

Some (Don't) Like It Hot: The Use of the “Hot Goods” Injunction in Perishable Agriculture

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ABSTRACT: From 2001 to 2013, the Department of Labor (“DOL”) used “hot goods” injunctions to crack down on suspected violations of the Fair Labor Standards Act by farmers who employed migrant workers. While the DOL’s use of the “hot goods” injunction in perishable agriculture is an effective tool for protecting the rights of farmworkers, the injunction creates special hurdles for growers of perishable goods—food that will spoil if not shipped quickly, such as berries and fruits. For these growers, the potential of a “hot goods” injunction is equivalent to losing an entire crop. Even a “hot goods” objection—that is, the threat of an injunction issued before any court proceedings—can ruin an entire crop because distributors and wholesalers refuse to purchase potentially “hot goods.” By the time the matter is sorted out, the crop has spoiled. In early 2014, an Oregon district court vacated a consent judgment between the DOL and a blueberry grower because the court found that the “hot goods” objection placed the grower under economic duress. This Note examines the DOL’s use of the “hot goods” injunction in perishable agriculture and analyzes whether the challenges facing growers outweigh the rights of migrant farmworkers, who face special obstacles when trying to enforce their rights. This Note concludes that while the “hot goods” objection is unwarranted because it imposes severe hardships on growers without affording them adequate legal protections, the DOL’s use of the “hot goods” injunction affords growers adequate protections and is a necessary enforcement tool to protect the rights of migrant farmworkers who face many obstacles in enforcing their rights.

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I. INTRODUCTION.....	1843
II. THE FAIR LABOR STANDARDS ACT’S “HOT GOODS” INJUNCTION	1844
A. <i>GOALS OF THE FLSA</i>	1844
B. <i>THE “HOT GOODS” INJUNCTION</i>	1845
C. <i>THE USE OF THE “HOT GOODS” INJUNCTION AS A TOOL TO END UNFAIR LABOR PRACTICES</i>	1846
D. <i>“HOT GOODS” IN THE GARMENT INDUSTRY</i>	1846
E. <i>APPLYING THE “HOT GOODS” INJUNCTION OUTSIDE THE GARMENT INDUSTRY</i>	1847
III. AGRICULTURE’S UNIQUE ISSUES REGARDING THE “HOT GOODS” INJUNCTION	1849
A. <i>AGRICULTURAL WORKERS ARE TREATED DIFFERENTLY UNDER THE FLSA</i>	1849
B. <i>MIGRANT FARMWORKERS HAVE AN INFERIOR BARGAINING POSITION IN ENFORCING THEIR RIGHTS AGAINST THEIR EMPLOYERS</i>	1852
C. <i>THE “HOT GOODS” PROVISION CAUSES PRODUCERS OF PERISHABLE GOODS ECONOMIC DURESS</i>	1855
IV. THE DOL SHOULD USE THE “HOT GOODS” INJUNCTION INSTEAD OF THE “HOT GOODS” OBJECTION TO PROTECT MIGRANT FARMWORKERS	1858
A. <i>THE DOL CAN USE THE “HOT GOODS” INJUNCTION AS A POWERFUL TOOL TO PREVENT LABOR ABUSES IN THE AGRICULTURAL MARKET</i>	1859
B. <i>ALTHOUGH USING THE “HOT GOODS” INJUNCTION TO ENFORCE LABOR VIOLATIONS IN AGRICULTURE CREATES UNIQUE PRESSURES ON THE GROWER, PROCEDURAL SAFEGUARDS SERVE AS MEANINGFUL CHECKS ON THE SYSTEM</i>	1861
1. Like Any Temporary Restraining Order, a Successful “Hot Goods” Injunction Requires Showing That the Suit Is Likely to Be Successful	1861
2. Despite the Unique Pressures on Growers, Growers Are in a Superior Bargaining Position to Enforce Their Rights Against the DOL Than the Migrant Farmworkers Are in to Enforce Their Rights Against a Grower.....	1863
V. CONCLUSION	1864

I. INTRODUCTION

Since its creation in 1938, the Department of Labor (“DOL”) has used the Fair Labor Standards Act (“FLSA”) to improve working conditions and maintain a competitive marketplace by preventing goods produced under unfair labor practices from entering interstate commerce.¹ Under the FLSA, one mechanism the DOL can use to prevent these goods from entering the marketplace is the “hot goods injunction,” a device that prohibits the movement or sale of “hot goods” in interstate commerce.² A “hot good” is a product that a grower intends to place into interstate commerce that the grower made or produced using unlawful labor practices, such as paying below minimum wage or using child labor.³ Although the DOL historically used this injunction against the textile industry, today the DOL uses the injunction for more diverse products, including perishable agriculture.⁴

The DOL’s use of the “hot goods” injunction in perishable agriculture creates unique problems because the goods can spoil while being held, pending resolution of the labor issue.⁵ At the same time, most workers who produce perishable agricultural products—migrant farmworkers—face unique challenges in enforcing their legal labor rights, including their transient presence in the area and various immigration issues.⁶ This Note considers whether the DOL’s use of the “hot goods” injunction in perishable agriculture is justified. Part II discusses the history of the FLSA “hot goods” injunction. Part III discusses the DOL’s use of the “hot goods” injunction in perishable agriculture, focusing on the relative bargaining strength of growers against the government and the migrant farmworkers against the farm owners. Part IV concludes that despite the inherent risk of economic duress that the DOL’s use of a “hot goods” injunction causes, the DOL should continue to use the “hot goods” injunction to protect migrant farmworkers because migrant farmworkers face unique obstacles that complicate their ability to enforce their rights and growers have adequate procedural protections. Part IV also concludes that the DOL’s use of a “hot goods” objection—a threat of an injunction—is unwarranted because it imposes equally severe hardships on growers without affording them adequate legal protections.

1. 29 U.S.C. § 202 (2012).

2. *Id.* § 215.

3. *Id.*

4. *See infra* Part II.D–E.

5. Complaint and Demand for Jury Trial at 4–5, *Pan–Am. Berry Growers, LLC v. Perez*, No. 6:13-cv-01439-TC (D. Or. Aug. 15, 2013), 2013 WL 4506981.

6. *See infra* Part III.B.

II. THE FAIR LABOR STANDARDS ACT'S "HOT GOODS" INJUNCTION

Congress enacted the FLSA in 1938 to address various problems with the labor market, including employers' use of unfair labor practices, such as child labor and insufficient pay to gain a competitive advantage in interstate commerce.⁷ One of the methods Congress created to enforce the FLSA was the "hot goods" injunction, which allows the DOL to prevent goods produced in violation of the FLSA from entering interstate commerce.⁸ Under the FLSA, the Secretary of Labor can use a "hot goods" injunction after investigating the production of goods and attempting to negotiate a settlement with an employer.⁹ Although the DOL does not use the "hot goods" injunction frequently, in the past the "hot goods" injunction has served as a powerful tool to halt unfair labor practices.¹⁰ This Part discusses the overall aims of the FLSA, the "hot goods" injunction as an enforcement mechanism of the wage and hour provisions of the FLSA, and how the DOL has successfully used the "hot goods" injunction to fix unfair labor practices. Part II.A of this Note discusses Congress's goals in enacting the FLSA. Part II.B examines the complexities of the "hot goods" injunction. Part II.C analyzes how the DOL has used the "hot goods" injunction in an attempt to end unfair labor practices. Part II.D details the primary example of the DOL's use of the "hot goods" injunction in the garment industry. Part II.E explains how the DOL has used the "hot goods" injunction outside of the garment industry.

