencies that serve the agricultural worker population and working with agencies responsible for enforcing law pertaining to the rights of the agricultural worker population.

These grantees seek to ensure staff have specialized expertise in laws and regulations with particular relevance for the agricultural worker population, such as FLSA, AWPA, and OSHA as well as laws pertaining to human trafficking, job discrimination and sexual harassment. Because of the mobility of the agricultural worker population and the impact of judicial rulings and enforcement activities around the country, farmworker advocates maintain on-going coordination and communication with advocates serving agricultural workers in other states.

The Agricultural Population for Allocating Funding for Specialized Assistance¹⁴

To allocate funding for the delivery of specialized assistance to the agricultural worker population, LSC management recommends that this population be defined to include migrant and seasonal crop workers, horticultural workers, livestock workers, and certain forestry workers, and these workers' dependents, *who have incomes below the poverty line* (the benchmark used by the U.S. Census Bureau for defining the poverty population) *and meet LSC eligibility criteria regarding citizenship and alien status*.

The range of factors identified above combine to create access barriers and legal needs that are unique to this population. First, agricultural labor is distinctive for its dangers, insecurity, and low pay. Second, this population experiences distinctive social, cultural and geographic isolation. Third, these workers are subject to statutory and regulatory provisions that are unique to agriculture. Fourth, this population is served by other federal and state programs that are specifically designed to address the distinctive needs of agricultural workers in areas such as education, employment, health, and housing. Finally, these workers all work in industrial sectors that are classified as "agriculture" by the Census Bureau's North American Industry Classification System.

¹⁴ See Section VIII below.

Updated Count of the Agricultural Worker Population¹⁵

Table I sets forth the national and state-by-state estimates of the agricultural worker population eligible for LSC services. It also contrasts the Department of Labor ETA estimates with the estimates currently used for allocating Migrant Grants. For both the population estimates currently used and the ETA estimates, the table shows the estimated population of the LSC-eligible agricultural worker population nationally, and each state's percentage share of the national LSC-eligible agricultural worker population. The table also shows the extent to which the ETA estimates and the estimates currently used differ in numerical and percentage terms.

As the data in Table I show, the ETA estimate of the total LSC-eligible agricultural worker population national population is 1,553,003; 4.13% less than the estimate currently used of 1,619,982. The magnitude of the changes at the state level varies, in most cases more significantly.

¹⁵ See Section IX below.

Table I
LSC-Eligible Agricultural Worker Population by State
Comparison of Current Population Estimates and Department of Labor Employment and
Training Administration (ETA) Estimates

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Alabama	4,712	0.291%	13,120	0.845%	8,408	178.4%
Alaska	0	0.000%	1,485	0.096%	1,485	n/a
Arizona	21,265	1.313%	40,135	2.584%	18,870	88.7%
Arkansas	11,321	0.699%	13,245	0.853%	1,924	17.0%
California	378,096	23.340%	323,521	20.832%	(54,575)	-14.4%
Colorado	21,272	1.313%	27,458	1.768%	6,186	29.1%
Connecticut	2,386	0.147%	8,889	0.572%	6,503	272.5%
Delaware	3,556	0.220%	1,472	0.095%	(2,084)	-58.6%
Florida	128,633	7.940%	91,727	5.906%	(36,906)	-28.7%
Georgia	56,155	3.466%	28,820	1.856%	(27,335)	-48.7%
Hawaii	0	0.000%	12,701	0.818%	12,701	n/a
Idaho	26,771	1.653%	32,852	2.115%	6,081	22.7%
Illinois	35,754	2.207%	35,394	2.279%	(360)	-1.0%
Indiana	16,285	1.005%	26,006	1.675%	9,721	59.7%
Iowa	5,404	0.334%	45,938	2.958%	40,534	750.1%
Kansas	0	0.000%	29,978	1.930%	29,978	n/a
Kentucky	6,096	0.376%	25,017	1.611%	18,921	310.4%
Louisiana	3,945	0.244%	16,849	1.085%	12,904	327.1%
Maine	10,281	0.635%	12,264	0.790%	1,983	19.3%
Maryland	13,022	0.804%	5,729	0.369%	(7,293)	-56.0%
Massachusetts	2,384	0.147%	9,004	0.580%	6,620	277.7%
Michigan	86,214	5.322%	43,522	2.802%	(42,692)	-49.5%
Minnesota	28,656	1.769%	38,462	2.477%	9,806	34.2%
Mississippi	8,174	0.505%	13,991	0.901%	5,817	71.2%
Missouri	11,668	0.720%	27,461	1.768%	15,793	135.4%

Table I (Continued)
LSC-Eligible Agricultural Worker Population by State
Comparison of Current Population Estimates and Department of Labor Employment and Training Administration (ETA) Estimates

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Montana	7,818	0.483%	13,854	0.892%	6,036	77.2%
Nebraska	6,056	0.374%	31,440	2.024%	25,384	419.2%
Nevada	0	0.000%	5,740	0.370%	5,740	n/a
New Hampshire	1,424	0.088%	3,845	0.248%	2,421	170.0%
New Jersey	17,281	1.067%	8,008	0.516%	(9,273)	-53.7%
New Mexico	12,509	0.772%	19,564	1.260%	7,055	56.4%
New York	39,645	2.447%	38,244	2.463%	(1,401)	-3.5%
North Carolina	76,764	4.739%	51,741	3.332%	(25,023)	-32.6%
North Dakota	16,602	1.025%	16,851	1.085%	249	1.5%
Ohio	18,042	1.114%	31,834	2.050%	13,792	76.4%
Oklahoma	8,963	0.553%	15,574	1.003%	6,611	73.8%
Oregon	79,782	4.925%	60,176	3.875%	(19,606)	-24.6%
Pennsylvania	23,739	1.465%	20,234	1.303%	(3,505)	-14.8%
Puerto Rico	41,642	2.571%	7,098	0.457%	(34,544)	-83.0%
Rhode Island	253	0.016%	988	0.064%	735	290.5%
South Carolina	28,330	1.749%	13,547	0.872%	(14,783)	-52.2%
South Dakota	0	0.000%	15,572	1.003%	15,572	n/a
Tennessee	9,084	0.561%	17,928	1.154%	8,844	97.4%
Texas	198,948	12.281%	83,809	5.397%	(115,139)	-57.9%
Utah	9,715	0.600%	10,247	0.660%	532	5.5%
Vermont	1,161	0.072%	4,880	0.314%	3,719	320.3%
Virginia	22,589	1.394%	21,058	1.356%	(1,531)	-6.8%
Washington	104,545	6.453%	79,936	5.147%	(24,609)	-23.5%
West Virginia	0	0.000%	3,792	0.244%	3,792	n/a
Wisconsin	13,040	0.805%	45,482	2.929%	32,442	248.8%
Wyoming	0	0.000%	6,521	0.420%	6,521	n/a
Total U.S.	1,619,982	100.000%	1,553,003	100.000%	(66,979)	-4.13%

SECTION II STUDY METHODOLOGY

The analysis to develop updated estimates of the population on which to base LSC funding allocations for services to agricultural workers and their dependents had two components. One was defining the “agricultural worker population”: the universe of agricultural workers and their dependents with access challenges and unique legal needs that can be addressed most effectively and efficiently by specialized legal assistance and delivery approaches. That part of the analysis was conducted by LSC itself. The second part of the analysis was estimating the total size and the geographic distribution among the 50 states, the District of Columbia, and Puerto Rico of the portion of the agricultural worker population that is eligible for LSC-funded legal assistance (the LSC-eligible agricultural worker population). LSC contracted with the Department of Labor’s Employment and Training Administration (ETA) to provide estimates of the LSC-eligible agricultural worker population.

LSC ANALYSIS

Identifying the Agricultural Worker Population

The analysis conducted to identify the agricultural worker population that can be served most effectively and efficiently with specialized legal assistance and delivery approaches incorporated information from the following sources.

- *Internal LSC data sets.* These include grantee staffing, funding, and Case Services Reports (CSR) data; information in Program Quality Visit Reports conducted by the Office of Program Performance (OPP) and Case Service Report/Case Management System Review Reports conducted by the Office of Compliance and Enforcement (OCE); grant applications; and other documents.
- *Literature review.* Documents reviewed include government reports, academic and other research publications, and reports and publications of groups with subject-matter expertise. These documents are listed in Appendix C.
- *Interviews.* Interviews were conducted with individuals with expertise and knowledge regarding the demographic characteristics, social, health and economic status, legal issues and related information about agricultural workers and their dependents. These included current and former staff of government agencies, academics and other researchers, and staff of organizations with subject-matter expertise. Appendix D provides a list of those interviewed.
- *Surveys of LSC Grantees.* Separate Agricultural Worker Population surveys were conducted of the LSC grantees that receive Migrant Grants (Migrant Grantee Survey) and the basic field programs that do not receive Migrant Grants (Basic Field Grantee Survey). All of the 31 programs that receive Migrant Grants responded to the survey,

for a response rate of 100%. Of the 103 basic field programs that do not receive Migrant Grants, 70 responded to the survey, for a response rate of 68%. The survey instruments are provided in Appendices E and F.

- *Consultations* with:
 1. Executive directors and staff of LSC grantees, members of the National Legal Aid and Defender Association (NLADA) Agricultural Workers Group Project, and managers and staff of other providers of legal services to agricultural workers and their dependents.
 2. Staff of the U.S. Department of Labor Employment and Training Administration (ETA), the contractors ETA hired to develop the estimate, and the members of the expert panel the ETA contractor convened to obtain input in the development of the estimation methodology.

Definition of the “LSC-Eligible Agricultural Worker Population” for ETA Population Estimates

The ETA estimate of the LSC-eligible agricultural worker population includes agricultural workers and their dependents who have incomes less than 100% of the U.S. poverty line. Although income eligibility for LSC-funded services is 125% of the poverty guidelines published annually by the U.S. Department of Health and Human Services,¹⁶ Congress requires LSC to allocate funding among geographic areas based on the Census Bureau’s estimates of the poverty population. The Census Bureau estimates are based on 100% of the poverty line.

The ETA estimate of the LSC-eligible agricultural worker population includes only those persons who meet the LSC eligibility criteria regarding citizenship and alien status as set forth in Part 1626 of the LSC Regulations. LSC management recommends that the allocation for farmworker funding should be adjusted for eligibility criteria regarding citizenship and alien status because of the large proportion of the agricultural worker population that is unauthorized – approximately 50%.¹⁷ Simply put, LSC funding should not be allocated for grants to serve agricultural workers and diverted from basic field grants to the extent credible data show that a material proportion of the agricultural worker population would not likely be eligible for LSC-funded services. Although LSC’s basic field grants are allocated based on Census data without adjustment for citizenship and alien status, unauthorized immigrants comprise only about 3.6% of the total U.S. population.¹⁸

¹⁶ 45 C.F.R. § 1611(c)(1).

¹⁷ U.S. DEP’T OF LABOR, EMP’T & TRAINING ADMIN., NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS), PUBLIC DATA SETS, <http://www.doleta.gov/agworker/naws.cfm> (last visited Jan. 15, 2015).

¹⁸ This is calculated from American Community Survey (ACS) data and estimates developed by Jeffrey S. Passel and D’Vera Cohn. According to the 2012 American Community Survey (ACS) 1-year estimates the total U.S. population was 313.9 million people. Passel and Cohn estimated that there are 11.2 million unauthorized persons in the U.S. ($11.2 \div 313.9 = 3.57\%$). AMERICAN COMMUNITY SURVEY, <http://www.census.gov/acs/www/> (last visited Jan. 16, 2015) and Jeffrey S. Passel & D’Vera Cohn,

ETA ESTIMATION OF THE SIZE AND GEOGRAPHIC DISTRIBUTION OF THE LSC-ELIGIBLE AGRICULTURAL WORKER POPULATION

ETA contracted with JBS Associates (JBS) to develop the estimates of the size and distribution of the LSC-eligible agricultural worker population. Appendix A provides JBS’s memorandum setting forth in detail the methodology used to develop these estimates. A summary of the methodology is provided here.

In developing the estimation method, JBS relied on the input of a panel of experts and reviewed the methods used by other federal agencies to estimate their service populations.¹⁹ The estimation methodology was based on a “top down” approach – using national data sources to develop an estimate of the total U.S. agricultural worker population and consistent data sources and methods to estimate each state’s share of that total population. In the judgment of the expert panel and ETA, this top down method provides better reliability and validity than other approaches.

There are no U.S. Census Bureau or other available data sets that provide comprehensive, reliable information regarding the size, distribution, economic and demographic characteristics, of the agricultural worker population in the U.S. Consequently, the estimates ETA provided LSC are based on a methodology that uses a combination of data sources. ETA believes that these are the best available data sets, and farmworker demographic experts consider the ETA estimation methodology the best approach for developing accurate, reliable estimates of the farmworker population.

Data from the following sources were used in these calculations: the United States Department of Agriculture (USDA) 2012 Census of Agriculture (COA), the USDA Farm Labor Survey (FLS), the Department of Labor (DOL) Bureau of Labor Statistics’ Quarterly Census of Employment and Wages (QCEW), the DOL National Agricultural Workers Survey (NAWS), the DOL Office of Foreign Labor Certification (OFLC) H2-A and H-2B worker certification data, the DOL “Adverse Effect Wage Rate” (AEWR) data, and the U.S. Census Bureau poverty thresholds.

Unauthorized Immigrant Totals Rise in 7 States, Fall in 14: Decline in Those From Mexico Fuels Most State Decreases” (Pew Research Ctr.’s Hispanic Trends Project, Nov. 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/> (last visited Jan. 16, 2015).

¹⁹ The panel of experts consisted of: Dr. Edward Kissam, trustee of the Werner Konhnstamm family fund and long-term farmworker researcher involved in population estimates; Dr. Phil Martin, professor of agricultural economics at the University of California Davis and author of several publications on estimating farmworkers; and Dr. Don Villarejo, founder and retired director of the California Institute for Rural Studies and an expert in farmworker data.

The following are the specific data sets used in the calculations to develop the estimates of the LSC-eligible agricultural worker population:

- The *base estimate of the number of agricultural workers* in each state was calculated using data from the COA, the NAWS, and the FLS. (The base number of forestry workers employed QCEW data rather than FLS data.)
- The *base estimate of the number of LSC-eligible agricultural workers (and their dependents) (i.e., household income below poverty line and citizenship or alienage eligibility based criteria of Part 1626 of the LSC Regulations)* in each state was calculated using the U.S. Census Bureau poverty thresholds and data from the NAWS.
- The *number of LSC-eligible agricultural workers (and their dependents) who are temporarily out of the agricultural workforce* in each state was calculated using the U.S. Census Bureau poverty thresholds and data from the COA, the NAWS, and the FLS.
- The *number of LSC-eligible retired agricultural workers (and their dependents)* in each state was calculated using the U.S. Census Bureau poverty thresholds and data from COA, the NAWS, and the FLS.
- The *number of LSC-eligible H-2A agricultural workers and H-2B forestry workers* in each state was calculated using the U.S. Census Bureau poverty thresholds, AEWR data, OFLC H2-A and H-2B worker certification data, and data from the NAWS.

The estimates developed through the calculations identified above were then used to calculate the estimates of the LSC-eligible agricultural worker population for each state and in the U.S.

The estimates of the LSC-eligible agricultural worker population for each state is equal to the sum of:

- The base estimate of the number of LSC-eligible agricultural workers (and their dependents) in the state;
- The total number of LSC-eligible agricultural workers (and their dependents) who are temporarily out of the agricultural workforce in the state;
- The total number of LSC-eligible retired agricultural workers (and their dependents) in the state; and
- The total number of number of LSC-eligible H-2A agricultural workers and H-2B forestry workers in each state.

The estimate of the total LSC-eligible agricultural worker population in the U.S. is the sum of all of the states' LSC-eligible agricultural worker populations.

SECTION III

LSC FUNDING OF FARMWORKER LEGAL SERVICES

LSC has provided funding for specialized legal assistance to migrant and seasonal farmworkers since LSC's establishment.²⁰ This has been based on LSC's determination that specialized services were needed to ensure the provision of legal assistance that would most effectively and efficiently address the particular access difficulties and legal problems this population faced. This targeted funding parallels the approach Congress has adopted to address the particular needs of farmworkers in a wide range of other areas.