A. GOALS OF THE FLSA

The FLSA's declaration of policy states that Congress seeks to remedy "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹¹ To improve labor conditions, the FLSA created safeguards against unfair labor practices, including creating a federal minimum wage and overtime pay and restricting child labor.¹² The FLSA

7. 29 U.S.C. § 202.

8. *Id.* § 215.

9. Plaintiff's Opposition to Defendant's Motion to Vacate Consent Judgment and Order at 4-5, *Perez v. Pan-Am. Berry Growers, LLC*, No. 6:12-cv-01474-HO (D. Or. Sept. 20, 2013).

10. *See infra* Part II.C.

11. 29 U.S.C. § 202(a).

12. *See id.* § 206 (creating a federal minimum wage); *id.* § 207 (creating overtime pay for those who work over 40 hours per week); *id.* § 212(a) (restricting child labor). The FLSA also requires employers covered by the Act to maintain records about employees regarding wages, hours, and other conditions and practices of employment, in order to track working conditions. *Id.* § 211(c).

limits these broad rights somewhat through a few specific exemptions.¹³ By providing these baseline protections for employees, Congress hoped to “protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”¹⁴

In *United States v. Darby*, one of the first cases challenging the constitutionality of provisions of the FLSA, the Supreme Court held that the purpose of FLSA was “to make effective the [c]ongressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.”¹⁵ In order to prevent such products from entering interstate commerce, the Court held that the government could directly enforce the FLSA provisions against the manufacturers of non-conforming goods, as well as any person or entity involved in their interstate transportation.¹⁶

B. THE “HOT GOODS” INJUNCTION

Congress created the “hot goods” provision, section 15, in the FLSA as a method to impose liability upon employers who did not comply with the FLSA.¹⁷ Section 15(a) provides that “it shall be unlawful for any person . . . to transport, offer for transportation, ship, deliver, or sell in commerce . . . any goods” produced in violation of the FLSA.¹⁸ This provision extends liability to people and entities that manufacture or handle products produced using unfair labor standards.¹⁹ This causes liability to attach to the goods the moment a prohibited practice is used and to continue until they reach the ultimate consumer.²⁰ President Roosevelt promoted the continuing liability as a method to achieve the goals of FLSA: “Goods produced under conditions

13. *Id.* § 213(a) (listing employees that are exempt from maximum hour and minimum wage provisions); *see also id.* § 203(l) (limiting the definition of “[o]ppressive child labor” to employers who are not the “parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between . . . sixteen and eighteen years or detrimental to their health or well-being”); *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (holding that exemptions from the FLSA’s “humanitarian and remedial” purposes must be narrowly construed).

14. *United States v. Rosenwasser ex rel. Perfect Garment Co.*, 323 U.S. 360, 361 (1945) (internal quotation marks omitted).

15. *United States v. Darby*, 312 U.S. 100, 115 (1941).

16. *Id.* at 117–18.

17. 29 U.S.C. § 215.

18. *Id.* § 215(a).

19. Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1553 (1996).

20. *Id.* at 1554.

which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.”²¹

C. *THE USE OF THE “HOT GOODS” INJUNCTION AS A TOOL TO END UNFAIR LABOR PRACTICES*

Under the FLSA, the Secretary of Labor has the authority to investigate and inspect employers’ records and to enter and question such employees as the Secretary “may deem necessary or appropriate to determine whether any person has violated [the FLSA].”²² If a violation of section 15 has occurred, the Secretary of Labor has authority under section 16 to bring a “hot goods” action in federal court.²³ A successful “hot goods” action can result in an injunction, payment of back wages, overtime compensation, and attorney fees and costs.²⁴

Actions for a “hot goods” injunction to remedy violations of the FLSA must be brought in federal court because the FLSA gives jurisdiction over injunctive relief to federal courts.²⁵ The Secretary of Labor need not provide notice of a pending injunction to an employer.²⁶ Federal courts have exercised jurisdiction over “hot goods” provisions even where no such notice was given.²⁷

D. *“HOT GOODS” IN THE GARMENT INDUSTRY*

The most prominent example of the DOL’s use of the “hot goods” provision in the FLSA has been in the garment industry. From the 1930s to the 1970s, the DOL’s very extensive use of the “hot goods” provision greatly

21. S. REP. NO. 75-884, at 2 (1937) (quoting Letter from President Franklin D. Roosevelt, to the Congress of the United States (May 24, 1937)).

22. 29 U.S.C. § 211(a). The Wage and Hour Division (“WHD”) lists the following steps to an investigation: a conference between a DOL representative and representatives of the business to explain the investigation process; examination of records relating to the business, time, and payroll; private interviews with employees; and informing the employer of what the violations are and how to correct them. *Enforcement Under the Fair Labor Standards Act*, U.S. DEP’T LAB., <http://www.dol.gov/elaws/esa/flsa/screen74.asp> (last visited Feb. 28, 2015).

23. 29 U.S.C. § 216(b). Although section 16 allows an employee to bring a “hot goods” action for wages, only the Secretary of Labor can bring an action for a “hot goods” injunction. *Id.*; see also Leo L. Lam, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623, 652–53 (1992) (noting that standing limitations often result in manufacturers receiving multiple sanctions before the DOL attempts to bring a “hot goods” action for an injunction).

24. 29 U.S.C. § 216(b). For purposes of this Note, a successful “hot goods” action is one in which the DOL secures an injunction, consent judgment, or other ruling in its favor after investigating a potential FLSA violation.

25. *Id.* § 217.

26. See *Donovan v. Pub. Serv. Co. of N.M.*, 607 F. Supp. 784, 787 (D.N.M. 1984).

27. *Id.*

reduced the number of sweatshops in the United States.²⁸ However, garment sweatshops reemerged as a problem in the late 1990s. In 1994, Secretary of Labor Robert Reich began initiating “hot goods” charges against retailers, but noted that the ratio of inspectors to garment establishments was too small to be effective in the long term.²⁹ To curb these violations, the DOL stepped up enforcement of the FLSA through a more systematic monitoring system, rather than the “cat and mouse” tactics that the DOL had used previously.³⁰

The DOL became proactive in monitoring clothing manufacturers. The DOL used monitoring to help apparel manufacturers and shippers avoid dealing with “hot goods.”³¹ Monitoring involves directing personnel to actively inspect whether the manufacturer is following the FLSA.³² When the DOL finds FLSA violations, the manufacturer must immediately correct the abusive practices.³³ The increased use of monitoring in the garment industry has resulted in greater compliance with the FLSA.³⁴ Commentators have lauded the DOL’s system, but several commentators also note that the mechanism for bringing a complaint and the lack of resources at the disposal of the DOL truncates the effectiveness of the “hot goods” injunction in the apparel industry.³⁵

E. APPLYING THE “HOT GOODS” INJUNCTION OUTSIDE THE GARMENT INDUSTRY

Although the DOL has most visibly used the “hot goods” injunction in the garment industry, the DOL can use the injunction for any “goods” as defined by the FLSA. The FLSA defines “goods” very broadly: “goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part

28. Julia Fisher, *Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions*, 26 B.C. THIRD WORLD L.J. 267, 278 (2006).

29. ROBERT J.S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS 155 (2004).

30. DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 37 (2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>. The DOL’s “cat and mouse” tactics involved the direct investigation of contractor shops, which wasted valuable resources. *Id.* at 29.

31. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, APPAREL CONTRACTOR GUIDE TO COMPLIANCE UNDER THE FAIR LABOR STANDARDS ACT (2008), available at www.dol.gov/whd/garment/contractorGuide.pdf.