A. LSC's Legal Authority for Sub-Population Grants

The LSC Act provides broad general authority for LSC grantmaking for "the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). Section 1006(a)(1) of the LSC Act authorizes LSC "(A) to provide financial assistance to qualified programs furnishing legal assistance to eligible clients . . . and (B) to make such other grants and contracts as are necessary to carry out the purposes and provisions [of the LSC Act.]" 42 U.S.C. § 2996e(a)(1)(A) and (B). Starting in 1996, Congress has appropriated almost all grant funds (with the exception of funds for Technology Initiative Grants and Pro Bono Innovation Fund Grants) in a single broad category – basic field programs providing direct legal services. The LSC Act does not further define the nature of those grants and leaves to LSC the discretion to determine what types of grants to provide to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas." 42 U.S.C. § 2996f(a)(3).

In the 1977 reauthorization of the LSC Act, Congress recognized the needs of special populations by requiring LSC to conduct a study of the legal needs of migrants and seasonal farmworkers and other specific subpopulations and to implement methods of addressing those needs. Pub. L. 95-222, § 13, adding § 1007(h) of the LSC Act, codified at 42 U.S.C. § 2996f(h). Section 1007(h) of the LSC Act provides:

The Corporation shall conduct a study on whether eligible clients who are—

- (1) veterans,
- (2) native Americans,
- (3) migrants or seasonal farm workers,
- (4) persons with limited English-speaking abilities, and,
- (5) persons in sparsely populated areas where a harsh climate and an inadequate transportation system are significant impediments to receipt of legal services

²⁰ This funding built on and expanded the legal assistance previously funded by the Legal Services Program of the Office of Economic Opportunity (OEO) and the Department of Labor.

have special difficulties of access to legal services or special legal problems which are not being met. The Corporation shall report to Congress no later than January 1, 1979, on the extent and nature of any such problems and difficulties and shall include in the report and implement appropriate recommendations.

As directed by Congress, LSC's Section 1007(h) Study (hereafter, 1007(h) Study), issued in 1979, identified each of these population's access difficulties and special legal problems and also identified the measures LSC should implement to ensure these groups' legal needs were addressed most effectively and efficiently.²¹ LSC implemented a range of measures to ensure the particular needs of each of these populations were met. It determined that earmarked funding was needed to ensure that the requisite capacities were in place to serve two of these populations: Native Americans and migrant and seasonal farm workers. Earmarked grants for legal assistance to these groups have continued ever since then.

B. Historical Rationale for Earmarked Funding for Farmworker Legal Services

LSC Section 1007(h) Study

The 1007(h) Study articulated the rationale for earmarked funding for legal assistance to migrant and seasonal farmworkers.²² It concluded that "migrant farmworkers face five significant barriers to access to legal services that are special and arise out of the type and conditions of work in which they are engaged and out of their cultural and ethnic background."²³ These are:

- Physical barriers, *e.g.*, distance, migrants' lack of transportation, work hours that conflict with legal services office hours, and housing in labor camps to which legal services personnel are denied access;
- The limited time migrants are in a program's service area;
- Migrants' limited English proficiency;
- The inability or unwillingness of migrants to communicate about their working and living conditions, which "is because of their almost absolute economic dependence upon their employers and crew leaders;" and
- Migrants' view that the legal system is not a favorable means of resolving disputes and their reluctance to seek the assistance of legal aid programs.

²¹ LEGAL SERVICES CORPORATION, SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, MIGRANT AND SEASONAL FARM WORKERS, NATIVE AMERICANS, PEOPLE WITH LIMITED ENGLISH-SPEAKING ABILITY, AND INDIVIDUALS IN SPARSELY POPULATED AREAS ("1007(h) Study") Vol. I, Chap. I (1979).

²² The 1007(h) Study's full analysis of migrant and seasonal farmworkers' special access needs and unmet special legal needs are elaborated in Volume I, Chapter I, Section III-D, and in Chapter V of the 1007(h) Study.

²³ *Id.* at 305-308.

The study found that seasonal farmworkers also faced barriers to legal assistance related to their dependence on employers (though this was not as great as migrants' dependence on employers), limited English proficiency, and their unwillingness to seek out lawyers or use the legal system to resolve their problems.

The study identified “four major areas presenting legal problems for migrant and seasonal farmworkers which are special and, according to our data, not fully met.” These areas are employment, immigration and discrimination related problems of non-citizens authorized to be in the U.S., public benefits, education, and migrants' housing. The study found that these workers also “faced particular problems with consumer and credit, problems that are aggravated by language and cultural difficulties.”²⁴

Based on these findings, the 1007(h) study made clear that LSC expected recipients of “Migrant Grants” to serve migrant farmworkers *and* seasonal farmworkers. However, LSC continued to allocate funding for services to this population based only on the estimated size of the population of migrant farmworkers. This discrepancy between the broader population actually served and the narrower population counted for purposes of determining funding allocations remains a part of LSC’s current funding of farmworker programs. The updated population count presented in this analysis addresses this inconsistency.²⁵

Federal Laws and Federal Programs Targeting Farmworkers

Congress has established a range of federal programs designed to provide the specialized services required to address the particular needs of migrant and other farmworkers. Nearly all of these programs serve populations broader than *migrant* farmworkers and their dependents. These include the following:²⁶

- The Migrant and Seasonal Farmworkers Program, administered by the Department of Education, provides vocational rehabilitation grants for targeted projects because “States with projects funded through this program are better equipped to provide *specialized services* needed to effectively serve migrant and seasonal farmworkers with disabilities.”²⁷

²⁴ *Id.* at 313-315.

²⁵ See the discussion presented in Section VIII below.

²⁶ Other programs serving farmworker populations broader than migrants include the High School Equivalency Program (HEP) and the College Assistance Migrant Program (CAMP) educational programs, and the Rural Farm Labor Housing program. The Department of Education’s Migrant Education Even Start and Migrant Education Program focus exclusively on the needs of migrants and their dependents.

²⁷ U.S. Dep’t of Educ., *Migrant and Seasonal Farmworkers Program*, <http://www2.ed.gov/programs/rsamigrant/index.html> (last visited Jan. 15, 2015).

- The Migrant Health Center Program, administered by the Department of Health and Human Services, Health Resources and Services Administration, provides targeted funding for health centers to serve migrant and seasonal farmworkers, because they comprise a “special medically underserved population.”²⁸
- The Migrant and Seasonal Head Start Program, administered by the Department of Health and Human Services, Administration of Children and Families, Office of Head Start, seeks to accomplish the goals of all Head Start programs – ensuring a greater degree of social competency and school readiness within each child. It serves additional goals as well because Migrant and Seasonal Head Start “children and families have unique characteristics and circumstances that differentiate their program service needs from traditional Head Start children and families.”²⁹
- The National Farmworker Jobs Program, administered by the Department of Labor, Employment and Training Administration, provides employment and training services and housing assistance for migrant and seasonal farmworkers in order to “counter the chronic unemployment and underemployment experienced by MSFWs who depend primarily on jobs in agricultural labor performed within the United States and Puerto Rico.”³⁰
- The Migrant and Seasonal Farmworkers Monitor Advocate System, administered by the Department of Labor, Employment and Training Administration, seeks to ensure that the services provided migrant and seasonal farmworkers “are ‘qualitatively equivalent and quantitatively proportionate’ to the services provided to other jobseekers. This means that MSFWs should receive all workforce development services, benefits and protections on an equitable and non-discriminatory basis (i.e. career guidance, testing, job development, training, and job referral).”³¹

Thus, earmarked funding for legal services to migrant and seasonal farmworkers parallels the approach Congress has adopted to meet the particular needs of migrants and other farm workers in the areas of education, health, and employment.

²⁸ Health Care Consolidation Act of 1996, Pub. L. No. 104-299, § 330(g), 110 Stat. 3628 (1996).

²⁹ U.S. DEP’T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILDREN AND FAMILIES, OFFICE OF HEAD START, EFFECTIVE PARTNERSHIPS GUIDE: IMPROVING ORAL HEALTH FOR MIGRANT AND SEASONAL HEAD START CHILDREN AND THEIR FAMILIES, <http://eclkc.ohs.acf.hhs.gov/hslc/states/collaboration/docs/effective-partnerships-guide-oral-health-mshs-v3.pdf> (last visited Jan. 15, 2015).

³⁰ U.S. DEP’T OF LABOR, EMP’T AND TRAINING ADMIN., THE NATIONAL FARMWORKER JOBS PROGRAM, <http://www.doleta.gov/Farmworker/html/NFJP.cfm> (last visited Jan. 15, 2015).

³¹ U.S. DEP’T OF LABOR, EMP’T AND TRAINING ADMIN., MIGRANT AND SEASONAL FARMWORKERS MONITOR ADVOCATE SYSTEM, <http://www.doleta.gov/programs/msfw.cfm> (last visited Jan. 15, 2015).

C. LSC Funding for Farmworker Legal Assistance Since 1974

Farmworker Funding Prior to FY1996

The earmarked funding LSC has provided for migrant legal services built on the legal assistance previously funded by the Legal Services Program of the Office of Economic Opportunity (OEO) and the Department of Labor. LSC funding allocations to Migrant Grants from the early 1980s through FY1996 reflected policies implemented by LSC during the 1979-1981 periods, which immediately followed the issuance of the 1007(h) Study. Starting in 1986, Congress set specific funding amounts (“lines”) for migrant legal services and several other funding categories or entities (*e.g.*, Native American grantees, national and state support, the National Clearinghouse) in LSC’s annual appropriation.³² These funding lines specified the *minimum* amounts of funding that LSC had to provide grantees for the identified purposes. The FY93 and FY94 appropriations laws specified the use of the Migrant Health Atlas³³ and the Larson-Plascencia study³⁴ to govern the distribution of funding *increases* among migrant programs.³⁵ (The total migrant population was derived from the Migrant Atlas; the distribution among states was based on the Larson-Plascencia enumeration.)

The relative share of LSC funding allocated by Congress to migrant, basic field and Native American budget lines remained stable throughout the FY82-FY95 period,³⁶ suggesting that

³² Making Continuing Appropriations for the Fiscal Year 1987, and for Other Purposes, Pub. L. No. 99-500, 100 Stat. 1783-69 (1986).

³³ U.S. DEP’T OF HEALTH AND HUMAN SERV., PUB. HEALTH SERV., HEALTH RES. AND SERV. ADMIN., BUREAU OF HEALTH CARE DELIVERY AND ASSISTANCE, MIGRANT HEALTH PROGRAM, AN ATLAS OF STATE PROFILES WHICH ESTIMATE NUMBER OF MIGRANT AND SEASONAL FARMWORKERS AND MEMBERS OF THEIR FAMILIES (1990) (Migrant Health Atlas), *available at* <http://files.eric.ed.gov/fulltext/ED332857.pdf>.

³⁴ ALICE C. LARSON & LUIS PLASCENCIA, MIGRANT ENUMERATION PROJECT, (Tomas Rivera Center, Univ. of Tex at San Antonio 1993).

³⁵ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. 102-394, 106 Stat. 1792, 1861 (1992) and Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. 103-121, 107 Stat. 1153, 1184 (1993).

³⁶ The respective funding levels for Migrant Grants for the following years are illustrative (expressed as a percentage of the sum of migrant, basic field, and Native American grant funds): FY82 – when the 1979-1981 policies were first reflected in funding levels – 3.58%; FY85 – the year before Congress began setting funding floors – 3.60%; FY86 – the first year after floors were set – 3.40%; FY94 – the last year the Migrant Health Atlas-Larson-Plascencia numbers were used to specify allocation of migrant funding issues – 3.50%; and FY95 – the last year funding “lines” were set for migrant and other funding categories – 3.46%. The small variances in these numbers may have resulted from data inconsistencies (*e.g.*, the tables from which these data are drawn are from different data sets), shifts in the amounts going to categories other than migrant, basic field or Native Americans, rounding, etc.

Congress did not intend to change the migrant funding policy or allocations that LSC had set in 1981.

Farmworker Funding Since FY1996

The FY96 LSC appropriation eliminated all “lines” for special legal services except for Native American funding. LSC determined that the access barriers and unique legal needs of migrant and seasonal farmworkers and their dependents would be met most effectively and efficiently by continuing to provide grants for specialized assistance to this population. Accordingly, LSC notified Congress of its plans to continue providing Migrant Grants.³⁷ LSC then implemented the policy that has guided migrant funding until today. This policy’s major elements include:

- Funding for migrant legal services is based on the estimated size of the migrant poverty population in each geographic area. The funding for this population is “backed out” of the funding for the rest of a state’s poverty population.
- The 1990 Migrant Health Atlas figure used to estimate the total migrant population was 1,661,875.³⁸ LSC determined in 1995 that 70% of this population – 1,116,195 – had incomes below the poverty line.
- The distribution of the total migrant population among states is based on the Larson-Plascencia data.
- The Migrant Health Atlas and Larson-Plascencia estimates were used in the FY96 funding policy because they had the imprimatur of Congress; as noted above, the FY93 and FY94 LSC appropriations had required their use for allocating increases in migrant funding for those years.

LSC’s current funding for migrant services assumes that changes in the total size of the migrant population since the implementation of the FY96 policy (then based on 1990 data) have closely mirrored the changes in the size of the total U.S. poverty population. (The increase in the total poverty population served by LSC grantees since the 1990 Census is 40.2%; the increase in the estimated size of the migrant population is 39.3%.) Based on this assumption, the current migrant population for LSC funding purposes is 1,619,982, which is 3.39% of the total poverty population served by LSC grantees.

³⁷ In December 1995 and March 1996, LSC President Alex Forger notified Congress of its plans to implement for FY1996 the migrant funding policy set forth above. Both communications requested that Congress notify LSC if it had objections to the migrant funding policy LSC intended to implement. Congress did not notify LSC of any such concerns. LSC’s final FY96 appropriation, enacted after the December 1995 communication, provided no language pertaining to migrant funding.

³⁸ Migrant Health Atlas, *supra* note 33, at 13 (Table II – Adjusted State Profiles).

SECTION IV

THE NEED TO UPDATE THE POPULATION ESTIMATES FOR ALLOCATING FUNDING FOR SPECIALIZED SERVICES TO THE AGRICULTURAL WORKER POPULATION

There are two reasons why the population estimates used to allocate funding for farmworker legal services need to be updated. First, the data on which the population estimates are based are over 20 years old. There have been many changes in the agricultural worker population during those 20 years that affect their number and characteristics. Second, the population on which funding allocations are based should match the population of agricultural workers that require specialized legal assistance and that are served by farmworker programs.

The Need for Current Data

As described in Section III regarding LSC's funding of specialized assistance for the agricultural worker population, the funding level for farmworker legal services since FY1996 has been based on data sets from the late 1980s and early 1990s. The total migrant population estimate implemented for FY1996 funding allocations was derived from the 1990 Migrant Health Atlas, which was based on data collected in 1987-1989, and poverty estimates from the early 1990s. Those estimates were updated in 2003 and 2013 based on the untested assumption that the migrant population had increased at the same rate as the total U.S. poverty population.

The estimated distribution of the migrant population among states has since 1996 been based on the estimates of the 1993 Migrant Enumeration Project. Those estimates were based on data from sources including the 1990 Migrant Health Atlas, U.S. Bureau of Labor Statistics (BLS) data from 1989-1991, Migrant Health and Migrant Education data from 1990 and 1991, and the 1987 Census of Agriculture. Those estimates were updated in 2003 and 2013 based again on the untested assumption that the migrant population in each state had increased at the same rate as the total U.S. poverty population.