32. *Id.*

33. *Id.* However, some argue that the private monitoring programs amount to a “privatization of government functions” in that the DOL has created a monitoring industry that offers substantial benefits to the employer without the independence of random inspections. ROSS, *supra* note 29, at 149.

34. WEIL, *supra* note 30, at 32. For example, in 1998, California had a 65% compliance rate with the minimum wage requirement by the FLSA. *Id.* By 2000, this compliance rate had increased to 74%. *Id.*

35. Lam, *supra* note 23, at 640–42.

or ingredient thereof.”³⁶ Accordingly, courts have upheld the DOL’s use or threatened use of a “hot goods” injunction in many other settings.³⁷ The DOL has used “hot goods” injunctions to prevent the shipment of products as diverse as wholesale animal hides to commercial air handling and heat exchange systems.³⁸

In the past few years, there has been a movement within the DOL to apply the “hot goods” injunction to a broader range of products.³⁹ Advocates reason that the growing cost of shipping goods creates a greater incentive to comply with the FLSA to avoid a “hot goods” injunction.⁴⁰ The potential delay from a “hot goods” injunction increases the transaction costs, so the threat of an injunction increases the likelihood that parties will be able to settle cases more quickly and prevent future noncompliance.⁴¹

However, the reception among employers has been mixed. Not all employers support the DOL’s increased use of the “hot goods” injunction, and some claim that the DOL’s more frequent use of the “hot goods” injunction can lead to the imposition of economic duress.⁴² One area that has seen an increase in “hot goods” enforcement actions is the agriculture industry, since the Wage and Hour Division (“WHD”) has been focusing resources to reduce the wage theft of farmworkers.⁴³ Although the DOL used the “hot goods” provision in agriculture as early as the 1950s, from 2001 through 2012, the WHD has increased its enforcement.⁴⁴ Despite some who applaud the DOL’s increased use of “hot goods” injunctions in agriculture,

36. 29 U.S.C. § 203(i) (2012).

37. See *Reich v. Tri-State Energy Prods., Inc.*, 836 F. Supp. 358, 359–60 (S.D. W. Va. 1993) (acknowledging that the defendant’s commercial air handling and heat exchange systems were “hot goods” and upholding an injunction against them); News Release, Wage & Hour Div., U.S. Dep’t of Labor, US Labor Department Sues Boston Hides & Furs Ltd., Seeking at Least \$1 Million in Back Wages and Damages for Underpaid, Wrongfully Fired Workers (Nov. 28, 2012), available at <http://www.dol.gov/opa/media/press/whd/WHD20122131.htm> (reporting the DOL’s threat of a “hot goods” injunction against a wholesale animal hides business).

38. See sources cited *supra* note 37.

39. WEIL, *supra* note 30, at 80–81.

40. *Id.* at 37–38, 80–81.

41. *Id.* at 37–38, 80. Weil’s recommendation to expand the application of the “hot goods” injunction beyond the apparel industry was the only recommendation that was listed as being likely to have a deterrent effect, be sustainable, and have systemic effects. *Id.* at 94. This result would initially seem to be a good default rule. See generally Herbert Hovenkamp, *Fractured Markets and Legal Institutions*, 100 IOWA L. REV. 617, 651–54 (2015) (“The proper default rule should reflect a reality that occurs in the great majority of cases, or that produces the greatest value, but where socially valuable deviations are likely to occur when people intentionally deviate from the default.”)

42. See Mateusz Perkowski, *Berry Farmers Seek to Rescind “Hot Goods” Settlements*, CAP. PRESS (Aug. 20, 2013, 5:27 PM), http://media-ofb.oregonfb.org/wp-content/themes/twentyten/pdf_ofb/cap_press_0820132.pdf (critiquing the threatened use of a “hot goods” injunction against Oregon berry growers).

43. Plaintiff’s Opposition to Defendant’s Motion to Vacate Consent Judgment and Order, *supra* note 9, at 6.

44. *Id.* at 5.

growers have begun to voice their concerns regarding what they view as a bullying technique to force compliance with questionable violations without judicial process.⁴⁵

As the DOL attempts to enforce the FLSA through the “hot goods” provision, the process of placing a “hot goods” injunction on goods may be changing. For example, some growers are claiming that the DOL’s use of the “hot goods” injunction is no longer a true injunction; rather, the DOL is using a “hot goods” objection that prevents the shipment of goods before initiating any formal judicial process.⁴⁶ However, the DOL argues that the current method of placing a hold on agricultural goods is no different than the time-tested method of imposing a “hot goods” injunction upon any other good.⁴⁷

III. AGRICULTURE’S UNIQUE ISSUES REGARDING THE “HOT GOODS” INJUNCTION

Although the FLSA covers all goods, the application of the FLSA to agricultural goods poses several problems. First, farmworkers face challenges in asserting their rights because the FLSA limits the application of overtime and wage provisions to many agricultural workers due to the nature of agriculture.⁴⁸ Secondly, the workforce in agriculture is largely made up of undocumented farmworkers who often face many barriers to enforcing their labor rights.⁴⁹ Finally, the FLSA’s enforcement mechanisms, particularly the “hot goods” injunction, place growers of perishable goods in a particularly vulnerable position.⁵⁰ Part III.A of this Note discusses how the FLSA treats agricultural workers. Part III.B examines the unequal bargaining power between farmworkers and growers. Part III.C explains how the “hot goods” provision places economic hardship on perishable goods producers.

A. AGRICULTURAL WORKERS ARE TREATED DIFFERENTLY UNDER THE FLSA

Agricultural workers face many barriers to having their rights enforced under the FLSA, including numerous exceptions for agricultural workers,

45. Compare D. Michael Dale & Ramon Ramirez, *Government Was Right to Crack Down on Blueberry Growers, Enforce Wage Laws*, OREGONIAN (Sept. 15, 2012, 5:00 AM), http://www.oregonlive.com/opinion/index.ssf/2012/09/government_was_right_to_crack.html (applauding the Labor Department’s use of “hot goods” injunctions against Oregon farmers), with *Hot Goods Update*, OR. FARM BUREAU, <http://www.oregonfb.org/usdol/> (last visited Feb. 28, 2015) (compiling and commenting on the Oregon lawsuit to rescind consent judgments entered against Oregon blueberry farmers).

46. See *infra* Part IV.

47. See Plaintiff’s Opposition to Defendant’s Motion to Vacate Consent Judgment and Order, *supra* note 9, at 4–5.

48. 29 U.S.C. § 213 (2012).

49. BON APPÉTIT MGMT. CO. FOUND. & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES 5 (2011) [hereinafter FARMWORKER INVENTORY], available at http://www.ufw.org/pdf/farmworkerinventory_0401_2011.pdf.

50. See *infra* Part III.C.

fewer available protections, and minimal enforcement. For instance, the FLSA exempts many agricultural employees from the FLSA's overtime and minimum wage protections.⁵¹ Early cases suggested that Congress created these exceptions because agricultural workers were "not subject to the usual evils of sweatshop conditions of long hours indoors at low wages."⁵² These cases also noted that the attempt to regulate agricultural wages would be more difficult since agricultural workers' income often goes substantially towards room and board.⁵³ These cases and the FLSA's agricultural exception serve as an initial obstacle for farmworkers attempting to assert their rights.⁵⁴

Furthermore, the FLSA does not require overtime pay or minimum wage for many agricultural workers.⁵⁵ This exception in section 13 encompasses several categories of agricultural workers, including those whose employers did not use more than 500 man-days of agricultural labor in any quarter in the prior calendar year, family members of the employer, and certain employees who are paid on a piece rate basis.⁵⁶ Early courts reasoned that Congress exempted most agricultural workers from overtime and minimum wage protections because of the seasonal nature of their work and the uncertainty about whether crops would flourish.⁵⁷

For those agricultural employees who are covered by the FLSA, enforcement has historically been minimal.⁵⁸ In 2002, the DOL investigated 38,537 labor violations under the FLSA; only 229 investigations involved

51. 29 U.S.C. § 213.