Discrepancy between the Population Base for Farmworker Funding and the Farmworker Population of Needing Specialized Services

The 1007(h) Study. Section III also noted that since 1979 there has been a discrepancy between the population base for determining farmworker funding, which is based on the migrant population, and the much broader agricultural worker population that requires and is provided specialized services by LSC grantees. The 1007(h) study concluded that specialized legal expertise and knowledge were needed to address the distinctive "unmet special legal problems" that migrants *and seasonal farmworkers* shared because of their status as farmworkers. Migrant Grantees were expected to serve migrant farmworkers, as well as seasonal farmworkers on non-status related issues, even though Migrant Grants were based on the size of the migrant population and "seasonal farmworkers are counted in the census figures used by the Corporation for funding allocations to field programs." Nonetheless, LSC

maintained the existing formula that allocated migrant funding based on the number of migrants in a service area.³⁹

The 1007(h) study reported that field programs had the legal expertise to assist seasonal farmworkers in their service areas on legal issues *unrelated* to their status as farmworkers. However, “[c]reating a duplicate delivery system for farmworkers – one for [farmworker] status-related problems and another for other problems – may often be impractical, if not impossible” because a range of factors constrained the ability of field programs to provide these services effectively. For example, migrants and seasonal farmworkers often shared the same language and culture, lived in the same communities, had close family and social ties, and had similar legal needs, and as “a natural result of intense caseload and other pressures,” basic field programs might routinely refer to the migrant program Spanish-speakers or “those who appear to be ‘migrants.’”⁴⁰

The 1007(h) study stated that decisions on how to resolve this access problem would be left to local programs, but “with continuing monitoring and oversight” by LSC staff. If local programs did “resolve this access problem on their own,” LSC would consider “require[ing] the migrant components to serve only migrants,” or “altering the service and funding allocation formulas.”⁴¹

The McKay Letter. LSC management did not formally address this issue until 2000, when LSC President John McKay sent a letter to directors of LSC grantees that provided guidance about the scope and focus of migrant legal services grantees’ work. The McKay letter emphasized that the “factors enumerated in the 1007(h) Study are as true as they were 22 years ago.” To address eligible clients’ legal needs, the letter stated that LSC expected migrant legal services projects to “primarily represent those clients in need of legal assistance from a specialized migrant unit because (1) they are faced with barriers which otherwise restrict clients’ access to legal assistance and (2) they have specialized legal needs which arise from their work in agriculture and status as a farmworker.”

The letter broadly defined the universe of agricultural workers that migrant programs should serve. It affirmed that migrant programs should serve seasonal farmworkers and also stated that these programs should serve clients conducting “some types of work, not typically thought of as ‘farm work’ or agricultural employment.” The additional types of work were forestry, nursery work, cotton ginning, mushroom growing, seed conditioning, pine bough tying, aloe vera processing, work on sod farms, work in meat and poultry processing plants, livestock and feed lot work, shepherding, work on egg farms, and tobacco housing, stripping, and warehousing.

³⁹ 1007(h) Study, *supra* note 21 at 315.

⁴⁰ *Id.* at 311.

⁴¹ *Id.* at 38-40.

The identification of an expanded universe of agricultural workers that migrant programs should serve – and in fact were already serving – did not result in a similar change in the funding formula. Allocations were still based on the size of the migrant population. However, the McKay letter effectively endorsed a dual farmworker delivery system discussed in the 1007(h) study, as it advised Migrant Grantees to focus their work on issues related to clients' status as migratory and agricultural workers, leaving to basic field programs representation of those workers on issues not related to their status as migratory and agricultural workers.

SECTION V

UNIQUE LEGAL NEEDS OF AGRICULTURAL WORKERS

The unique legal needs of farmworkers and their dependents arise from the nature of agricultural work and the laws and regulations that have particular significance for the agricultural workforce, and the limitations of the agencies responsible for enforcing these laws and regulations.

A. The Nature of Agricultural Work

The Dangers and Physical Demands of Agricultural Work

Government data regarding occupational fatality and injury rates reflect that agricultural work is highly dangerous and physically demanding. In 2013, for example, the fatality rate for the farming, fishing, and forestry industry was seven times the rate for all private industry. The fatality rate was 69% higher than for the industry with the next highest rate (transportation and warehousing).⁴²

The farming, fishing, and forestry industry category likewise had the highest rate of nonfatal occupational injuries and illnesses among private industry. In 2013, its rate was 71% higher than the rate for all private industry and 43% higher than the industry with the next highest rate (construction).⁴³

Agricultural workers experience especially high rates of heat stress, musculoskeletal pain, respiratory illness, and gastrointestinal illness. Because of the extensive use of pesticides and the proximity of farmworker housing to the fields, the agricultural workers and their families suffer from significantly elevated rates of pesticide poisoning. These workplace hazards are compounded by the conditions of farmworker housing that are discussed below.⁴⁴

⁴² U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992-2013 (PRELIMINARY DATA), <http://www.bls.gov/iif/oshcfoi1.htm#2013> (last visited Jan. 16, 2015).

⁴³ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, TABLE 5. INCIDENCE RATE AND NUMBER OF NONFATAL OCCUPATIONAL INJURIES BY SELECTED INDUSTRIES AND OWNERSHIP, 2013, <http://www.bls.gov/news.release/osh.t05.htm> (last visited Jan. 16, 2015).

⁴⁴ Wide-ranging research, including numerous studies supported by the National Institute for Occupational Safety and Health (NIOSH), has documented the health status of the farmworker population. See Don Villarejo, *Health-Related Inequities Among Hired Farm Workers and the Resurgence of Labor-intensive Agriculture* (The Kresge Foundation, Troy, Michigan, 2012) (providing a very useful overview of much of the literature); Thomas Arcury & Sara A. Quandt, *Living and Working Safely: Challenges for Migrant and Seasonal Farmworkers* 72(6):466-70 (N. C. Med. J. Nov.-Dec. 2011); G.M. Calvert, J. Karnik, L. Mehler, J. Beckman, B. Morrissey, J. Sievert, R. Barrett, M. Lackovic, L. Mabee, A. Schwartz, Y. Mitchell, & S. Moraga-McHaley, *Acute pesticide poisoning among agricultural workers in the United States, 1998-2005*, 51(12):883-98 (American J. Of Indus. Med., Dec.

These workplace hazards are exacerbated by insufficient field sanitation facilities, as significant numbers of agricultural workers lack required drinking water, toilets, and hand washing facilities in the fields where they work. According to the most recent National Agricultural Workers Survey, 6% of workers were provided no water and no cups, 2% were not provided toilets and 2% were not provided water for washing their hands.⁴⁵

It should be noted that because of data limitations the actual prevalence of workplace injuries may be significantly higher than reported. Farms with fewer than 11 employees comprise 93% of all farms and employ 46% of all hired workers and such farms are not required to report

2008); K. Emmi, K. Jurkowski, N. Codru, E. Bell, M. Kacica, & T. Carter, *Assessing the health of migrant and seasonal farm workers in New York State: statewide data 2003-2005* 21(2):448-63 (J. of Health Care for the Poor and Underserved, May 2010); R. Mines, J. Hausman, & L. Tabshouri, *The Need for Targeted Surveys of Farm Workers: A Comparison of the California Health Insurance Survey (CHIS) and the California Agricultural Workers Health Survey (CAWHS)* (Cal. Inst. for Rural Studies, Davis, CA 2005); A. Steege, S. Baron, & X. Chen, *Occupational Health of Hired Farm Workers in the United States, National Agricultural Workers Survey, Health Supplement*, 1999. (Nat'l Inst. for Occupational Safety and Health, NIOSH Publ'n No. 2009-119, 2009); U. S. Ctr. for Disease Control and Prevention, *Heat-related deaths among crop workers – U. S., 1992-2006* 57(24):649-53 (Morbidity and Mortality Weekly Report, June 2008); Maria, Stoecklin-Mariosa, Tamara Hennessey-Burt, Dianne Mitchell, & Marc Schenker, *Heat Related Illness Knowledge and Practices Among California Hired Farmworkers in the MICASA Study* 51(1):47-55 (Industrial Health, 2013); U.S. Ctr. for Disease Control and Prevention, Nat'l Inst. for Occupational Safety and Health, *Respiratory Disease in Agricultural Workers: Mortality and Morbidity Statistics* (2007); A.L. Gentry, J.G. Grzywacz, S.A. Quandt, S.W. Davis, & T.A. Arcury, *Housing Quality Among North Carolina Farmworker Families* (J. of Agric. Safety & Health 13(3):323-337, 2007); Marc Schenker & Stephen McCurdy, *Occupational Health Among Migrant and Seasonal Farmworkers: The Specific Case of Dermatitis* (Am. J. of Indus. Med. 18:345-351, 1990); J. Paul Leigh, Marc Schenker, & Stephen McCurdy, *Occupational Health Among Migrant and Seasonal Farmworkers: The Specific Case of Dermatitis* (Pub. Health Rep. Vol. 116, May-June 2001); Stephen J. Reynolds, Matthew W. Nonnenmann, Joannis Basinas, Margaret Davidson, Lena Elfman, John Gordon, Shelley Kirychuk, Sue Reed, Joshua W. Schaffer, Marc Schenker, Vivi Schlunssen, & Torben Sigsgaard, *Systematic Review of Respiratory Health Among Dairy Workers* (J. of Agromedicine 18:3, 219-243, 2013); S.R. Kirkham & M.B. Schenker, *Current Health Effects of Agricultural Work: Respiratory Disease, Cancer, Reproductive Effects, Musculoskeletal Injuries, and Pesticide-Related Illnesses* (J. of Agric. Safety & Health 8(2):199-214, 2002); Lance George, Mary Lee Hall, Ilene J. Jacobs, Ann Moss Joyner, Ed Kissam, Shelley Latin, Allan Parnell, Virginia Ruiz, Nargess Shadbeh, & Janet Tobacman, *Farmworker Housing Standards and Regulations, Their Promise and Limitations, and Implications for Farmworker Health* (Key Rep. 1 from the Transdisciplinary Conference on Farmworker Housing Quality and Health, Crystal City, Va., Nov. 11, 2014); and Sara A. Quandt, Carol Brooke, Kathleen Fagan, Allyson Howe, Stephen A. McCurdy, Lisel Holdenried, Thomas K. Thornburg, & Don Villarejo, *Farmworker Housing and Its Impact on Health* (Key Rep. 2 from the Transdisciplinary Conference on Farmworker Housing Quality and Health, Crystal City, Va., Nov. 11, 2014).

⁴⁵ NAWS, *supra* note 17.

occupational injury data.⁴⁶ Research indicates that workers on small farms have higher rates of occupational injuries than workers on larger farms.⁴⁷ In addition, the U.S. Government Accountability Office (GAO) reports that underreporting of occupational injuries likely results from shortcomings of the data collection procedures of the Bureau of Labor Statistics (BLS) and the Occupational Safety and Health Administration (OSHA). GAO also found “disincentives that affect workers’ decisions to report work-related injuries and illnesses and employers’ decisions to record them.” The employer disincentives lie in potentially increased worker compensation costs and adverse impacts on obtaining contracts that result from higher injury rates. Worker disincentives include fear of job loss and other retaliatory actions.⁴⁸

Agricultural Work Is Generally Temporary, Insecure and Low-Paid

Temporary nature of agricultural work. Because of the seasonal nature of much farm work and the varying demands for labor, few crop workers work year-round. NAWS data show that for the 1995-2009 period, the average number of weeks per year that crop workers were employed in agriculture ranged from 24 to 35.⁴⁹ Over the 2005-2009 period, three crop workers in four were employed for less than nine months a year in farm work.⁵⁰

Insecurity of agricultural work. Agricultural workers’ employment is also insecure because the agricultural labor market has a surplus of workers. According to one study, “there are 2 to 2.5 farm workers for each year-round equivalent job.”⁵¹ Agriculture typically has unemployment rates twice those of other private wage and salary workers.⁵² Although this gap narrowed in recent years because of the significant increases in non-farm unemployment caused by the 2008 recession, the unemployment rates for agricultural workers in 2012 and 2013 were 12.4%

⁴⁶ U.S. DEP’T OF AGRIC., NAT’L AGRICULTURAL STATISTICS SERV., 2012 CENSUS OF AGRICULTURE, Vol. 1 Geographic Area Series Part 51, 300 (2014) (2012 Census of Agriculture) (Table 7. Hired Farm Labor – Workers and Payroll: 2012), *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

⁴⁷ VILLAREJO, HEALTH-RELATED INEQUITIES AMONG HIRED FARM WORKERS AND THE RESURGENCE OF LABOR-INTENSIVE AGRICULTURE 7-8, *supra* note 44

⁴⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-10, WORKPLACE SAFETY AND HEALTH. ENHANCING OSHA’S RECORDS AUDIT PROCESS COULD IMPROVE THE ACCURACY OF WORKER INJURY AND ILLNESS DATA, (2009).

⁴⁹ NAWS, *supra* note 17.

⁵⁰ BON APPETIT MGMT CO. FOUND. & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE U.S. 15 (United Farm Workers, March 2011), *available at* http://www.ufw.org/pdf/farmworkerinventory_0401_2011.pdf.

⁵¹ PHILLIP MARTIN, FARM LABOR AND H-2A (Univ. of Cal.-Davis, 2014).

⁵² WILLIAM KANDEL, ECON. RESEARCH REPORT NO. 60, PROFILE OF HIRED FARMWORKERS: A 2008 UPDATE 16-19 (U.S. Dep’t of Agric., July 2008).

and 10.1%, respectively, in contrast to unemployment rates for other private wage and salary workers, which were 7.9% and 7.2%.⁵³

Low compensation for agricultural work. Compensation for agricultural work is very low relative to compensation for other workers. Median weekly wages of all full-time agricultural workers are 55% of the wages paid to all wage and salary full-time workers.⁵⁴ Full-time crop workers earn only 53% of the median weekly wages of all wage and salary full-timers. The median weekly earnings of livestock workers and crop workers both fall below the median level for major “low skill occupations,” with crop workers earning less than all of these workers, except for dishwashers.⁵⁵

Because of intense labor demands during the growing season, agricultural workers often work long hours: in the 2005-2009 period, 51% of crop workers averaged working 41-60 hours a week and 8% averaged working more than 60 hours a week. During the same period, 51% of crop workers averaged working six or more days a week.⁵⁶

B. Laws and Regulations That Affect Agricultural Workers

The federal laws that have the most significance for agricultural workers are the Fair Labor Standards Act; the Migrant and Seasonal Agricultural Worker Protection Act; the Federal Insecticide, Fungicide and Rodenticide Act; the Occupational Safety and Health Act; the National Labor Relations Act; and the Immigration and Nationality Act. The following is a very brief summary of the provisions of these laws that have the most significant impact on agricultural workers’ well-being and legal needs.⁵⁷

⁵³ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES, 26. UNEMPLOYED PERSONS BY INDUSTRY, CLASS OF WORKER, AND SEX, <http://www.bls.gov/cps/cpsaat26.pdf> (last visited Jan. 16, 2015).

⁵⁴ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES, 39. MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX, <http://www.bls.gov/cps/cpsaat39.pdf> (last visited Jan. 16, 2015). *See also* KANDEL, *supra* note 52 at iv.

⁵⁵ KANDEL, *supra* note 52 at iv, 20-23.

⁵⁶ BON APPÉTIT MGMT CO. FOUND., *supra* note 50, at 14.

⁵⁷ For summaries of these laws and regulations as they apply to agricultural workers *see* Jack Runyan, *Summary of Federal Laws and Regulations Affecting Agricultural Workers*, (U.S. Dep’t of Agric., Econ. Research Serv., July 2000); Susan Reed & Ilene Jacobs, *Serving Farmworkers* 38:5-6 (Clearinghouse Rev., Sept.-Oct. 2004); Brian Craddock, *Federal and State Employment Standards and U.S. Farm Labor. A Reference Guide to Labor Protective Laws and Their Applicability in the Agricultural Workplace* (Motivation Educ. & Training, Inc., Apr. 1988); OxFam Am., *Like Machines in the Fields: Workers without Rights in American Agriculture* (OxFam Am. Rep., 2004); Bon Appétit Mgmt. Co. Found. & United Farm Workers, *Inventory of Farmworker Issues and Protections in the United States* (2011); Megan Horn & Nicholas Marritz, *Unfinished Harvest: The Agricultural Worker Protection Act at 30* (Farmworker Justice, 2013); William Beardall (ann. by Gregory Schell), *Migrant and Seasonal*

*The Migrant and Seasonal Agricultural Worker Protection Act (AWPA).*⁵⁸ The Act contains provisions with protections for migrant and seasonal workers related to pay, working conditions, housing, and transportation.

Key provisions

- AWPA requires employers to:
 1. Inform workers of the terms of employment at the time they are recruited;
 2. Comply with the employment terms related to wages and hours and other issues such as housing and transportation, if they are provided; and
 3. Confirm that the farm labor contractors they use are registered with and licensed by DOL.
- AWPA also requires that:
 1. Farmworker housing meets local and federal housing standards; and
 2. Providers of agricultural workers' transportation certify that the vehicles they use meet appropriate safety standards and are insured.
- The AWPA "joint employer" provision specifies that if a worker has been hired through a farm labor contractor (FLC), *both* the grower and the FLC are subject to AWPA's requirements. This provision is designed to prevent growers from evading responsibility for violations of their employees' rights by asserting that the FLCs are the employers and, therefore, are solely responsible for these violations.
- AWPA provides workers a private right of action.

The survey of LSC Farmworker Programs found that 93.3% of the programs provided representation to agricultural workers with regard to AWPA violations related to the terms of employment, including housing and transportation standards.

*The Fair Labor Standards Act (FLSA).*⁵⁹ FLSA contains provisions governing minimum wages, overtime, child labor, and recordkeeping.

Key provisions

- FLSA requires employers to pay workers for all hours workers and to pay workers at least the federal minimum wage. However, farms with fewer than 11 employees

Agricultural Worker Protection Act, Outline and Annotations, March 2014 Update (Tex. Equal Justice Ctr., Austin, Tex.); and William Beardall (ann. by Gregory Schell), *Outline of Fair Labor Standards Act in Agriculture and Related Employment, March 2014 Update*, (Tex. Equal Justice Ctr., Austin, Tex.).

⁵⁸ Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872.

⁵⁹ Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

(which comprise 93% of all farms and employ 46% of all hired workers)⁶⁰ are exempt from the federal minimum wage requirement.

- The law exempts all agricultural employers from paying overtime wages (*i.e.*, at least 1.5 times the regular pay rate) for time worked in excess of 40 hours a week.
- FLSA also exempts agricultural employers from child labor requirements that apply to other employers. “Consequently,” GAO notes, “children may work in agriculture under circumstances that would be illegal in other industries.”⁶¹ In most industries, employing workers younger than 16 is considered “oppressive child labor.” In agriculture, however, 14 and 15 year-olds can work anytime outside of school hours, and children as young as 10 years old can be employed with the written consent of their parents.
- FLSA provides workers a private right of action.

The most common claims arising under FLSA are for non-payment of wages, violations of child labor laws, and failure to provide required breaks. In response to the survey conducted in support of this analysis, 97% of the Migrant Grantees indicated that agricultural workers in their area have wage claims and claims arising from other FLSA violations. Eighty-nine percent (89%) separately indicated that child labor law violations were problematic. The most common claims arising under FLSA are for non-payment of wages, violations of child labor laws, and failure to provide required breaks.

Occupational Safety and Health Act (OSHA).⁶² The OSHA is the primary federal law to protect the health and safety of workers.

Key provisions

- With regard to agricultural workers, employees are required to:
 1. Meet standards for temporary camps;
 2. Meet field sanitation standards requiring that require employers to provide workers with drinking water, toilet facilities, and hand washing facilities in the fields;
 3. Provide safety devices for farm field equipment;
 4. Provide persons trained to provide first aid when these services are not near the workplace; and

⁶⁰ 2012 Census of Agriculture, *supra* note 46, at 300f (Table 7. “Hired Farm Labor – Workers and Payroll: 2012”).

⁶¹ Government Accountability Office, *Child Labor in Agriculture: Changes Needed to Better Protect Health and Educational Opportunities*, GAO/HEHS-98-193, 1998.

⁶² Occupational Safety and Health Act, 29 U.S.C. §§ 651-678; National Labor Relations Act, 29 U.S.C. §§ 151-169.

5. Meet safety requirements for slow-moving vehicles.
- Employers with fewer than 11 employees and without temporary labor camps are exempt OSHA worker protections. In addition, federal health and safety inspections of these establishments are prohibited. (As noted above, about half of hired workers are employed on these farms.)
 - OSHA is prohibited from conducting inspections, investigations, and similar enforcement activities at these small farms. These prohibitions apply to safety or health inspections as well as actions to respond to employee complaints, or requests to investigate if employees are fired for making complaints, or to investigate fatalities, catastrophes, and accidents.
 - There is no OSHA standard relating to musculo-skeletal injuries, among the most widespread injuries suffered by agricultural workers. (The Federal Insecticide, Fungicide and Rodenticide Act, discussed below, not the OSHA, governs workers' use of and exposure to pesticides.)
 - OSHA provides workers with no private right of action.
 - Common claims by agricultural workers under OSHA include failure meet requirements regarding temporary camps standards and field sanitation standards, and issues related to heat stress.

The LSC Migrant Grantee Survey found that 90% of the Migrant Grantees reported that agricultural workers have OSHA related issues. Common claims by agricultural workers under OSHA include failure meet requirements regarding temporary camps standards and field sanitation standards, and issues related to heat stress.

*The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).*⁶³ FIFRA provides for the federal control of pesticide distribution, sale, and use. It provides the basis for the Worker Protection Standard (WPS),⁶⁴ which is a regulation designed to protect agricultural workers and pesticide handlers.

Key provisions

- The WPS requires employers to:
 1. Provide workers with pesticide safety training, personal protective equipment and decontamination supplies;
 2. Notify workers of pesticide applications and restrict workers' entry into areas with pesticide application for specified periods; and
 3. Provide emergency medical assistance.

⁶³ Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y.

⁶⁴ JACK RUNYAN, SUMMARY OF FEDERAL LAWS AND REGULATIONS AFFECTING AGRICULTURAL WORKERS 16 (U.S. Dep't of Agric., Econ. Research Serv., July 2000).

- FIFRA delegates to the U.S. Environmental Protection Agency (EPA) and state agencies enforcement and inspection duties to ensure compliance with the WPS. States assume responsibility for enforcement where they have an approved “state plan.”

Ninety-seven percent (97%) of respondents to the Migrant Grantee survey indicated that the agricultural worker population in their service area encountered problems with violations of Worker Protection Standards and other EPA enforcement issues.

*The Immigration and Nationality Act (INA) provisions regarding temporary nonimmigrant workers.*⁶⁵ A significant number of non-immigrant, temporary agricultural workers (H-2A workers) are brought into the country each year through the H-2A program, which is authorized under the Immigration and Nationalization Act and administered by the ETA Office of Foreign Labor Certification (OFLC).⁶⁶ The INA also authorizes the admission into the U.S. temporary, nonimmigrant nonagricultural workers (H-2B workers) through the H-2B program.⁶⁷ Part 1626 of the LSC Regulations allows grantees to serve all H-2A agricultural workers and H-2B forestry workers.

Employers must demonstrate that there are insufficient numbers of U.S. workers who are able, willing, and qualified to perform the needed work and that hiring these guest workers will not have “an adverse effect on the wages and working conditions of similarly employed U.S. workers.”

Key provisions

- Under the terms of the DOL-administered H-2A program, employers must:
 - Provide employees with a written contract (or similar document) that specifies, in a language the worker can understand, the terms and conditions of work (*e.g.*, pay rate, benefits, expenses, work periods, and work locations);
 - Pay workers at least the “adverse effect wage rate,” a level substantially above the federal and state minimum wage;
 - Provide workers with no-cost housing that meets applicable safety and health standards;
 - Guarantee a minimum amount of work;

⁶⁵ Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537.

⁶⁶ The H-2A program and H-2A worker names are derived from the section of the INA under which the program is authorized: Section 101(a)(15)(h)(ii)(a) (8 U.S.C. 1101(a)(15)(h)(ii)(a)).

⁶⁷ The H-2B program and H-2B program names are similarly derived from the section of the INA under which the program is authorized: Section 101(a)(15)(h)(ii)(b) (8 U.S.C. 1101(a)(15)(h)(ii)(b)).

- Provide (or reimburse the worker for the costs of) inbound and outbound transportation between the jobsite and the worker’s home abroad, and subsistence en route;
- Provide free daily transportation between the housing and the worksite; and
- Provide worker’s compensation insurance or its equivalent.

The survey of LSC Migrant Grantees indicated that violations of the terms of employees’ contracts are a significant problem.⁶⁸ In addition, complaints of violations of H-2A workers’ rights under the terms of the North American Agreement on Labor Cooperation (NAALC) (the labor side-agreement to NAFTA) led to the U.S. Secretary of Labor and the Mexican Secretary of Labor and Social Welfare signing a “Joint Ministerial Declaration on Migrant Workers” to address concerns regarding “the labor rights of Mexican migrants working in the United States with H-2A and H-2B temporary work visas and the responsibilities of their employers.”⁶⁹

C. Factors Limiting Government Enforcement of Agricultural Workers’ Rights

In spite of the protections provided by the federal laws described above, the constrained enforcement capacities of the government agencies responsible for each of the acts limit agricultural workers’ ability to take advantage of the protections of these laws.

Reports by the GAO and other data sources indicate lack of sufficient staffing impairs enforcement of laws protecting agricultural workers. Relevant findings include the following:

- From 1997 to 2007, the annual number of the Department of Labor Wage and Hour Division’s (WHD) enforcement actions for all industries decreased by more than a third, from approximately 47,000 actions in 1997 to just under 30,000 in 2007.⁷⁰
- In FY2002, only 0.6% of the investigations WHD conducted of labor law violations nationally involved agricultural employers. This fell to 0.5% in FY2008.⁷¹

⁶⁸ The survey did not ask a specific question about H-2A violations. However, in response to a question regarding significant accomplishments of their work, 28% identified indicated that their most significant accomplishment involved H2-A violations.

⁶⁹ MINISTERIAL CONSULTATIONS JOINT DECLARATION BETWEEN THE DEPARTMENT OF LABOR OF THE UNITED STATES OF AMERICA AND THE SECRETARIAT OF LABOR AND SOCIAL WELFARE OF THE UNITED MEXICAN STATES CONCERNING MEXICAN NAO PUBLIC COMMUNICATIONS MEX 2003-1, MEX 2005-1, AND MEX 2011-1 UNDER THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, *available at* <http://www.dol.gov/opa/media/press/ilab/ILAB20140543-US-Mex-Declaration.pdf>. For more information see U.S. Dep’t of Labor, *News Release: Joint ministerial declaration on migrant workers signed by US Secretary of Labor, Mexican Secretary of Labor and Social Welfare*, <http://www.dol.gov/opa/media/press/ilab/ILAB20140543.htm> (last visited Jan. 16, 2015).

⁷⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-962T, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 5 (2008).

- From FY1986 to FY2002 the number of investigations conducted under AWPFA fell 50%. The number of these investigations fell another 19% by FY2008, while from 2002-2008 the percent of employers found in violation remained constant at 60% of those investigated.⁷²
- The number of DOL's confirmed cases of child labor violations fell by 65% from 1997 to 2009.⁷³ As GAO has indicated, however, reductions in confirmed violations do not mean fewer violations are occurring. Noting that child labor violations reported by WHD declined by 70% from 1993 to 1997, the GAO stated that "weaknesses in enforcement and data collection procedures mean violations are not being detected."⁷⁴
- GAO reported that the Environmental Protection Agency (EPA) "has little assurance that the protections called for in the [Worker Protection] Standard are actually being provided to farmworkers generally or to children who work in agriculture."⁷⁵
- In 2009 WHD cited only two violations of agricultural hazardous orders that accounted for only 0.14% of the 1,432 hazardous occupation violations it found that year.⁷⁶
- In 2009, OSHA conducted a total of only 26 inspections on crop farms in the 25 states where it is responsible for enforcing workplace safety standards.⁷⁷

Constraints on staffing limit federal and state agencies' ability to enforce laws effectively to protect agricultural workers' rights. For example, from 1997 to 2007, the total number of WHD investigators for all industries nationally, not just agriculture, fell by more than 20 percent, from 942 to 732.⁷⁸ In 2008, the Department of Labor had the equivalent of only 22 full-time investigators for the approximately 576,000 U.S. agricultural employers in the U.S.⁷⁹ Similarly,

⁷¹ FARMWORKER JUSTICE & OXFAM AM., *WEEDING OUT ABUSES: RECOMMENDATIONS FOR A LAW-ABIDING FARM LABOR SYSTEM 4* (2010), available at <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.7%20weeding-out-abuses.pdf>.

⁷² *Id.*

⁷³ HUMAN RIGHTS WATCH, *FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE 74* (2010), <http://www.hrw.org/reports/2010/05/05/fields-peril> (last visited Jan. 16, 2015).

⁷⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-193, *CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES 6* (1998).

⁷⁵ U.S. GOV'T ACCOUNTABILITY OFFICE GAO/RCED-00-40, *PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 5* (2000).

⁷⁶ HUMAN RIGHTS WATCH, *supra* note 73, at 79.

⁷⁷ BON APPETIT MGMT. CO. FOUND., *supra* note 50, at 36.

⁷⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, *supra* note 70, at 6.

⁷⁹ BON APPETIT MGMT. CO. FOUND., *supra* note 50, at 20.

the North Carolina Department of Labor “has only seven inspectors to review all the 6,000 to 10,000 farmworker camps in the state for OSHA standards.”⁸⁰

Interviews with federal and state enforcement agencies’ managers also highlighted these agencies’ limited enforcement capacities. For example, John Trasviña, Dean of the University of San Francisco School of Law and former Special Counsel for Immigration Related Unfair Employment Practices for DOL and Assistant Secretary of the HUD Office of Fair Housing and Equal Opportunity, stated that “government agencies alone cannot effectively enforce the law” because of staffing limitations and insufficient connections with farmworker communities. Similar problems were cited by Ellen Widess, former Chief of the California Occupational Safety and Health Administration and former Director of the Texas Department of Agriculture’s Pesticide Program, and Ronald Javor, former Deputy Director and Staff Counsel of the California Department of Housing and Community Development.⁸¹

D. The Incidence of Legal Problems That Affect Agricultural Workers

As described above, government resources to enforce the legal rights of agricultural workers are limited. Accordingly, the surveys of LSC grantees and other sources of information indicate that agricultural workers often require the assistance of legal services lawyers to enforce their rights in these areas. The legal needs of agricultural workers and their dependents are described in numerous publications.⁸²

⁸⁰ Lara E. Whalley, Joseph G. Grzywacz, Sara A. Quandt, Quirina M. Vallejos, Michael Walkup, Haiying Chen, Leonardo Galvan, & Thomas A. Arcury, *Migrant Farmworker Field and Camp Safety and Sanitation in Eastern North Carolina* 14(4):9 (J. of Agromedicine 2009).

⁸¹ Others interviewees who also highlighted the limitations of agencies’ enforcement capacities included: Professor Thomas A. Arcury; Cesar Britos, Esq.; Bruce Goldstein, Esq.; Professor Joan Flocks; Professor Cindy Hahamovitch; Ed Kissam, Ph.D.; Ruben Martinez, Ph.D.; Gregory Schell, Esq.; Cynthia Schneider, Esq.; Rebecca Smith, Esq.; and Don Villarejo, Ph.D.