52. *Bowie v. Gonzalez*, 117 F.2d 11, 18 (1st Cir. 1941).

53. *Id.*

54. *See infra* Part III.B.

55. 29 U.S.C. § 213(a)(6). The exemption from minimum wage only applies to small farms "that employ[] roughly seven or fewer full-time employees working five days a week." FARMWORKER INVENTORY, *supra* note 49, at 11.

56. 29 U.S.C. § 213(a)(6). This provision is extremely expansive, exempting:

[A]ny employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, . . . or (E) if such employee is principally engaged in the range production of livestock.

Id. In the migrant farmworker situation, hours worked for one farmer-employer are typically not imputed onto a subsequent farmer-employer. *See Salinas v. Rodriguez*, 978 F.2d 187, 189 (5th Cir. 1992).

57. *See Dye v. McIntyre Floral Co.*, 144 S.W.2d 752, 755 (Tenn. 1940).

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

agricultural employers.⁵⁹ In 2008, both total investigations and investigations in agriculture dropped respectively to 21,375 and 110.⁶⁰ Although the total number of investigations fell during this time period, the percentage of investigations into agricultural violations fell from 0.594% to 0.515%.⁶¹ To maintain the already low ratio of agricultural investigations, the DOL would have had to perform 127 agricultural investigations during that year. This drop in investigations is a continuation of a steady decrease from 1997 to 2007.⁶² In 1997, 47,000 FLSA enforcement actions were brought, whereas in 2007, the DOL brought approximately 30,000.⁶³ One reason for the low number of investigations is the decrease in size of the investigatory staff.⁶⁴ The low enforcement numbers lead to bad outcomes for farmworkers; for example, in Marion County, Oregon, 90% of farmworkers reported that they earned an hourly wage below the minimum wage of \$8.25, with an average wage of \$5.30.⁶⁵

Under the FLSA, child labor is less heavily regulated in agriculture than in other industries.⁶⁶ The agriculture exception includes a limited child labor exception that lowers the minimum working age and provides special exceptions for children working on a family-owned farm.⁶⁷ The FLSA lowers the child labor age from 18 to 16, easing the protections granted to farmworkers.⁶⁸ Even as the FLSA allows younger children to work on farms,

59. *Id.*

60. *Id.*

61. *See id.*

62. 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), available at <http://www.gao.gov/new.items/do8962t.pdf>.

63. *Id.*

64. *Id.* at 6. The WHD had approximately 730 investigative staff members and the budget was approximately \$165 million in 2007. *Id.* at 3. However, the number of investigators decreased by 20% from 1997 to 2007. *Id.* at 6.

65. FARMWORKER INVENTORY, *supra* note 49, at 11. Some states have affirmatively acted to try to remedy wage violations. *Id.* at 11–12. California, Oregon, and Washington have all enacted laws to govern areas such as minimum wage, overtime, required rest periods, and required meal periods. *Id.* Out of these three states, only California allows for overtime pay. *Id.* at 12. All three apply a minimum wage (although some have exemptions), a required rest period, and a required meal period. *Id.*

66. 29 U.S.C. § 213 (2012).

67. *Id.* § 213(a)(6)(D). The relevant child labor section exempts:

[A]ny employee employed in agriculture . . . (D) if such employee . . . (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been . . . paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent . . . and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm.

Id.

68. *See id.* § 213. These relaxed restrictions affect between 300,000 to 800,000 children and youth. FARMWORKER INVENTORY, *supra* note 49, at 16. The children who work on farms perform many dangerous activities. *Id.* From 1992 to 1996 and 1997 to 2002, “the rate of work-related

the FLSA has fewer restrictions relating to when children can work.⁶⁹ Unlike many other occupations, the FLSA does not prohibit children from working late at night or early in the morning, nor is there a limit on the number of hours a child can work per day or per week.⁷⁰ The FLSA only prohibits children from working during school hours.⁷¹ Despite the lax treatment of child laborers in agriculture, the WHD still encounters some violations with child labor laws in agriculture.⁷²

B. MIGRANT FARMWORKERS HAVE AN INFERIOR BARGAINING POSITION IN ENFORCING THEIR RIGHTS AGAINST THEIR EMPLOYERS

While individuals who choose to litigate a FLSA violation can receive back pay and potentially reinstatement, regardless of immigration status,⁷³ migrant farmworkers face special challenges in asserting their rights to receive these benefits. Migrant farmworkers are predominantly minorities with “minimal English skills” and a “low level[] of education.”⁷⁴ While some migrant farmworkers enter the United States with an H-2A worker visa, many others—40% to 50%—are undocumented.⁷⁵ Obtaining legal services is difficult due to the limited number of non-profit legal services offices that can represent these undocumented workers.⁷⁶ From 2000 to 2009, only 21 out of 22,499

deaths of youth 15–19 years old increased 14 percent on crop and livestock farms.” *Id.* Although outside the scope of this Note, the FLSA contains several limitations regarding child labor involving some of the most high-injury workplaces. See Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 135–36 (2010).

69. FARMWORKER INVENTORY, *supra* note 49, at 16.

70. *Id.*; see also 29 U.S.C. § 213(c)(1). However, some states add additional safeguards by increasing the age to work and fixing maximum hours and days to work. FARMWORKER INVENTORY, *supra* note 49, at 17. California, Florida, Oregon, and Washington are examples of states that have modified the child labor laws applicable to farmworkers. *Id.*

71. 29 U.S.C. § 213(c)(1).

72. See News Release, Wage & Hour Div., U.S. Dep’t of Labor, US Department of Labor Prevents Shipment of Strawberries Following Investigation of Santa Cruz, Calif.-based Labor Contractor Jorge Castro Farms (Jan. 25, 2012), available at <http://www.dol.gov/opa/media/press/whd/whd20120030.htm> (describing a “hot goods” injunction used to remedy a labor contractor allowing a 13-year-old boy to harvest strawberries with his family in New Jersey).

73. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 147 (2009). However, the “hot goods” injunction is not a remedy available to individuals bringing FLSA claims. 29 U.S.C. § 211(a).

74. FARMWORKER INVENTORY, *supra* note 49, at 5. According to Farmworker Justice, 70% of hired farmworkers are foreign-born, whereas 97% of contract farmworkers are foreign-born. *Id.* “The average educational attainment . . . is eight years for all hired workers and six years for contract workers. About one third (34%) of the hired and two-thirds (67%) of the contract farmworkers cannot speak any English.” *Id.* Even fewer read English. *Id.* at 5–6. These characteristics make farmworkers particularly susceptible to coercion. Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 411–17 (2011) (discussing the “exploitive” conditions that immigrant workers often endure).

75. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 588 (2001).