⁸² In addition to the 1007(h) study, these include: Susan Reed & Ilene Jacobs, *Serving Farmworkers* 38:5-6 (Clearinghouse Rev., Sept.-Oct., 2004); OxFam Am., *Like Machines in the Fields: Workers without Rights in American Agriculture* (OxFam Am. Rep., 2004); Bon Appetit Mgmt. Co. Found. & United Farm Workers, *Inventory of Farmworker Issues and Protections in the U.S.* 15 (United Farm Workers, March 2011); Megan Horn & Nicholas Marritz, *Unfinished Harvest: The Agricultural Worker Protection Act at 30* (Farmworker Justice, 2013); U.S. Comm’n on Agric. Workers, *Report of the Commission on Agricultural Workers*, 50 and 105-106 (1992); Migrant Delivery Working Grp., *Basic Policy Issues for Migrant Legal Services* (Dec. 27, 1999) (part of the materials provided at the Migrant Workers Legal Serv. Conference, Boerne, Tex., Mar. 19-22, 2000), http://lri.lsc.gov/sites/default/files/LRI/docs/020072_BasicPolicyIssuesforMigrant.pdf; Alan Houseman, *Excellence in Migrant Programs: A Very Preliminary Analysis* (Mar. 10, 2000) (part of the materials provided at the Migrant Workers Legal Serv. Conference, Boerne, Tex., Mar. 19-22, 2000), http://lri.lsc.gov/sites/default/files/LRI/docs/020072_ExcellenceinMigrantLSprog.pdf; “Effective Delivery of Legal Services to Agricultural Workers,” memorandum from NLADA Agric. Worker Project Grp. to Ronald S. Flagg, Gen. Counsel, and Bristow Hardin, Program Analyst (Dec. 8, 2014); “The Need

Those interviewed as part of this study also identified a range of legal problems that the agricultural worker population confronts.⁸³ Interviewees indicated that the most common of these legal problems include: wage theft; violations of worker safety standards; unsafe and substandard housing; retaliation; discrimination; child labor law violations; and sexual harassment and sexual violence.

Two additional data sources further highlight the areas in which agricultural workers commonly experience legal needs: (1) the Migrant Grantee Survey undertaken for this Report and (2) a 2011 survey conducted by the Bon Appétit Management Company Foundation and the United Farm Workers (Bon Appétit/UFW survey) of farmworker legal services programs in states with some of the highest concentrations of agricultural workers in the country.⁸⁴ (Advocates in California, Florida, North Carolina, and Washington responded to the survey.⁸⁵)

The Bon Appétit/UFW survey asked advocates to identify the five most common types of legal problems experienced by their clients. The Migrant Grantee Survey asked programs to indicate the degree to which the farmworker population that it serves encounters various legal problems, including those typically associated with agricultural workers as well as those that affect the general population of low-income persons.⁸⁶

for Specialized Migrant Legal Services Programs,” Luis Jaramillo, NLADA, Remarks at the Meeting of the Provisions Comm. of the Legal Serv. Corp. Bd. (Sept. 14, 2003); Thomas Arcury & Sara A. Quandt, *Living and Working Safely: Challenges for Migrant and Seasonal Farmworkers* (N. C. Med. J. 72(6): 466-70, Nov.-Dec. 2011); Farmworker Justice & Oxfam Am., *Weeding Out Abuses: Recommendations for a Law-Abiding Farm Labor System* 4 (2010); Ctr. for Migrant Rights, *Recruitment Revealed, Fundamental Flaws in the H-2Temporary Worker Program and Recommendations for Change* (Jan. 17, 2013); Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011); and Erin Robinson, H Nguyen, S. Isom, S. Quandt, J. Grzywacz, H. Chen, & Tom Arcury, *Wages, Wage Violations, and Pesticide Safety Experienced by Migrant Farmworkers in North Carolina* (New Solutions 21(2):251-268, 2011).

⁸³ Interviewees identifying these types of legal problems included: Professor Thomas A. Arcury; Professor Peter Benson; Cesar Britos, Esq.; Bruce Goldstein, Esq.; Professor Joan Flocks; Professor David Griffith; Professor Cindy Hahamovitch; Ronald Javor, Esq.; Ed Kissam, Ph.D.; Nancy Leppink, Esq.; Ruben Martinez, Ph.D.; Gregory Schell, Esq.; Professor Marc Schenker; Cynthia Schneider, Esq.; Rebecca Smith, Esq.; William Tamayo, Esq.; John Trasviña, Esq.; Don Villarejo, Ph.D.; and Ellen Widess, Esq.

⁸⁴ BON APPÉTIT MGMT. CO. FOUND., *supra* note 50, at 10.

⁸⁵ Thirty-six percent of all U.S. hired farmworkers and 46% of all hired crop workers are employed in the four states. See NAWS, *supra* note 17.

⁸⁶ The data for the Migrant Grantees are based on responses to survey question 5.

As the data in Table V show, these surveys yield similar results with respect to the legal problems that are especially significant for the agricultural worker population. In particular:

- Ninety-seven percent (97%) of Migrant Grantee survey respondents and all of the four Bon Appétit/UFW survey respondents indicated agricultural workers experience FLSA-related legal problems.
- Ninety-seven (97%) percent of Migrant Grantee survey respondents and all of the Bon Appétit/UFW survey respondents indicated the clients experience legal problems related to sexual violence, harassment, or other civil rights-related issues.
- Ninety-three (93%) percent of Migrant Grantee survey respondents and three of four of Bon Appétit/UFW survey respondents indicated that clients experience AWPAs-related legal problems.
- Ninety percent (90%) of Migrant Grantee survey and all of Bon Appétit/UFW survey respondents indicated that clients encounter OSHA-related legal problems.
- Eighty-seven percent (87%) of Migrant Grantee survey respondents and all of Bon Appétit/UFW survey respondents indicated that clients experience Worker Protection Standard violations and related EPA-related legal problems.
- Eighty percent (80%) of Migrant Grantee survey respondents and all of Bon Appétit/UFW survey respondents indicated that clients experience trafficking-related issues.

The Migrant Grantee Survey also identified legal problems that the agricultural worker population experiences at much higher levels than the broader population, in particular, other employment-related issues, such as worker's compensation (identified by 97%), immigration or naturalization related-issues (identified by 93%), taxes (not related to the Earned Income Tax Credit) (identified by 93%),⁸⁷ and child labor (identified by 60%).

The results of the Migrant Grantee Survey also indicated that crop workers and livestock workers have similar legal needs. In particular, one of the questions asked about the extent to which seven different categories of workers experienced legal problems in each of nine different substantive issue areas including: wage and hour violations, AWPAs violations, unsafe/unhealthy working conditions, unsafe/unhealthy housing conditions, discrimination, employer retaliation, sexual harassment/violence, child labor violations, and immigration.⁸⁸ In identifying the extent to which different workers had legal problems in these areas, the highest number of respondents consistently named migrant and seasonal crop workers and fruit and vegetable packing and processing workers. Livestock workers were consistently identified by the next highest percentage of respondents as having problems in each of these areas.⁸⁹

⁸⁷ Tax issues can be especially important to agricultural workers because employers may not report the information to the IRS or report incomplete or inaccurate information.

⁸⁸ Migrant Grantee Survey, question 11, attached as Appendix E.

⁸⁹ The other categories of workers were nursery and greenhouse workers, agriculture support workers (e.g., cotton ginning, crop planting/grading), workers in forest nurseries or gathering forest products, and aquaculture workers (i.e., farm raising and production of aquatic animals and plants).

Table V

SUBSTANTIVE AREAS IN WHICH AGRICULTURAL WORKERS ENCOUNTER PROBLEMS		
Substantive Area	% of LSC-funded Migrant Grantees' that identified the area as a problem for agricultural workers in their area	Top Five Areas of Legal Need Identified in Bon Appétit/United Farm Workers Study
Wage claims and other Fair Labor Standards Act (FLSA)-related issues	97%	Non-payment of wages or violations of minimum wage laws – identified in all 4 States
Other employment related (e.g., worker's compensation)	97%	
Civil rights (e.g., sexual harassment, employment discrimination)	97%	Sexual abuse and sexual harassment – identified in 3 of 4 states
Migrant and Seasonal Agricultural Workers Protection Act (AWPA)-related issues	93%	Substandard housing issues – identified in 3 of 4 states and violations of employer contracts – identified in 2 states
Immigration/naturalization	93%	
Taxes	93%	
Occupational Safety and Health Act (OSHA)-related issues	90%	Violations of occupational safety and health– identified in all 4 states
Health (not OSHA-related or EPA-related)	90%	
Environmental Protection Agency (EPA) enforcement-related issues (Worker Protection Standard/pesticides)	87%	Violations of or field sanitation standards – identified in all 4 states
Public benefits (other than unemployment insurance)	87%	
Domestic violence	87%	
Housing (not covered by AWPA)	87%	
Human trafficking	80%	Human trafficking – identified in 3 of 4 states
Unemployment Insurance (UI)	80%	
Consumer	80%	
Family (other than domestic violence)	80%	
Education	73%	
Child labor	60%	
Youth (other than child labor)	47%	

SECTION VI

FACTORS CREATING THE AGRICULTURAL WORKER POPULATION'S ACCESS BARRIERS

As described above, the surveys of LSC grantees and other sources of information indicate that agricultural workers often require the assistance of legal services lawyers to enforce their rights in these areas. A combination of factors, however, creates barriers to access to legal services to address the legal needs of the agricultural worker population. The characteristics of the agricultural worker population create these access barriers and can exacerbate their legal needs.

A. Who Agricultural Workers Are and Where They Are Employed

The terms “farmworker” and “agricultural worker” refer to hired workers as opposed to farm owners and their family members who work on their own farms. A very small number of the nation’s 2.1 million farms account for most agricultural production and employment of agricultural workers. According to the most recent USDA Census of Agriculture (COA), less than 4% of farms account for slightly more than two-thirds (67%) of the total market value of products sold.⁹⁰ About one in four (26.9%) farms hires workers. Of those farms, 7.2% employed 53.8% of all U.S. agricultural workers.⁹¹ One in ten farms (10.3%) employ workers hired through Farm Labor Contractors (FLCs) – individuals or entities that hire farm laborers and contract them out to farms – and only 7.3% of these farms bore 79.1% of total farm labor contract expenses (the number of workers hired through contractors is not reported separately).⁹²

The need for hired labor varies significantly by product. For example, labor’s share of total cash expenses ranges from about 5% for products such as corn, soybeans, and wheat to 13-14% for dairy and poultry products to over 40% for fruits, vegetables, and nursery crops. Two-thirds of the labor expenditures reported by farm employers to the Census of Agriculture are attributed to four commodities: fruits and nuts, 25%; nursery crops, 20%; vegetables, 12%; and dairy, 10%.⁹³

Overall, about three-fourths of hired agricultural workers are “crop workers” employed in the highly-mechanized production of crops like corn and wheat to labor-intensive planting, harvesting, and processing “high value” commodities such as vegetables, melons, fruits, and nuts, and in greenhouses and nurseries. Most of the remaining one-fourth of hired agricultural

⁹⁰ 2012 Census of Agriculture, *supra* note 46, at 245 (Table 1, State Summary Highlights: 2012).

⁹¹ *Id.* at 300 (Chapter 2, Table 7. Hired Farm Labor – Workers and Payroll: 2012).

⁹² *Id.* at 11 (Chapter 1, Table 4. Farm Production Expenses: 2012 and 2007).

⁹³ RURAL MIGRATION NEWS, *Projections, Mechanization*, <http://migration.ucdavis.edu/rmn/more.php?id=1804> (last visited Jan. 15, 2015).

workers work in raising livestock, such as beef and dairy cattle, swine, and poultry, including egg farms.

B. Different Worker Categories: Migrant and Settled Agricultural Workers, Direct-Hired and Contract Agricultural Workers, and Guest Workers

Migrant and Settled Agricultural workers

The agricultural workforce includes both migrant and settled workers. Migrants are workers who are absent from their permanent place of residence in order to seek employment in agricultural work, in contrast to those who are settled in or near the community in which they are employed.⁹⁴ Historically, migrant agricultural workers have comprised a major portion of the U.S. agricultural workforce. The LSC 1007(h) Study provided detailed information about the different migrant “streams” in the East, Midwest, and West.⁹⁵ In the late 1980s, somewhat over two in five (43%) agricultural workers were migrants. Their numbers increased after that, and by 1998 nearly three in five agricultural workers (59%) were migrants. Since then, however, their numbers have significantly declined, so that by 2011-2012 only 17% of agricultural workers were migrants.⁹⁶

Migrant farmworkers typically perform crop work (production of fruits, nuts, vegetables, melons, nursery products, etc.) or forestry tasks (such as tree planting) rather than livestock work. The percentage of farmworkers who are migrants varies widely across the country, with the highest in the East and the lowest in the West.

In general, migrant workers are more vulnerable than settled workers to unlawful practices by employers, especially because they are more dependent on employers for work, housing and transportation and more isolated geographically and socially. Migrant workers’ demographic characteristics also exacerbate their vulnerability. Compared to settled workers, migrant workers are younger; are more likely to be foreign born; are more likely to be recent immigrants; have lower educational attainment levels; are less likely to be proficient in English; are more likely to be indigenous to locations other than where they work; are more likely to be unaccompanied by any family members; and are more likely to be unauthorized.⁹⁷

⁹⁴ There is no universally accepted definition of a migrant farmworker as various researchers and federal agencies employ different definitions. This analysis follows the definition used in the Department of Labor’s National Agricultural Workers Survey (NAWS): a migrant is “a person who reported jobs that were at least 75 miles apart or who reported moving more than 75 miles to obtain a farm job during a 12-month period.” NAWS, *supra* note 17.

⁹⁵ 1007(h) Study, *supra* note 21, at 34.

⁹⁶ NAWS, *supra* note 17.

⁹⁷ NAWS, *supra* note 17.

Data from the Department of Labor’s National Agricultural Workers Survey (NAWS) reflect that migrant workers’ economic circumstances are generally worse than settled workers’ circumstances. Migrants generally have fewer weeks of farm employment annually; have lower incomes; are more likely to be poor; are more likely to live in substandard and crowded housing; and have less access to health care and other public services.⁹⁸

Direct-Hired and Contract Agricultural workers

Historically, a significant portion of the agricultural worker labor force has been recruited and employed by Farm Labor Contractors (FLCs). FLCs can range in size from a single individual (“crew leader”) to a large corporate entity, some of which are owned by individual growers or growers associations.

The description of the FLCs’ core functions in a 1974 Senate Report remains apt today:

Although the specific functions of the farm labor contractor, often called a “crew leader” or “crew pusher,” might vary from job to job, his role remains essentially the same – a bridge between the operator and the worker. In many instances, the contractor is not only the recruiter, hirer, and transporter, but acts as the supervisor, foreman, and paymaster as well. In addition, the contractor frequently controls housing and other vital aspects of the workers’ everyday needs. In the vast majority of cases, the crew leader is not only the link between the worker and the grower, but also acts as an intermediary with the non-farming community as well. In the latter role, the crew leader functions as a sort of cultural broker, mediating between the worker and the outside, often alien, community.⁹⁹

When FLCs do not directly perform these functions, they often have sub-contracts or informal relationships with other entities to provide necessary services.

Since the late 1990s, the number of agricultural workers employed by growers has increased and those employed by Farm Labor Contractors have fallen. For example, recent data from the NAWS show that from 1998-1999 to 2011-2012, direct-hire workers increased from 73% to 90% of crop workers while workers employed by contractors fell from 27% to 10%.¹⁰⁰ (These numbers do not include H2-A “guest workers” who are discussed below.)

Farmers often use FLCs to lower their production costs by outsourcing expenses for labor recruitment and supervision as well as the costs associated with housing and transporting

⁹⁸ NAWS, *supra* note 17.

⁹⁹ S.REP. NO.93-1295 (1974), *reprinted in* U.S.C.C.A.N. 6441, 6442.

¹⁰⁰ NAWS, *supra* note 17.

workers.¹⁰¹ However, FLCs typically face intense competition and narrow profit margins, which can create pressures to cut costs, including by means which are unlawful. Key provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) were enacted because of recognition of this problem.¹⁰²

NAWS data reflect that FLCs tend to hire the most vulnerable workers. For example, 97% of contract workers versus 70% of hired workers are foreign born; two-thirds (67%) of contract workers versus about one-third (34%) of hired workers cannot speak English; 76% of contract workers versus 46% of hired workers are undocumented; and contract workers are twice as likely as direct-hired workers to be migrants.¹⁰³ The great majority of contract employees are crop workers, although some may work in tree planting. Very few livestock workers are contract employees.

H-2A Temporary, Nonimmigrant Agricultural Workers

A significant number of non-immigrant, temporary agricultural workers are brought into the country each year through the H-2A program authorized under the Immigration and Nationalization Act and administered by the ETA Office of Foreign Labor Certification (OFLC).¹⁰⁴

OFLC certified 116,689 H-2A positions in FY2014. Those positions were concentrated in relatively few states. One-third (32%) were in three states: North Carolina, Florida, and Georgia.¹⁰⁵ These workers come from many different countries around the world, but over 90% are from Mexico. Virtually all H-2A workers are unaccompanied young men. Most have limited educational attainments levels and limited English proficiency. The great majority of these workers perform crop work.