76. Griffith, *supra* note 73, at 137.

surveyed farmworkers indicated that their family had used legal services.⁷⁷ Roughly a quarter of farmworkers live below the poverty line, with a median personal income between \$15,000 and \$17,499 per year.⁷⁸ Further, in 2000, the Human Rights Watch documented North Carolina employers leading workers in throwing away “‘Know Your Rights’ manuals from Legal Services attorneys” and “using the local sheriff to drive away Legal Services advocates responding to calls from H-2A workers.”⁷⁹

Beyond the immigration challenges, migrant farmworkers also lack many legal protections, including collective action and union organizing rights.⁸⁰ The National Labor Relations Act of 1935, which regulates such activities, specifically exempts agricultural workers from its protections.⁸¹

Further, migrant farmworkers often only work for a few weeks at a time for any particular grower, making timeliness in catching violations critical.⁸² As part of the agricultural process, farmworkers are unable to work the entire year.⁸³ The average number of months that farmworkers spent on farm work in 2009 was roughly eight months.⁸⁴ From 2005 to 2009, 59% of farmworkers worked more than 40 hours per week.⁸⁵ In addition to working overtime, these workers had fewer days off in the standard week.⁸⁶ Despite these working conditions, only 18% of WHD investigations into agricultural employers were initiated by employee complaints.⁸⁷ The low number of investigations initiated by employee complaints may be due to employees not filing complaints or the Secretary of Labor failing to investigate employee complaints, as the Secretary of Labor has no duty to reply or investigate complaints filed by employees regarding violations of the FLSA.⁸⁸

77. FARMWORKER INVENTORY, *supra* note 49, at 10. This is also concerning because migrant farmworkers who do seek legal advice bring important issues, including discrimination, sexual harassment, and inadequate sanitation. *Id.* at 10–11.

78. *Id.* at 13.

79. Holley, *supra* note 75, at 597.

80. Griffith, *supra* note 73, at 142.

81. 29 U.S.C. § 152(3) (2012). This affects both H-2A workers and undocumented workers because the National Labor Relations Act covers both documented and undocumented immigrants. Griffith, *supra* note 73, at 142–43.

82. FARMWORKER INVENTORY, *supra* note 49, at 14.

83. *Id.* at 47–48.

84. *Id.* at 14.

85. *Id.*

86. *Id.* Only 6% of farmworkers “reported working less than five days a week,” while 58% “reported working more than . . . five days a week.” *Id.*

87. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 9. This is unusual because the majority of actions in all other industries were initiated as a result of complaints. *Id.* at 9–10.

88. See 29 C.F.R. § 501.6(a) (2014); Holley, *supra* note 75, at 599. The Migrant and Seasonal Agricultural Worker Protection Act also provides some protections to migrant farmworkers. See *infra* text accompanying notes 102–07.

In addition, many migrant farmworkers fear retaliation for complaints against their employers based on their temporary visa status.⁸⁹ For workers in the United States with temporary H-2A visas, their ability to stay in the United States is contingent on their employment with the particular employer.⁹⁰ Even if employers do not retaliate against farmworkers who file complaints, the H-2A visas are only available for a one-year-long term without an option to seek permanent residency or citizenship in the United States after the expiration of the visa.⁹¹ Getting a temporary work visa in the first place can be difficult because the process for hiring H-2A workers is difficult for employers, to the point that some employers admit they will hire undocumented workers instead of workers on a temporary work visa because the H-2 “process is too expensive, taxing, and time-consuming.”⁹² H-2A worker visas are contingent upon maintaining a relationship with the employer for the duration of the visa, and “H-2 workers . . . fear being blacklisted—refused employment in future years—or otherwise intimidated if they attempt to assert their rights.”⁹³ Migrant farmworkers’ fear of blacklisting appears to be well-founded; a 1999 Carnegie Endowment study found that blacklisting H-2A workers was “widespread . . . highly organized, and occur[red] at all stages of . . . recruitment and employment.”⁹⁴ These immigration issues underlie the bargaining position of migrant farmworkers.⁹⁵

The FLSA protects employees from retaliation in order “to encourage employees to report their employer’s wage and hour violations.”⁹⁶ Although retaliating against an employee attempting to correct improper labor conditions is illegal under the FLSA, farmworkers’ burden of proof to show retaliation is high. An employee may prove retaliation by direct or indirect evidence, although finding direct evidence of retaliation is extraordinarily rare.⁹⁷ To prove retaliation occurred, the employee must show “that (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) the two are causally related.”⁹⁸ Upon a successful showing of the three elements, “the burden then shifts to the

89. Griffith, *supra* note 73, at 135.

90. *Id.* The number of migrant workers in the United States on H-2A visas tripled between 1995 and 1999, despite the fact that H-2A workers are paid more than American workers. Holley, *supra* note 75, at 576.

91. Griffith, *supra* note 73, at 135.

92. *Id.* at 136 (internal quotation marks omitted).

93. *Id.* at 137–38 (internal quotation marks omitted).

94. Holley, *supra* note 75, at 596.

95. *Id.* at 595–97.

96. Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 539 (2001).

97. *Id.*

98. *Id.* (citing *Richmond v. Oneok, Inc.*, 120 F.3d 205, 208–09 (10th Cir. 1997)).

employer to provide a legitimate, non-retaliatory reason for the adverse employment action.”⁹⁹

Further undercutting the effectiveness of anti-retaliation remedies is the fact that circuit courts disagree as to when the anti-retaliation protection attaches to the employee.¹⁰⁰ Although some circuits hold that informal complaints made orally to the employer are sufficient to constitute a “complaint” worthy of protection, other circuits require a formal written complaint.¹⁰¹ The circuit split over this outcome-determinative aspect of the anti-retaliation provision makes pursuing a claim unlikely in circuits that require a formal written complaint, especially if the worker also faces immigration consequences for losing employment.

Due to a combination of some or all of these factors, undocumented migrant farmworkers rarely invoke protective provisions to protect their rights, despite the additional protection provided by the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (“AWPA”).¹⁰² The AWPA includes protections regarding “housing, transportation, wage, disclosure, and recordkeeping requirements.”¹⁰³ Individuals may bring actions to address violations and receive actual or statutory damages for violations.¹⁰⁴ Those who bring actions are protected from retaliation.¹⁰⁵ Notwithstanding the farmworkers’ protections from retaliation, roughly one-half of agricultural employers violate at least some part of the AWPA.¹⁰⁶ These violations may be more likely in part because a complaint from an undocumented worker is unlikely since the farmworker does not have the right to reinstatement after an AWPA violation.¹⁰⁷

C. THE “HOT GOODS” PROVISION CAUSES PRODUCERS OF PERISHABLE GOODS
ECONOMIC DURESS

The perishable nature of many agricultural goods puts substantial economic pressure on growers to negotiate quickly to prevent a “hot goods” injunction. Perishable agricultural goods need to be shipped quickly to

99. *Id.* (citing *Richmond*, 120 F.3d at 208).

100. *Id.* at 545.

101. *Id.* at 541–50. For a discussion of these various approaches and an argument for adopting a broad interpretation of compliance to protect workers who follow their internal grievances procedure, see *id.*

102. See Griffith, *supra* note 73, at 148 (listing the protections that the AWPA provides).

103. *Id.*

104. 29 U.S.C. § 1854(c)(1) (2012).

105. Holley, *supra* note 75, at 586 (discussing the AWPA’s retaliation protection).

106. Plaintiff’s Opposition to Defendant’s Motion to Vacate Consent Judgment and Order, *supra* note 9, at 6. The low compliance rate with the AWPA is one of the justifications the WHD has used to support using “hot goods” enforcement actions in agriculture. *Id.*

107. Griffith, *supra* note 73, at 150.

prevent spoilage.¹⁰⁸ Although technology continues to prolong the shelf life of perishable agricultural goods, certain foods, particularly fruits, continue to have a short shelf life.¹⁰⁹ When the DOL began increasing enforcement of the FLSA with the “hot goods” injunction, growers quickly realized that a “hot goods” injunction could ruin an entire crop.¹¹⁰ When the DOL uses or threatens to use “hot goods” injunctions, the grower faces a very difficult position: fight the injunction and risk losing an entire crop, or sign a consent judgment.¹¹¹ The added pressure places increasingly demanding procedures on growers to track workers’ hours and wages.¹¹²

Growers and the media quickly noted that a “hot goods” injunction not only keeps producers from shipping the crop, but it also keeps workers out of the fields and the produce from reaching shelves.¹¹³ Even the threat of a “hot goods” injunction can be devastating—for example, in August 2012, one “hot goods” objection caused a grower to hold approximately 400,000 pounds of fresh blueberries that were under contract for sale and to stop the harvest of certain varieties of blueberries because the blueberries required immediate shipping, resulting in a suspension of 30,000 to 50,000 pounds of blueberries per day.¹¹⁴ The media put forward a less intrusive method to collect potentially unpaid or underpaid hourly wages following a few “hot goods” injunctions in Oregon.¹¹⁵ The media suggested freezing revenues from the crops instead of prohibiting the producers from shipping the crops.¹¹⁶ However, the WHD has

108. Jared Meyer, *Department of Labor Extorts American Blueberry Farmers*, ECON. POLICIES FOR 21ST CENTURY MANHATTAN INST. (Aug. 6, 2014), <http://economics21.org/commentary/departement-labor-extorts-american-farmers>.

109. E.g., U.S. DEP’T OF AGRIC. & NAT’L FOOD SERV. MGMT. INST., FRUIT PRODUCT SHEETS 62 (n.d.), available at http://www.fns.usda.gov/sites/default/files/quality_fruit.pdf (listing a shelf life of strawberries at five to seven days).

110. See Editorial, “Hot Goods” Order Spoils Trust in the Blueberry Field, OREGONIAN (Aug. 31, 2012, 6:20 PM), http://www.oregonlive.com/opinion/index.ssf/2012/08/hot_goods_order_spoils_trust_i.html.

111. See *id.* The suggestion to an employer that a “hot goods” injunction might be used to remedy potential FLSA violations is called a “hot goods” objection. The “hot goods” objection will be discussed in greater detail below. See *infra* notes 125–30 and accompanying text.

112. See Editorial, *supra* note 110.

113. *Id.*

114. Defendant’s Amended Memorandum in Support of Motion to Vacate Consent Judgment and Order at 11, *Solis v. Pan–Am. Berry Growers, LLC*, No. 6:12-cv-01474-HO (D. Or. Aug. 16, 2013).

115. Mateusz Perkowski, “Hot Goods” Assumptions Attacked, CAP. PRESS (Sept. 7, 2012), <http://www.capitalpress.com/content/mp-hot-goods-methods-090512>.

116. *Id.* This story argued that the use of “hot goods” injunctions in agriculture was an illustration of how convoluted agricultural law had become. *Id.* The authors noted that the real problem was that the coercive enforcement of wage inadequacy was a poor method to correct the more practical problem of an inaccurate piece-rate pay calculation and poor recordkeeping by the growers. *Id.* The determination of whom to hold responsible is further complicated by the extensive use of labor contractors in agriculture. Marc Linder, *Creoleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213,

no duty to use the least intrusive method; rather, the WHD has the right to use a “hot goods” injunction to cure alleged violations of the FLSA.¹¹⁷

Rebutting “hot goods” injunctions can be difficult in agriculture due to the individual differences between workers.¹¹⁸ In recent investigations of unfair labor practices, the DOL has used novel methods to show that the employer has inadequate wages or uses child labor.¹¹⁹ In Oregon, the DOL adopted a benchmark harvest rate to determine how many workers were being tracked per card.¹²⁰ Growers contended that skilled farmworkers could pick at a substantially higher rate than the rate the DOL investigators used.¹²¹ One of these growers, B&G Ditchen Farms, conducted a time study that showed that the hourly blueberry harvest rates ranged from 112 pounds to 196 pounds per employee, which is far above the benchmark of 50 to 68 pounds per hour.¹²² The DOL’s use of harvest rates to determine hours worked has caused concern among growers as to why the agency would rely on a statistical analysis when inspectors were at the farms and could have investigated the alleged infraction directly.¹²³ Although one former DOL employee noted that it was common to use average picking rates as an investigative tool, traditionally the DOL would follow up the calculations with direct observation to determine whether an infraction had occurred.¹²⁴

The DOL has also begun to use a less formal enforcement mechanism known as a “hot goods” objection that occurs when the DOL notifies the employer and employer’s customers that the employer has violated the FLSA, and “the goods are potentially ‘hot goods.’”¹²⁵ The DOL’s use of the “hot

230–32 (1990) (noting that labor contractors in agriculture have been used to avoid FLSA coverage by having the labor contractor’s workers be employed for less than 500 man-days in agriculture, thus fitting the laborers into the FLSA agricultural exception).

117. See Plaintiff’s Opposition to Defendant’s Motion to Vacate Consent Judgment and Order, *supra* note 9, at 2–3.

118. See Mateusz Perkowski, “Ghost Workers” Elude Labor Department, CAP. PRESS (Jan. 29, 2014, 3:59 PM), <http://www.capitalpress.com/article/20140129/ARTICLE/140129860>.

119. Perkowski, *supra* note 115.

120. *Id.* at 1. Some growers pay workers on a “piece rate,” which means that workers’ wages increase when they pick more produce. Under this system, someone—either a supervisor or the worker—records how much the worker picks each day on a worker card. The hourly wage still needs to comply with the FLSA. See 29 U.S.C. § 206(a) (2012).

121. Perkowski, *supra* note 115. In a recent case, a grower challenged this piece-rate methodology, and the DOL refused to modify its methodology. Defendant’s Amended Memorandum in Support of Motion to Vacate Consent Judgment and Order, *supra* note 114, at 9. On April 24, 2014, the court vacated the growers’ consent judgments. *Perez v. Pan-Am. Berry Growers, LLC*, No. 6:12-cv-01474-TC, 2014 WL 1668254 (D. Or. Apr. 24, 2014). The DOL will now—almost three years after the disputed wage violations—have to attempt to prove that the “hot goods” objection would have been successful. *Id.*

122. Perkowski, *supra* note 115.

123. *Id.*

124. *Id.*

125. Defendant’s Amended Memorandum in Support of Motion to Vacate Consent Judgment and Order, *supra* note 114, at 4 (citing Declaration of Manuel Lopez in Support of

goods” objection—the threat of an injunction—effectively places a freeze upon goods, which can result in spoilage before any legal action takes place. This “hot goods” objection effectively stops shipment of the goods, which makes the goods “unsellable and penaliz[es] the seller without a judicial hearing on the issue.”¹²⁶ Initially, the DOL lifted these “hot goods” objections when the seller placed the amount required to remedy the supposed violation “into an ‘escrow’ account and signed a consent judgment addressing future violations.”¹²⁷ However, in 2012, the DOL placed a “hot goods” objection upon harvested blueberries and indicated that it would not lift the objection until the grower paid and signed a consent judgment.¹²⁸ Indeed, that day, one of the grower’s purchasers notified the grower that the purchaser would suspend shipments.¹²⁹ The DOL’s application of the new “hot goods” objection has spawned new legal challenges as well as renewed tension between growers and the “hot goods” injunction.¹³⁰

IV. THE DOL SHOULD USE THE “HOT GOODS” INJUNCTION INSTEAD OF THE “HOT GOODS” OBJECTION TO PROTECT MIGRANT FARMWORKERS

Preserving the DOL’s use of the “hot goods” injunction in agriculture is vital to ensuring that growers comply with the FLSA. Protections available for farmworkers are minimal, which severely undercuts farmworkers’ ability to enforce their own rights against their employers. However, the DOL can use the “hot goods” injunction to prevent labor abuses in the agricultural market.¹³¹ The legal process for obtaining a “hot goods” injunction gives employers a chance to defend themselves. There are no similar procedural protections for a “hot goods” objection. Because these protections are lacking, the DOL should strictly comply with the FLSA and file a “hot goods” injunction—rather than merely rely on a “hot goods” objection—before placing the “hot goods” label on agricultural goods to ensure that the grower

Defendant’s Motion to Vacate Consent Judgment and Order, *Solis v. Pan–Am. Berry Growers, LLC*, No. 6:12-cv-01474-HO (Aug. 15, 2013)).