The ETA minimum requirements regarding H-2A workers' wages, benefits, and working conditions typically are substantially better than the compensation and working conditions of

¹⁰¹ This dynamic is highlighted in California. The state's labor costs are a higher proportion of agricultural production expenses than they are in many other state; likewise, contract workers' percentage of the agricultural labor force in California are higher than they are many other state. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2013, Agricultural Workers, All Others*, <http://www.bls.gov/oes/current/oes452099.htm> (last visited Jan. 16, 2015).

¹⁰² H.R. REP. NO. 97-885 (1982), *reprinted in* U.S.C.C.A.N. 4547 (reporting on the Migrant and Seasonal Agricultural Worker Protection bill H.R. 7102, which later became Pub. L. 97-470 (now codified at 29 U.S.C. §§ 1801-1872)).

¹⁰³ NAWS, *supra* note 17.

¹⁰⁴ See Section VI.B. above for a description of the law's key provisions.

¹⁰⁵ U.S. DEP'T OF LABOR, EMP'T AND TRAINING ADMIN., OFFICE OF FOREIGN LABOR CERTIFICATION, H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM - SELECTED STATISTICS, FY 2014, *available at* http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2013_YTD_Q4_final.pdf.

migrant and contract workers. However, H-2A workers are extremely dependent on their employers and typically isolated from other communities.

C. Characteristics of the Agricultural Worker Population That Increase Their Vulnerability

Certain characteristics of the agricultural worker population and the circumstances in which they work can increase their vulnerability to exploitation. Those factors include (1) their social, cultural, and geographic isolation; (2) inadequate housing, access to which is often controlled by the employer; and (3) susceptibility to retaliation when they assert their rights.

Agricultural Workers' Social, Cultural, and Geographic Isolation

Geographic isolation. Agricultural workers are often physically isolated by virtue of living and working in remote, rural areas. This can make them an “invisible population” that is “hidden” from other communities.¹⁰⁶ This isolation reduces their ability to reach out to others, aside from their employers, for assistance with regard to employment, housing, health, family and other issues. The isolation is exacerbated by the fact that many agricultural workers do not own vehicles. Recent NAWS data show that 53% of agricultural workers drive their own car to work, while 26% rely on *raiteros* (private van operators) or labor buses, often owned by or associated with farm labor contractors or employers. Another 17% ride with other workers, 11% walk and 2% use other means, such as public transit.¹⁰⁷

The reliance on employers and *raiteros* for transportation can significantly limit mobility and autonomy, both in getting to their workplace and attending to basic needs, such as shopping,, accessing needed services, and entertainment. Moreover, employers' and *raiteros'* vehicles are often unsafe and the costs of these services reduce workers' already-limited resources.¹⁰⁸

Ethnicity and National Origin. The ethnicity and national origin of agricultural workers and their families can also increase their vulnerability to discrimination in the job and housing markets.¹⁰⁹

¹⁰⁶ Interview with Ruben Martinez. Ronald Javor also referred to farmworkers as physically “invisible.” Professor Peter Benson referred to farmworkers as a “hidden” population.

¹⁰⁷ BON APPETIT MGMT. CO. FOUND., *supra* note 50, at 24 (table 19).

¹⁰⁸ See, e.g., NAWS, *supra* note 17; Megan Horn & Nicholas Marritz, *Unfinished Harvest: The Agricultural Worker Protection Act at 30*, (Farmworker Justice, 2013); SOUTHERN POVERTY LAW CTR., *Who Are Farmworkers?* <http://www.splcenter.org/sexual-violence-against-farmworkers-a-guidebook-for-criminal-justice-professionals/who-are-farmworke> (last visited Jan. 16, 2015); and Cal. Rural Legal Assistance (CRLA) & Cal. Rural Legal Assistance Foun. (CRLAF), Agric. Worker Health Project, *Farmworker Transportation*, <http://www.agworkerhealth.org/RTF1.cfm?pagename=Transportation> (last visited Jan. 16, 2015).

¹⁰⁹ See, among others, U.S. Comm'n on Agric. Workers, *Report of the Commission on Agricultural Workers*, 50 and 105-106 (1992); Hous. Assistance Council, *No Refuge from the Fields: Findings from a Survey of Farmworker Housing Conditions in the United States* (Sept. 2001); Don Villarejo, Marc Schenker, Ann Moss Joyner, & Allan Parnell, *(Un)Safe At Home: The Health Consequences of Sub-*

Seventy-one percent (71%) of agricultural workers are foreign born, in contrast to 16% of all U.S. residents over 18 who are foreign born.¹¹⁰ Seventy-six percent (76%) of agricultural workers, compared to 17% of the total U.S. population, are Latino/Hispanic.¹¹¹ Nearly all (96%) of the foreign born workers are from Mexico. An increasing number of Mexican-born workers are from states in southern Mexico, such as Guerrero, Oaxaca and Chiapas, where the native language is not Spanish.

Immigration Status. The immigration status of agricultural workers also contributes to their relative vulnerability to exploitation. NAWS data indicate that 52% of crop workers are authorized to work in the United States.¹¹² The picture is complex, however, since 78% of agricultural worker children are citizens and 65% of agricultural worker spouses are authorized. Nearly one-fourth (24%) of agricultural worker families are “mixed status” families, with members who are authorized as well as members who are unauthorized.¹¹³

Literacy and Education. Agricultural workers are also often handicapped by lack of literacy and education as well as limited proficiency in English. Only 39% have schooling beyond the nine grade. In contrast, 96.5% of all U.S. adults 24 years or older, have completed the eighth grade.¹¹⁴ Only 33% of agricultural workers report they can speak English “well,” nearly as many (27%) reporting they cannot speak English at all. Of those workers not born in the U.S., only 3%

standard Farm Labor Housing (Cal. Rural Legal Assistance, June 2012); Southern Poverty Law Ctr., *Under Siege. Life for Low-Income Latinos in the South* (Southern Poverty Law Ctr. Rep., Apr. 2009); Susan Reed & Ilene Jacobs, *Serving Farmworkers* 38:5-6 (Clearinghouse Rev., Sept.-Oct. 2004); and “Effective Delivery of Legal Services to Agricultural Workers,” memorandum from NLADA Agric. Worker Project Grp. to Ronald S. Flagg, Gen. Counsel, and Bristow Hardin, Program Analyst (Dec. 8, 2014).

¹¹⁰ NAWS, *supra* note 17 and U.S. CENSUS BUREAU, 2012 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, *Table B05003: Sex By Age By Nativity And Citizenship Status*, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Jan. 16, 2015).

¹¹¹ NAWS, *supra* note 17 and U.S. CENSUS BUREAU, 2012 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, *Table B03002: Hispanic Or Latino Origin By Race*, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Jan. 16, 2015).

¹¹² NAWS, *supra* note 17.

¹¹³ NAWS, *supra* note 17.

¹¹⁴ NAWS, *supra* note 17 and U.S. CENSUS BUREAU, 2012 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, *Table DP02: Selected Social Characteristics In The United States*, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Jan. 16, 2015).

speaking English “well.”¹¹⁵ In contrast, only 4.5% of all U.S. households have no one age 14 and over who speaks English “very well.”¹¹⁶

Agricultural Workers’ Inadequate and Insecure Housing

Lack of adequate housing and in some cases reliance on the employer for housing exacerbate agricultural workers’ vulnerability to exploitation. It is widely recognized that much of agricultural workers’ housing remains substandard and fails to comply with local, state and federal requirements.¹¹⁷ The critical importance of housing in the agricultural economy was highlighted by the Commission on Agricultural Workers (CAW), jointly appointed by the Office

¹¹⁵ NAWS, *supra* note 17.

¹¹⁶ U.S. CENSUS BUREAU, 2012 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, *Table S1602: No One Age 14 And Over Speaks English Only Or Speaks English ‘Very Well,’* <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Jan. 16, 2015).

¹¹⁷ The research on farmworker housing is considerable. See Thomas A. Arcury, Chensheng Lu, Haiying Chen, & Sara A. Quandt, *Pesticides present in migrant farmworker housing in North Carolina*, (Am. J. of Indus. Med., 51:312–22, March 2014); Werner E. Bischoff, Maria Weir, Phillip Summers, Haiying Chen, Sara A. Quandt, Amy K. Liebman, & Thomas A. Arcury, *The Quality of Drinking Water in North Carolina Farmworker Camps*, (Am. J. Pub. Health 102(10):49–54, 2012); Am. Pub. Health Ass’n, *Policy #20118, Improving Housing for Farmworkers in the United States Is a Public Health Imperative* (Nov. 2011); U.S. Gov’t Accountability Office GAO/RCED-00-40, *Pesticides: Improvements Needed to Ensure the Safety of Farmworkers and Their Children* (2000); Hous. Assistance Council, *Housing Conditions for Farmworkers* (Rural Research Rep., Sept. 2013); Mich. Civil Rights Comm’n, *A Report on the Conditions of Migrant and Seasonal Farmworkers in Michigan* (March 2010); Quirina M. Vallejos, Sara A. Quandt, Joseph G. Grzywacz, Scott Isom, Haiying Chen, Leonardo Galván, Lara Whalley, Arjun B. Chatterjee, & Thomas A. Arcury, *Migrant farmworkers’ housing conditions across an agricultural season in North Carolina* (Am. J. Indus. Med., 54: 533–44, July 2011); Don Villarejo, Marc Schenker, Ann Moss Joyner, & Allan Parnell, *(Un)Safe At Home: The Health Consequences of Sub-standard Farm Labor Housing* (Cal. Rural Legal Assistance, June 2012); Don Villarejo, *Health-Related Inequities Among Hired Farm Workers and the Resurgence of Labor-intensive Agriculture* (Health Program, The Kresge Found., Troy, Michigan, 2012); Don Villarejo, *California’s Hired Farmworkers Move to the Cities: The Outsourcing of Responsibility for Farm Labor Housing* (Cal. Rural Legal Assistance Priorities Conference, Asilomar, Cal., 2014); Lance George, Mary Lee Hall, Ilene J. Jacobs, Ann Moss Joyner, Ed Kissam, Shelley Latin, Allan Parnell, Virginia Ruiz, Nargess Shadbeh, & Janet Tobacman, *Farmworker Housing Standards and Regulations, Their Promise and Limitations, and Implications for Farmworker Health* (Key Rep. 1 from the Transdisciplinary Conference on Farmworker Housing Quality and Health, Crystal City, Va., Nov. 11, 2014); and Sara A. Quandt, Carol Brooke, Kathleen Fagan, Allyson Howe, Stephen A. McCurdy, Lisel Holdenried, Thomas K. Thornburg, & Don Villarejo, *Farmworker Housing and Its Impact on Health* (Key Rep. 2 from the Transdisciplinary Conference on Farmworker Housing Quality and Health, Crystal City, Va., Nov. 11, 2014). The inadequacy of farmworkers’ housing was also identified by the following interviewees: Professor Thomas A. Arcury; Professor Peter Benson; Bruce Goldstein, Esq.; Professor Joan Flocks; Ronald Javor, Esq.; Ed Kissam, Ph.D.; Ruben Martinez, Ph.D.; Professor Marc Schenker; and Don Villarejo, Ph.D.

of the President and the U.S. Congress, in 1993: “From an economic perspective, the *linchpin* of farmworkers’ economic strategies is access to affordable housing.” Without it, it is more difficult for workers “to cope with the uncertainty and intermittent employment of farm work.” However, the Commission found that “the number of farmworkers in need of housing exceeds the available housing stock. The result is overcrowding, the occupation of substandard units and homelessness. . . . [T]he vast majority of hired farmworkers are housed in seriously inadequate conditions. Most quarters are overcrowded Other problems include use of dilapidated structures and of buildings not intended for residential use, such as garages and storage sheds.”¹¹⁸

A recent analysis of farmworker housing research concluded that: “[t]here is no evidence in the [most recent] government report or in the peer-reviewed literature to indicate that the housing situation for hired farm workers on a national basis has changed appreciably in the past 20 years.”¹¹⁹ A 2008 USDA report noted that “farmworkers often confront substandard quality, crowding, deficient sanitation, proximity to pesticides (which is especially harmful for children), and lack of inspection and enforcement.”¹²⁰ Based on a review of the occupational safety and health research programs addressing agricultural workers, the National Research Council reported that “virtually all recent health survey research have [sic] demonstrated that a large share of this workforce is still experiencing unwarranted risks to health that are associated with their housing conditions.”¹²¹

This is reflected as well in Housing Assistance Council reports that 31% of agricultural workers live in crowded housing, over six times higher than the national average, and that “substandard and structurally deficient conditions are endemic to farmworker housing.” They estimate that one-third of farmworker housing and 44% of manufactured housing (mobile homes) are moderately or severely substandard, and about one in five units are both crowded and substandard.¹²² Moreover, farmworker housing quality is frequently impaired by agricultural chemicals, as studies “find evidence of pesticides in and about the home, often in rugs, furnishings, and often attributable to contaminated work clothing being brought home.”¹²³

¹¹⁸ U.S. COMM’N ON AGRIC. WORKERS, REPORT OF THE COMMISSION ON AGRICULTURAL WORKERS, 50 and 105-106 (1993).

¹¹⁹ DON VILLAREJO, MARC SCHENKER, ANN MOSS JOYNER, & ALLAN PARNELL, (UN)SAFE AT HOME: THE HEALTH CONSEQUENCES OF SUB-STANDARD FARM LABOR HOUSING (Cal. Rural Legal Assistance, June 2012).

¹²⁰ KANDEL, *supra* note 52, at 28.

¹²¹ VILLAREJO ET AL., *supra* note 119, at 6.

¹²² HOUS. ASSISTANCE COUNCIL, HOUSING CONDITIONS FOR FARMWORKERS 6-7 (Rural Research Rep. Sept. 2013). The 31% crowded measures exclude barracks and dormitories that are designed for high occupancy.

¹²³ Sara A. Quandt, Carol Brooke, Kathleen Fagan, Allyson Howe, Stephen A. McCurdy, Lisel Holdenried, Thomas K. Thornburg, & Don Villarejo, *Farmworker Housing and Its Impact on Health* (Key Rep. 2 from the Transdisciplinary Conference on Farmworker Housing Quality and Health, Crystal City, Va., Nov. 11, 2014).

The Agricultural Worker Population's Vulnerability to Employer Retaliation

The substantial control that employers' wield over agricultural workers and their families can limit workers' willingness to complain about or seek redress for violations of their rights. In the context of a farm labor surplus – with an estimated 2 to 2.5 workers for each year-round full-time equivalent job – the loss of current future employment can have major negative consequences.

As noted above GAO reports that “disincentives” such as job loss and other retaliatory practices result in the underreporting of occupational injuries and hazards in agriculture. A wide range of cases litigated since the late 1990s by the U.S. Equal Employment Opportunity Commission documented the nature and pervasiveness of retaliatory practices.¹²⁴ Interviews with former officials of government enforcement agencies highlight similar patterns. Based on her experience at WHD and the Minnesota Department of Commerce, Nancy Lippenk stated that retaliatory practices make farmworkers “afraid to come forward; they are afraid to complain.” And Ron Javor reported that his three decades with the California Department of Housing and Community Development demonstrated that agricultural workers are “afraid to speak up.” Several others interviewed for the study also highlighted the significance of retaliation.¹²⁵

¹²⁴ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECTED LIST OF PENDING AND RESOLVED CASES INVOLVING FARMWORKERS FROM 1999 TO THE PRESENT (AS OF AUGUST 2014), http://www.eeoc.gov/eeoc/litigation/selected/farmworkers_august_2014.cfm (last visited January 15, 2015).

¹²⁵ These included Professor Thomas A. Arcury; Professor Peter Benson; Bruce Goldstein, Esq.; Ed Kissam, Ph.D.; Ruben Martinez, Ph.D.; Gregory Schell, Esq.; Professor Marc Schenker; Cynthia Schneider, Esq.; and William Tamayo, Esq. Professor Cindy Hahamovitch observed that because the threat of retaliation made workers unlikely to speak up, the “cases that do come up are only tip of the iceberg.”