126. *Id.*

127. *Id.*

128. *Id.* at 7. The communication indicating that a “hot goods” objection had been placed upon the crops stated:

To help ensure compliance and avoidance of interruptions in the future in the flow of your goods, and in order for us to lift our objections to the shipment of the goods already harvested your firm will need to sign a consent judgment, which will include assurances of future compliance, the implementation of a monitoring/training program, the payment of civil money penalties, as well as any minimum wage deficiencies and liquidated damages. The exact amount of these figures is being compiled for inclusion in the consent judgment.

Id.

129. *Id.* at 8.

130. See Complaint and Demand for Jury Trial, *supra* note 5.

131. See *supra* Part II.E.

has a fair opportunity to object to the “hot goods” injunction. Part IV.A of this Note suggests how the DOL may use the “hot goods” injunction to prevent labor abuses in the agricultural sector. Finally, Part IV.B recognizes that although the “hot goods” injunction can cause growers economic hardship, the procedural safeguards within the system provide growers adequate protections.

A. *THE DOL CAN USE THE “HOT GOODS” INJUNCTION AS A POWERFUL TOOL TO PREVENT LABOR ABUSES IN THE AGRICULTURAL MARKET*

The agricultural market is unique in that agricultural goods have a set stock life and need specific care and storage to maintain marketability.¹³² This fact means that remedies that prevent the sale of agricultural goods are more potent than “hot goods” injunctions in other industries, such as the garment industry. In the past, the “hot goods” injunction has served as a way to deter unfair labor practices while maintaining a fair, competitive market.¹³³ Today’s migrant farmworkers face problems akin to the pre-FLSA garment sweatshops in that the migrant farmworkers face frequent wage violations without adequate methods to address their problems individually.¹³⁴

The working conditions and wage practices for today’s migrant farmworkers track the average textile worker’s working conditions before Congress enacted the FLSA.¹³⁵ After Congress implemented the FLSA, the DOL showed that it was possible to address unfair working and wage conditions by using the “hot goods” injunction.¹³⁶ The DOL’s focused use of these injunctions, as well as monitoring, created the impetus for private employers to implement internal oversight over wage and working conditions.¹³⁷ By using the “hot goods” injunction of the FLSA, the DOL could create similar incentives for growers to exercise greater care in ensuring that migrant farmworkers receive the pay they deserve.¹³⁸

The “hot goods” injunction is having some positive effects on the perishable agriculture industry. First, the WHD’s focus on maintaining proper wage practices in agriculture has been gaining attention and serves as a powerful method of informing growers that they are not beyond the reach of

132. See *supra* Part III.C.

133. See *supra* Part II.C.

134. See *supra* Part II.D.

135. See *supra* Part II.D.

136. See *supra* Part II.C.

137. See *supra* notes 108–12 and accompanying text.

138. See Alex Passantino, *What Happened, Dude?: WHD Rolls Out the Big Enforcement Guns*, SEYFARTH SHAW LLP’S WAGE & HOUR LITIG. BLOG (Apr. 12, 2013), <http://www.wagehourlitigation.com/dol-compliance-cerule-making/what-happened-dude-whd-rolls-out-the-big-enforcement-guns/> (advocating that employers assess wage and hour practices and educate any field personnel to ensure compliance with federal law).

the FLSA.¹³⁹ This is important because while visibility and outrage over the wage practices in the textile industry unified the country in demanding fair wages, the unfair wage practices that plague migrant farmworkers has not drawn the same attention.¹⁴⁰ While the lack of attention to these working conditions may be due to many reasons—such as the rural workplace, immigration issues, or America’s propensity to protect farmers—when these workers fall within the coverage of the FLSA, they deserve equal protection from the government.

The DOL’s recent use of the “hot goods” provision in perishable agriculture has caused growers to quickly comply with wage and hour laws. Many “hot goods” injunctions in agriculture end with consent judgments.¹⁴¹ Many of these consent judgments have been due to poor recordkeeping of hours worked or wages paid.¹⁴² The fact that the WHD rests many findings upon inaccurate or improper recordkeeping suggests that employers could avoid many FLSA violations with simple adjustments to ensure that growers comply with federal law, similar to the adjustments made by the garment industry following the enforcement of the FLSA.¹⁴³

139. See *supra* Part III.B.

140. See *supra* Part III.B.

141. See, e.g., News Release, Office of Pub. Affairs, U.S. Dep’t of Labor, US Department of Labor Recovers \$240,000 in Back Wages, Damages and Penalties from 3 Oregon Berry Farmers (Aug. 31, 2012), available at <http://nwlaborpress.org/wp-content/uploads/2012/09/12-1809-SAN.pdf> (discussing consent judgments following investigations under the FLSA and AWP); News Release, Wage & Hour Div., U.S. Dep’t of Labor, US Labor Department’s Wage and Hour Division Conducts Mississippi Enforcement Initiative to Protect Rights of Farmworkers, Educate Employers (Nov. 14, 2011), available at <http://www.dol.gov/opa/media/press/whd/whd20111518.htm> (discussing enforcement focused on migrant workers to “level [the] playing field and protect the interests of law-abiding employers who play by the rules and pay fair wages” (internal quotation marks omitted)); Press Release, Wage & Hour Div., U.S. Dep’t of Labor, Buena Vista, NJ, Vegetable Grower Agrees to Pay Nearly \$120,000 in Back Wages and Damages Following US Labor Department Investigation (July 8, 2010), available at <https://www.dol.gov.edgekey-staging.net/whd/media/press/whdpressVB2.asp?pressdoc=Northeast/NEarchive3/20100708.xml> (discussing consent judgments from violations of the FLSA).

142. See *Solis v. Pan–Am. Berry Growers, LLC*, No. 6:12-cv-01474-TC (D. Or. Aug. 18, 2012). Note that growers are becoming increasingly skeptical of the methods used by the WHD to calculate the wages paid to each employee. See *supra* text accompanying notes 45, 119–24. However, cases litigating the WHD’s methods of investigation and making findings of wage and hour violations are rare.

143. This conclusion is supported by the numerous advice columns suggesting that the easiest way to avoid a “hot goods” injunction is to be meticulous with recordkeeping. See Passantino, *supra* note 138 (suggesting that employers should assess current wage and hour practices, research the employers’ rights and obligations, and incorporate those obligations into an established protocol).

B. ALTHOUGH USING THE “HOT GOODS” INJUNCTION TO ENFORCE LABOR VIOLATIONS IN AGRICULTURE CREATES UNIQUE PRESSURES ON THE GROWER, PROCEDURAL SAFEGUARDS SERVE AS MEANINGFUL CHECKS ON THE SYSTEM

There is no doubt that a “hot goods” injunction places unique pressures on agricultural producers due to the perishable nature of the goods. While the growers’ interests are compelling, they are nevertheless in a far better position to enforce their rights against the DOL than migrant farmworkers are to enforce their rights against the growers. When the DOL does not overstep its authority granted by the FLSA, the “hot goods” injunction balances the bargaining power differential between the migrant farmworker and the grower by ensuring that the migrant farmworker starts from a position of earning a minimum wage.

1. Like Any Temporary Restraining Order, a Successful “Hot Goods” Injunction Requires Showing That the Suit Is Likely to Be Successful

The procedural safeguards integrated in the “hot goods” injunction protect growers from wrongful enforcement by the WHD. When used properly, a “hot goods” injunction requires a neutral magistrate to find that the suit for back wages and damages is likely to be successful.¹⁴⁴ Although many recent cases have been settled through consent judgments, a grower can bring an action to fight a “hot goods” injunction by showing that it paid all laborers adequate wages.¹⁴⁵ Growers also have the option to take action to prevent “hot goods” injunctions before the WHD conducts any investigation.¹⁴⁶ If these actions are unsuccessful, the grower can continue to fight the “hot goods” injunction in district court.¹⁴⁷

The WHD’s use of “hot goods” objections complicates the “hot goods” analysis.¹⁴⁸ Despite the fact that these objections occur after the same investigation and have the same effect as a “hot goods” injunction, “hot goods”

144. This is a particularly sought-after procedural device. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 673 (2014) (noting that litigants prefer decisions made by judges over all other procedures).

145. See *Perez v. Blue Mountain Farms*, 961 F. Supp. 2d 1164, 1167–68 (E.D. Wash. 2013).

146. *Id.* at 1167 (discussing a grower’s refusal and legal action to prevent a WHD investigation). In this case, the grower refused to allow WHD investigators to interview farmworkers during the harvest. *Id.* The WHD responded by filing for a temporary restraining order to allow their employees to interview the farmworkers in the fields and in buildings, and to make the grower print and distribute pamphlets regarding farmworker rights to their employees. *Id.* Although the court did grant the temporary restraining order to the extent of allowing interviews in the fields, the court refused to allow the WHD to enter buildings or make the grower print and distribute the informative pamphlets because those actions would unreasonably interfere with the grower’s harvest season. *Id.* at 1172.

147. See Complaint and Demand for Jury Trial, *supra* note 5.

148. See Plaintiff’s Opposition to Defendant’s Motion to Vacate Consent Judgment and Order, *supra* note 9, at 16.

objections have no judicial process.¹⁴⁹ During these “hot goods” objections, the DOL does not go to court before informing those further down the distribution line that the goods are “hot,” which means later purchasers will halt contracts to avoid violating federal law.¹⁵⁰ Overall, this process is inappropriate because it does not afford the grower any meaningful method to challenge the “hot goods” label before it causes substantial harm to their product.¹⁵¹

In 2014, three blueberry growers successfully challenged the DOL’s use of “hot goods” objections that had resulted in three separate consent judgments.¹⁵² A magistrate judge found that the DOL’s use of the “hot goods” objection had placed economic duress on the blueberry growers to sign the consent judgments:¹⁵³ “Although the government’s use of the ‘hot goods’ authority is authorized by statute to resolve wage and hour violations, applying such authority to perishable goods in this situation, in effect, prevented defendant’s [sic] from having their day in court.”¹⁵⁴

Due to the plethora of procedural protections available to growers who are subject to an alleged “hot goods” violation, the WHD should continue to pursue “hot goods” injunctions against growers engaged in perishable agriculture. Furthermore, WHD investigations should only lead to “hot goods” injunctions, rather than “hot goods” objections, because “hot goods” objections deprive the grower of an opportunity to present the grower’s side of the case to a neutral magistrate.

149. *See id.*

150. *See id.*

151. For a more detailed argument regarding the placement of economic duress of “hot goods” objections on perishable agricultural goods, see generally Findings and Recommendation, *Perez v. Pan-Am. Berry Growers, LLC*, No. 6:12-cv-01474-TC (D. Or. Jan. 15, 2014), 2014 WL 198781 (stating the magistrate’s findings and recommendation regarding the parties’ filed motions). Although this case presents an excellent fact pattern where both sides agree that there was no judicial determination that there was a violation or facts suggesting a case that would likely result in a determination of a violation of the FLSA, this case presents an imperfect test case of the “hot goods” objection because the growers signed the consent judgments and did not contest their validity until over a year after their entrance. *Id.* at 3.

152. *Perez v. Pan-Am. Berry Growers, LLC*, No. 6:12-cv-01474-TC, 2014 WL 1668254, at *1 (D. Or. Apr. 24, 2014).

153. Findings and Recommendations, *supra* note 151, at 5.

154. *Id.* at 4. The basis for the revocation of the consent judgment was a motion under Federal Rule of Civil Procedure 60(b)(3) for the use of extrinsic fraud. *Id.* at 4–5. The magistrate judge noted that “[o]btaining a judgment against a party through coercion or duress may constitute extrinsic fraud.” *Id.* at 4.

2. Despite the Unique Pressures on Growers, Growers Are in a Superior Bargaining Position to Enforce Their Rights Against the DOL Than the Migrant Farmworkers Are in to Enforce Their Rights Against a Grower

Migrant farmworkers face such adversity in enforcing their rights that their protections available under federal law should be liberally construed.¹⁵⁵ Migrant farmworkers face immigration issues, poverty, and harsh working conditions.¹⁵⁶ In addition, many migrant farmworkers face language barriers, which causes them confusion and difficulty in understanding their rights as workers in the United States.¹⁵⁷ Collectively, the barriers that migrant farmworkers face place them in a poor bargaining position in agricultural employment.¹⁵⁸

Whereas migrant farmworkers face difficulties enforcing their rights due to immigration issues and language barriers, growers are in a superior position to enforce their rights relative to migrant farmworkers due to the procedural safeguards that ensure that penalties and back wages are not ordered until after a magistrate has heard the case.¹⁵⁹ Growers are also more likely to know their rights because growers are aided by various state farm bureaus.¹⁶⁰ In addition, legal counsel is more widely available to growers due to their superior economic position and secure immigration status.

Based upon the incredibly unequal bargaining power between the grower and the migrant farmworker, it is imperative as a matter of public policy to allow the DOL to utilize all available enforcement mechanisms to even the playing field between farmworkers and growers. Through enforcing the FLSA, the DOL can ensure that migrant farmworkers are not exploited to further benefit their employers. This produces a fair employment relationship and prevents unfair competition between employers who follow the FLSA and those who do not in order to pay less for the production of agricultural goods. Congress's goal in enacting the FLSA was to maintain a "minimum standard of living necessary for health, efficiency, and general well-being of workers."¹⁶¹ This goal applies to all workers covered under the FLSA and to the extent that agricultural workers are covered by the FLSA, the DOL should strive to ensure that these workers receive the benefit of federal wage protections.

155. See *supra* Part III.A–B (explaining the legal and practical challenges that many farmworkers face).

156. See *supra* Part III.B.

157. See *supra* note 74 and accompanying text.

158. See *supra* Part III.B.

159. See *supra* Part IV.B.1.

160. See, e.g., "Hot Goods" Update, *supra* note 45 (encouraging farmers to contact an Oregon Farm Bureau representative if the DOL threatens a "hot goods" injunction).

161. 29 U.S.C. § 202(a) (2012).

V. CONCLUSION

Congress created the “hot goods” provision in the FLSA to correct unfair conditions in the labor market. The FLSA protections are particularly important to migrant farmworkers because they have an inferior bargaining position in relation to growers. However, perishable agriculture places a risk of complete loss of product upon the grower that is not truly analogous to any other manufacturing operation. Due to this complex balance of bargaining power and risk, the DOL should only use the “hot goods” provision after a thorough investigation that necessitates a formal “hot goods” injunction, rather than a mere “hot goods” objection.