SECTION VII

SPECIALIZED EXPERTISE AND SERVICES PROVIDED BY MIGRANT GRANTEES

LSC's Migrant Grantees employ delivery techniques that have been developed over decades to respond to the special characteristics of agricultural workers and the legal needs that result from those characteristics. The evolution of the system reflects the Legal Services Corporation Performance Criteria that were promulgated "to guide LSC's assessments of program performance generally and in the competitive grants process" and to enable the Corporation to best fulfill its "statutory responsibility to ensure the provision of economical and effective delivery of legal assistance by Legal Services programs to eligible persons in all parts of the country, including U.S. territories."¹²⁶ The Performance Criteria frame the following discussion of the ways that grants for specialized delivery approaches and legal expertise ensure that the unique access barriers and legal needs of the LSC-eligible agricultural worker population are addressed most effectively and efficiently.

The Performance Criteria are:

- Performance Area One. Effectiveness in identifying the most pressing civil legal needs of low-income people in the service area and targeting resources to address those needs.
- Performance Area Two. Effectiveness in engaging and serving the low-income population throughout the service area.
- Performance Area Three. Effectiveness of legal representation and other program activities intended to benefit the low-income population in the service area.
- Performance Area Four. Effectiveness of governance, leadership and administration.

A. Performance Area One. Effectiveness in identifying the most pressing civil legal needs of low-income people in the service area and targeting resources to address those needs.

Performance Area Two. Effectiveness in engaging and serving the low-income population throughout the service area.

Because core elements of Performance Areas One and Two are significantly entwined, farmworkers programs' activities in these areas are discussed in tandem. The most important elements of these Performance Areas concern farmworker programs' specialized expertise and delivery related to linguistic and cultural competence; engagement to foster clients' trust and confidence and to inform them of their legal rights; the identification of clients' most pressing

¹²⁶ LEGAL SERVICES CORPORATION, LEGAL SERVICES CORPORATION PERFORMANCE CRITERIA, REFERENCED TO THE ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID 1 (ed. 2007), *available at* <http://www.lsc.gov/sites/default/files/LRI/LSCPerformanceCriteriaReferencingABASTandards.pdf>.

legal needs and development and implementation of strategies to address those needs most effectively and economically; and facilitating clients' access to program services.

Pertinent information about farmworker program's work in these areas was derived from responses to the LSC Migrant Grantee Survey about legal needs of the agricultural worker population,¹²⁷ interviews with officials of state and federal agencies responsible for the enforcement of laws affecting the rights of the agricultural worker population and from LSC grantees' annual Case Services Reports (CSR).

LSC Migrant Grantees Survey Results. In their responses to the LSC survey, Migrant Grantees identified the capacities and strategies that they considered necessary and that they employed to serve the agricultural worker population "most effectively and efficiently."¹²⁸ For example, all (100%) of the Migrant Grantees considered the following techniques necessary and likewise incorporated them into their delivery approaches:

- Flexible staff work hours (for outreach in non-work hours and travel to remote areas);
- Outreach at labor camps and other places workers live;
- Outreach at locations other than where workers work or live;¹²⁹
- Partnerships with community organizations and agencies that served the agricultural worker population;
- Bilingual and multilingual staff;¹³⁰
- Staff with cultural competence with the agricultural worker population;¹³¹ and
- Community legal education.

Nearly all the Migrant Grantees considered it necessary provide special intake procedures (97%) and to make extensive use of technology (87%), such as special toll-free lines, cell/text phones, and laptops, to serve clients in remote areas (87%). Nearly all Migrant Grantees, in fact, use these approaches (97% use special intake procedures, 96% make extensive use of

¹²⁷ As noted in Section II, all of the LSC Migrant Grantees responded to the survey.

¹²⁸ The following information is based on the responses to question 1. The percentages do not include the small number of "don't know" responses.

¹²⁹ Because of the risk of employer retaliation, farmworker programs very seldom conduct outreach at farmworkers' work sites.

¹³⁰ LSC 2012 Grant Activity Reports (GAR) data indicate that of the total FTE staff of migrant programs, 82% are bilingual or multilingual. In contrast, 25% of the total basic field program FTE advocate staff are multilingual/bilingual.

¹³¹ To foster cultural competence programs conduct on-going training and also have staffing diversity that reflects the diversity of the farmworker population. GAR data from 2012 indicate that 53% the total FTE advocate staff of migrant programs, vs. 17% of basic field advocate staff, are Latino/Hispanic.

technology). Finally, nearly all considered work with enforcement agencies necessary and incorporated that work in their delivery model (90% and 89%, respectively).

LSC Basic Field Grantees Survey Results. In their responses to the LSC Basic Field Survey, basic field grantees also indicated that special delivery approaches were needed to serve the agricultural worker population effectively and efficiently.¹³² Nearly all indicated the need to have bilingual and multilingual staff (97%) and staff with cultural competence with the agricultural worker population (93%) were required. Nine in ten also indicated that work with community partners and agencies (91%) and community education (90%) were needed.

Interview Results. Interviews with four top officials of state and federal agencies responsible for enforcing the rights of the agricultural worker population provide insights into the effectiveness of farmworker programs' engagement with the agricultural worker population and their knowledge of that population's legal needs. All of these interviewees were officials with federal agencies (one continues in that capacity); two were also officials with state agencies.¹³³

All of these officials indicated that enforcement agencies lack the staffing to effectively enforce the relevant laws and fulfill their missions. They emphasized that enforcement agencies' staffing constraints are compounded by their insufficient connections with and trust within the communities they are expected to serve. These limitations restrict enforcement agencies' ability to identify violations of the legal rights of the agricultural worker community and to develop strategies to most effectively prevent those violations. The officials concurred with

¹³² The following is based on responses to question 10. The percentages do not include "don't know" responses. Also, the members of the California Project Directors Association and the Legal Aid Association of Michigan sent letters to LSC President James J. Sandman indicating that specialized services and assistance were needed to serve farmworkers. The letters recommended that LSC continue providing designated funding for these services. "Support for Dedicated Agricultural Worker Funding," letter from California Project Directors Association (May 21, 2014) and "Funding for Legal Assistance for Farmworkers," letter from Ann Rout & Deirdre Weir, Co-Chairs, Legal Services Association of Michigan (June 9, 2014).

¹³³ Interviewees included Nancy Lippenk, former Assistant Commissioner of Enforcement, Minnesota Commerce Department, and former Acting Administrator of the United States Department of Labor, Wage and Hour Division; William Tamayo, Regional Attorney, U.S. Equal Employment Opportunity Commission, San Francisco Office; John Trasviña, Dean of University of San Francisco School of Law, former U.S. Department of Justice Special Counsel for Immigration Related Unfair Employment Practices and former Assistant Secretary, U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity; and, Ellen Widess, former Chief, California Occupational Safety and Health Administration, and former Director, Texas Department of Agriculture, Pesticide Program.

one interviewee's assessment that without the assistance of legal services programs and other stakeholders "it is impossible to ensure the law is enforced."¹³⁴

These officials stressed the importance of farmworker programs' assistance in two major areas. First, farmworker programs enhance agencies' abilities to develop necessary connections with agricultural worker communities. The knowledge of where agricultural workers work and live is only one aspect of that. They considered no less important farmworker programs' linguistic and cultural competence and the trust they have within agricultural worker communities. Second, farmworker programs identify the legal needs of the agricultural worker population and help identify employers with patterns of illegal practices. They were referred to as agencies' "eyes and ears on the ground." Farmworker programs train agency staff on the major laws and regulations affecting agricultural workers and have partnered with agencies in training the community and employers about the laws.¹³⁵

B. Performance Area Three. Effectiveness of legal representation and other program activities intended to benefit the low-income population in the service area.

Performance Area Four. Effectiveness of governance, leadership and administration

Performance Area Three and Performance Area Four are discussed together because they both have particular relevance for assessing the need for specialized legal expertise and delivery approaches. Those criteria relate to the coherence and comprehensiveness of the delivery system and programs' participation in an integrated delivery system.

The most pertinent elements from the Performance Criteria Area Three relate to programs' capacities and activities with respect to the linguistic and cultural competence of staff; outreach and community education; intake; and substantive expertise. The first three of these were discussed in the previous section so the following focuses on issues related to specialized expertise.

LSC does not collect systematic data regarding the expertise of grantees' staff in specific substantive legal areas. However, in their responses to the Migrant Grantee Survey agricultural

¹³⁴ Interview with John Trasviña. William Tamayo observed that legal services programs are "indispensable" to the EEOC's success in prosecuting cases on behalf of farmworker women victimized by sexual violence and sexual assault.

¹³⁵ These officials also indicated that the assistance farmworker programs provided their agencies required the capacities and strategies employed by farmworker programs and that the absence of designated funding for special services could compromise the effectiveness and efficiency of legal assistance to farmworkers. They noted that designated funding would best ensure that providers had the specialized capacities and expertise to address the agricultural worker population's unique access barriers and legal needs. These views were echoed by others interviewed for this study, including Thomas A. Arcury, Joan Flocks, Ruben Martinez, Cesar Britos, Cynthia Schneider, and Rebecca Smith.

worker programs identified the substantive areas in which expertise was needed to “effectively and efficiently” meet the legal needs of the agricultural worker population.

Table VII.a shows the percent of respondents who indicated that specialized expertise was needed in the identified areas. As those data show, virtually all – between 97% and 100% –of the respondents indicated that specialized expertise was required regarding laws pertaining to agricultural workers’ pay and working conditions: Migrant and Seasonal Agricultural Workers Protection Act (AWPA)-related issues; wage claims and other Fair Labor Standards Act (FLSA)-related issues; Occupational Safety and Health Act (OSHA)-related issues; and Environmental Protection Agency enforcement-related issues (*e.g.*, Worker Protection Standard, pesticides). (As noted in Section V, expertise in AWPA is of singular importance given that the employment contract provisions may cover issues related to wages, employment conditions, and housing and transportation standards.)

Table VII.a
Legal Problem Areas Affecting Farmworkers that Require Specialized Expertise
Percent (%) of Migrant Grantee Survey Respondents Indicating that Specialized Expertise
Is Needed to Address the Needs of the Farmworker Population Effectively

Legal Problem Type	Specialized Expertise Needed
Migrant and Seasonal Agricultural Workers Protection Act (AWPA)-related issues	100%
Immigration/naturalization	100%
Wage claims and other Fair Labor Standards Act (FLSA)-related issues	97%
Occupational Safety and Health Act (OSHA)-related issues	97%
Environmental Protection Agency (EPA) enforcement-related issues (Worker Protection Standard/pesticides)	97%
Other employment related (<i>e.g.</i> , worker's compensation)	96%
Human trafficking	93%
Taxes	93%
Child labor	89%
Health (not OSHA-related or EPA-related)	88%
Civil rights (<i>e.g.</i> , sexual harassment, employment discrimination)	87%
Education	81%
Housing (not covered by AWPA)	81%
Public benefits (other than unemployment insurance)	79%
Youth (other than child labor)	79%
Unemployment insurance (UI)	75%
Domestic violence	75%
Consumer	74%
Family (other than domestic violence)	67%

All (100%) of respondents deemed specialized expertise necessary to protect the rights of eligible agricultural workers and their families on issues related to immigration and naturalization, and high percentages identified the need for this expertise with respect to human trafficking (93%), child labor (89%) and civil rights-related crimes such as job discrimination and sexual harassment (87%). A similar number consider this expertise necessary for health-related issues that did not arise from violations of OSHA or EPA worker protection standards.

All (100%) of the respondents noted that training in agricultural workers' legal needs, laws and delivery approaches are necessary to that ensure programs maintain the requisite skills and knowledge. All also indicated that the mobility of the agricultural worker population and the impact of judicial rulings and enforcement activities around the country required farmworker advocates to maintain on-going coordination and communication with the advocates serving agricultural workers in other states.

In their responses to the Basic Field Grantee Survey, basic field grantees likewise indicated that specialized legal expertise was necessary to serve the agricultural worker population “effectively and efficiently.”¹³⁶ For example, about nine in ten indicated the following types of expertise were needed: access to specialized training regarding agricultural worker issues/delivery (90%); coordination and communication with advocates providing services to agricultural workers in other states (88%); and expertise regarding federal laws and state laws with special provisions affecting agricultural workers (87%). Large majorities likewise indicated that work with enforcement agencies (84%) and federal litigation experience (78%) were needed.

The distribution of cases closed by Migrant Grantees provides indicators of the extent to which these grantees' advocacy (1) focuses on the particular legal needs of the agricultural worker population and (2) is concentrated in the substantive areas that require special expertise.

Tables VII.b and VII.c provide these data for 2013. Table VII.b shows that over 89% of the cases handled by Migrant Grantees focused on issues unique to agricultural workers that require specialized expertise. Those include in particular representation associated with employment, civil and individual rights, and health and safety. Table VII.c shows that only about 11% of the cases handled by Migrant Grantees focused on more general issues.

¹³⁶ Basic Field Grantee Survey, question 10, attached as Appendix F (“don’t know” responses are excluded).

Table VII.b
Distribution of Migrant Programs' Cases among Legal Problem Areas
Special Farmworker Focus

Legal Problem Type	Percent of Cases
Farmworker-Focused	
Wage claims/other FLSA	21.8%
Agricultural worker (not FLSA), employee rights, other: includes cases related to AWPA, OSHA, EPA (e.g., Worker Protection Standard), child labor	25.1%
Civil rights (e.g., sexual harassment, employment discrimination)	6.0%
Taxes (not Earned Income Tax Credit)	1.5%
Individual rights (immigration/naturalization, human trafficking)	12.7%
Health (not OSHA-related or EPA-related)	5.6%
Education	1.8%
Farmworker public benefits: workers compensation, unemployment insurance, food stamps	14.8%
Farmworker-focused as percent of total cases	89.3%

Table VII.c
Distribution of Migrant Programs' Cases among Legal Problem Areas
General Focus

Legal Problem Type	Percent of Cases
General Issues	
Consumer	1.2%
Family	2.0%
Non-farmworker public benefits: Social Security (not SSDI), SSDI, SSI, state and local income maintenance, TANF, veterans benefits	2.2%
Housing	3.1%
Youth	0.2%
Other individual rights	0.8%
Miscellaneous	1.2%
General issues as percent of total cases	10.7%

SECTION VIII

THE FARMWORKER POPULATION ON WHICH TO BASE THE ALLOCATION OF LSC FUNDING FOR FARMWORKER LEGAL SERVICES

The data and analyses set forth in the preceding sections support the conclusion that migrant and seasonal crop workers, livestock workers, and certain forestry workers,¹³⁷ and the dependents of each of these groups, share legal needs that can be most effectively and efficiently addressed with specialized expertise and delivery approaches. Therefore, LSC management recommends that these workers and their dependents should comprise the population that provides the basis for allocating farmworker legal services funding. The June 19, 2000, letter of John McKay, LSC President, stated that farmworker programs should serve this farmworker population as well as workers employed in meat and poultry slaughtering plants. Although meat and poultry workers share some of the same legal needs as farmworkers, LSC management believes that the foregoing data and analyses support the conclusion that they should not be included in the population on which to base farmworker legal services funding allocations. The reasoning for these recommendations follows.

The Farmworker Population: Crop Workers, Livestock Workers and Forestry Workers and Their Dependents

Although the agricultural workforce is not monolithic, crop workers, livestock workers and forestry workers, and their dependents share multiple, common characteristics that create access barriers and legal needs that can be addressed most effectively and efficiently with specialized legal expertise and delivery approaches. First, the agricultural workforce shares the distinctive characteristics of agricultural work and the agricultural labor market described in Section V. Agriculture is the most dangerous industrial sector in the U.S. Agricultural work is insecure, temporary and low-paid. A labor surplus – there are 2 to 2.5 farm workers for each year-round equivalent job – contributes to high unemployment. The seasonality of work means that very few workers have year-round work. The industry median wage is only 55% that of all full-time wage and salary workers.

Second, as Section V also discussed, the agricultural labor market is governed by a unique body of laws and regulations. Some that apply solely to agricultural workers and others that exclude agricultural workers from legal protections generally afforded to other workers and thereby directly affect the legal advice and strategies applicable to such workers. In the latter category, for example, the Fair Labor Standards Act (FLSA) requires employers to pay workers for all hours they work and to pay workers at least the Federal minimum wage. However, farms with fewer than 11 employees – which employ nearly half (46%) of all hired workers – are exempt from the federal minimum wage requirement. FLSA also exempts agricultural employers from paying overtime and from child labor requirements that apply to other employers. Provisions

¹³⁷ Logging workers are generally not included with other forestry workers.

of the Occupational Health and Safety Act (OSHA) require employers to meet field sanitation standards (e.g., drinking water, toilets) and temporary labor camp housing standards and provide safety equipment. However, appropriation riders prohibit Federal health and safety inspections at small farms without temporary labor camps and also exempt those establishments from OSHA's worker protection provisions. Agricultural employers are also exempt from the National Labor Relations Act (NLRA), which protects workers' rights associated with collective bargaining to improve the terms and conditions of employment. At the same time, other laws create a legal framework unique to agriculture. One federal law, the Migrant and Seasonal Agricultural Worker Protection Act (AWPPA), is designed specifically to protect the rights of agricultural workers. Section H-2A of the Immigration and Nationality Act authorizes growers to hire "temporary, nonimmigrant" guest workers (H-2A workers) when they demonstrate there are not sufficient U.S. workers qualified and available to perform the needed work.

Third, the farmworker population is geographically, socially, and culturally isolated. (See Section VI.) Job sites and employer-provided housing are often in remote locations. Off-farm housing accessed through the private market is often located in enclaves isolated from non-farmworker communities. And many farmworkers lack their own vehicles. Social and cultural isolation compounds this geographic isolation. A large majority of farmworkers have very low educational attainment levels and low English language proficiency. A large majority are Latino/Hispanic and foreign-born. About half of farmworkers are authorized to work in the U.S., although most children of unauthorized parents are citizens.

The combination of these factors creates access barriers and legal needs that are unique to the agricultural worker population. Tailored special delivery approaches and specialized legal expertise are necessary to meet this population's legal needs most effectively and economically. Accordingly, it is appropriate that crop workers, livestock workers and forestry workers, and their dependents, should be included in the "farmworker population" used for the allocation of LSC funding for farmworker legal services.

Meat and Poultry Processing Plant Workers

Workers employed in meat and poultry slaughtering plants have similar characteristics to the farmworker population and can be vulnerable and subjected to the same type of illegal and exploitive practices that farmworkers experience.¹³⁸ They share many of the same demographics with regard to race and ethnicity, educational levels and rural isolation. Meat and poultry plant workers may also have claims such as wage theft, violations of worker safety and health protections, discrimination based race and national origin, sexual violence and

¹³⁸ For an informative analysis of the meat and poultry processing workforce and the challenges they face, see HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS* (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

violence, trafficking and other illegal practices similar to claims which farmworkers frequently advance.

For several reasons, however, LSC management recommends that meat and poultry processing plant workers do not have the type of access challenges and legal needs that warrant their inclusion in the population count used to allocate funding for farmworker legal services.¹³⁹ Most significantly, workers in this industry have the rights and protections from laws such as FLSA, the OSH Act, and the NRLA that are denied to agricultural workers. Employment of meat and poultry workers is far less seasonal and sporadic, unemployment is much lower, and wages are higher in the meat and poultry processing industry than in agriculture.¹⁴⁰ Finally, the tasks performed by meat and poultry processing plant workers differ significantly from those performed by agricultural workers. These are among the reasons that the meat and poultry industry is defined by the Census Bureau's North American Industry Classification System as manufacturing, not agriculture.

¹³⁹ Several individuals interviewed for the study indicated that the differences in legal needs of meat and poultry processing plant workers and the agricultural worker population were greater than their similarities. They indicated that because of those differences meat and poultry processing plant workers should not be included in the population count that provided the basis for funding for specialized services to the agricultural worker population. Interviewees included: Thomas A. Arcury, David Griffith, Nancy Lippenk, Ruben Martinez, Don Villarejo, Ellen Widess, Ed Kissam, Gregory Schell, and Cynthia Schneider.

¹⁴⁰ For example, in 2012 the median hourly wages and median annual earnings of meat and poultry processing workers were 33% higher than both the median hourly wages and median annual earnings of crop workers and laborers. *See data at:* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2013, 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse*, <http://www.bls.gov/oes/current/oes452092.htm> (last visited Jan. 20, 2015) and U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages, May 2013, 51-3023 Slaughterers and Meat Packers*, <http://www.bls.gov/oes/current/oes513023.htm> (last visited Jan. 20, 2015).

SECTION IX

UPDATED COUNT OF THE AGRICULTURAL WORKER POPULATION

The national and state-by-state estimates of the LSC-eligible agricultural worker population provided to LSC by the Department of Labor Employment and Training Administration (ETA) are summarized below. More details about the estimates and the methodology used to develop them are provided in Appendix A.

Table IX.a and Table IX.b show the ETA estimates as well as the estimates currently used for allocating Migrant Grants (“Current Estimate”). Both tables provide the following information:

- The estimated population of the LSC-eligible agricultural worker population nationally and in each state.
- Each state’s percentage share of the national LSC-eligible agricultural worker population.
- The differences between the ETA estimate and the Current Estimate.

Table IX.a provides these data in alphabetical order by state name, Table IX.b. provides these data in the order of the change in size (in percentage terms) of states’ respective shares of the total national population.

As these data show, the ETA estimate of the total LSC-eligible agricultural worker population national population is 1,553,003; 4.13% less than the estimate currently used of 1,619,982. The magnitude of the changes at the state level varies, in many cases significantly.

Table IX.a
LSC-Eligible Agricultural Worker Population by State
Current Population Estimates and Department of Labor
Employment and Training Administration (ETA) Estimates
In Alphabetical Order by State

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Alabama	4,712	0.291%	13,120	0.845%	8,408	178.4%
Alaska	0	0.000%	1,485	0.096%	1,485	n/a
Arizona	21,265	1.313%	40,135	2.584%	18,870	88.7%
Arkansas	11,321	0.699%	13,245	0.853%	1,924	17.0%
California	378,096	23.340%	323,521	20.832%	(54,575)	-14.4%
Colorado	21,272	1.313%	27,458	1.768%	6,186	29.1%
Connecticut	2,386	0.147%	8,889	0.572%	6,503	272.5%
Delaware	3,556	0.220%	1,472	0.095%	(2,084)	-58.6%
Florida	128,633	7.940%	91,727	5.906%	(36,906)	-28.7%
Georgia	56,155	3.466%	28,820	1.856%	(27,335)	-48.7%
Hawaii	0	0.000%	12,701	0.818%	12,701	n/a
Idaho	26,771	1.653%	32,852	2.115%	6,081	22.7%
Illinois	35,754	2.207%	35,394	2.279%	(360)	-1.0%
Indiana	16,285	1.005%	26,006	1.675%	9,721	59.7%
Iowa	5,404	0.334%	45,938	2.958%	40,534	750.1%
Kansas	0	0.000%	29,978	1.930%	29,978	n/a
Kentucky	6,096	0.376%	25,017	1.611%	18,921	310.4%
Louisiana	3,945	0.244%	16,849	1.085%	12,904	327.1%
Maine	10,281	0.635%	12,264	0.790%	1,983	19.3%
Maryland	13,022	0.804%	5,729	0.369%	(7,293)	-56.0%
Massachusetts	2,384	0.147%	9,004	0.580%	6,620	277.7%
Michigan	86,214	5.322%	43,522	2.802%	(42,692)	-49.5%
Minnesota	28,656	1.769%	38,462	2.477%	9,806	34.2%
Mississippi	8,174	0.505%	13,991	0.901%	5,817	71.2%
Missouri	11,668	0.720%	27,461	1.768%	15,793	135.4%

Table IX.a (Continued)
LSC-Eligible Agricultural Worker Population by State
Current Population Estimates and Department of Labor
Employment and Training Administration (ETA) Estimates
In Alphabetical Order by State

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Montana	7,818	0.483%	13,854	0.892%	6,036	77.2%
Nebraska	6,056	0.374%	31,440	2.024%	25,384	419.2%
Nevada	0	0.000%	5,740	0.370%	5,740	n/a
New Hampshire	1,424	0.088%	3,845	0.248%	2,421	170.0%
New Jersey	17,281	1.067%	8,008	0.516%	(9,273)	-53.7%
New Mexico	12,509	0.772%	19,564	1.260%	7,055	56.4%
New York	39,645	2.447%	38,244	2.463%	(1,401)	-3.5%
North Carolina	76,764	4.739%	51,741	3.332%	(25,023)	-32.6%
North Dakota	16,602	1.025%	16,851	1.085%	249	1.5%
Ohio	18,042	1.114%	31,834	2.050%	13,792	76.4%
Oklahoma	8,963	0.553%	15,574	1.003%	6,611	73.8%
Oregon	79,782	4.925%	60,176	3.875%	(19,606)	-24.6%
Pennsylvania	23,739	1.465%	20,234	1.303%	(3,505)	-14.8%
Puerto Rico	41,642	2.571%	7,098	0.457%	(34,544)	-83.0%
Rhode Island	253	0.016%	988	0.064%	735	290.5%
South Carolina	28,330	1.749%	13,547	0.872%	(14,783)	-52.2%
South Dakota	0	0.000%	15,572	1.003%	15,572	n/a
Tennessee	9,084	0.561%	17,928	1.154%	8,844	97.4%
Texas	198,948	12.281%	83,809	5.397%	(115,139)	-57.9%
Utah	9,715	0.600%	10,247	0.660%	532	5.5%
Vermont	1,161	0.072%	4,880	0.314%	3,719	320.3%
Virginia	22,589	1.394%	21,058	1.356%	(1,531)	-6.8%
Washington	104,545	6.453%	79,936	5.147%	(24,609)	-23.5%
West Virginia	0	0.000%	3,792	0.244%	3,792	n/a
Wisconsin	13,040	0.805%	45,482	2.929%	32,442	248.8%
Wyoming	0	0.000%	6,521	0.420%	6,521	n/a
Total U.S.	1,619,982	100.000%	1,553,003	100.000%	(66,979)	-4.13%

Table IX.b
LSC-Eligible Agricultural Worker Population by State
Current Population Estimates and Department of Labor
Employment and Training Administration (ETA) Estimates
In Order of Change in Size of Percentage (%) Change by State

STATE	Current Estimate		ETA Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Alaska	0	0.000%	1,485	0.096%	1,485	n/a
Hawaii	0	0.000%	12,701	0.818%	12,701	n/a
Kansas	0	0.000%	29,978	1.930%	29,978	n/a
Nevada	0	0.000%	5,740	0.370%	5,740	n/a
South Dakota	0	0.000%	15,572	1.003%	15,572	n/a
West Virginia	0	0.000%	3,792	0.244%	3,792	n/a
Wyoming	0	0.000%	6,521	0.420%	6,521	n/a
Iowa	5,404	0.330%	45,938	2.958%	40,534	750.1%
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Missouri	11,668	0.720%	27,461	1.768%	15,793	135.4%
Tennessee	9,084	0.560%	17,928	1.154%	8,844	97.4%
Arizona	21,265	1.310%	40,135	2.584%	18,870	88.7%
Montana	7,818	0.480%	13,854	0.892%	6,036	77.2%
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Mississippi	8,174	0.500%	13,991	0.901%	5,817	71.2%
Indiana	16,285	1.010%	26,006	1.675%	9,721	59.7%

Table IX.b (Continued)
LSC-Eligible Agricultural Worker Population by State
Current Population Estimates and Department of Labor
Employment and Training Administration (ETA) Estimates
In Order of Change in Size of Percentage (%) Change by State

STATE	Current Estimate		ETA Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
New Mexico	12,509	0.770%	19,564	1.260%	7,055	56.4%
Minnesota	28,656	1.770%	38,462	2.477%	9,806	34.2%
Colorado	21,272	1.310%	27,458	1.768%	6,186	29.1%
Idaho	26,771	1.650%	32,852	2.115%	6,081	22.7%
Maine	10,281	0.630%	12,264	0.790%	1,983	19.3%
Arkansas	11,321	0.700%	13,245	0.853%	1,924	17.0%
Utah	9,715	0.600%	10,247	0.660%	532	5.5%
North Dakota	16,602	1.020%	16,851	1.085%	249	1.5%
Illinois	35,754	2.210%	35,394	2.279%	(360)	-1.0%
New York	39,645	2.450%	38,244	2.463%	(1,401)	-3.5%
Virginia	22,589	1.390%	21,058	1.356%	(1,531)	-6.8%
California	378,096	23.340%	323,521	20.832%	(54,575)	-14.4%
Pennsylvania	23,739	1.470%	20,234	1.303%	(3,505)	-14.8%
Washington	104,545	6.450%	79,936	5.147%	(24,609)	-23.5%
Oregon	79,782	4.920%	60,176	3.875%	(19,606)	-24.6%
Florida	128,633	7.940%	91,727	5.906%	(36,906)	-28.7%
North Carolina	76,764	4.740%	51,741	3.332%	(25,023)	-32.6%
Georgia	56,155	3.470%	28,820	1.856%	(27,335)	-48.7%
Michigan	86,214	5.320%	43,522	2.802%	(42,692)	-49.5%
South Carolina	28,330	1.750%	13,547	0.872%	(14,783)	-52.2%
New Jersey	17,281	1.070%	8,008	0.516%	(9,273)	-53.7%
Maryland	13,022	0.800%	5,729	0.369%	(7,293)	-56.0%
Texas	198,948	12.280%	83,809	5.397%	(115,139)	-57.9%
Delaware	3,556	0.220%	1,472	0.095%	(2,084)	-58.6%
Puerto Rico	41,642	2.570%	7,098	0.457%	(34,544)	-83.0%
Total U.S.	1,619,982	100.000%	1,553,003	100.000%	(66,979)	-4.13%

The state estimates are substantially affected by variances in the percentage of the agricultural population in each state that are LSC-eligible (i.e., have incomes below the poverty line and meet LSC eligibility criteria regarding citizenship and alien status). These percentages are determined by factors that can differ across the country, such as income levels, family size (including the number of unaccompanied workers), and the percent of dependents who are citizens that reside with unauthorized workers.

The data in Table IX.c show, for each state, the average number of workers that are LSC-eligible and the average number of LSC-eligible dependents per worker (for all workers, not just LSC-eligible workers). States in each NAWS region will have the same eligibility factors, because, as discussed in Appendix A, eligibility calculations can only be calculated at the regional level. As those data show, the percentage of the agricultural workforce that is eligible for LSC services ranges from 7% in the Southeast to 31% in Arizona and New Mexico, and the average number of LSC-eligible dependents per worker ranges from .15 in the Mid-Atlantic to .65 in Arizona and New Mexico.

Table IX.c
Regional and State LSC-Eligibility Factors Used in the Department of Labor
Employment and Training Administration Agricultural Worker Population Estimates
Average Number of Workers & Average Number of Dependents Per Worker that Are LSC-Eligible In
NAWS Regions and States

NAWS Region	States in Region	Percent of Agricultural Workers that Are LSC-Eligible	Average LSC Eligible-Dependents Per Agricultural Worker
NE 1	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont	17%	.30
NE 2	Delaware, Maryland, New Jersey, Pennsylvania	18%	.15
AP	Kentucky, North Carolina, Tennessee, Virginia, West Virginia	20%	.19
DSE	Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina	07%	.23
FL	Florida	09%	.46
SP	Oklahoma, Texas	19%	.33
CBNP	Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, North Dakota, Ohio, South Dakota	23%	.24
LK	Michigan, Minnesota, Wisconsin	13%	.33
MT 12	Colorado, Idaho, Montana, Nevada, Utah, Wyoming	14%	.32
MT 3	Arizona, New Mexico	31%	.65
PC	Washington, Oregon	09%	.39
CA	California	10%	.33
Not NAWS Region	Alaska, Hawaii, Puerto Rico	14%	.31