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An Agricultural Law Research Article

**Migrant Farmworkers: The Legislature
Giveth and Taketh Away**

by

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COMMENTS

Migrant Farmworkers: The Legislature Giveth and Taketh Away

I. INTRODUCTION

While migrant and seasonal agricultural workers have been given token protection by Congress, lack of appropriated funds and manpower have made enforcement nonexistent. One California deputy labor commissioner describes their enforcement efforts as the “brush-fire standards”.¹ These “standards” are a result of underfunding: thus, the Secretary of Labor² reacts to problems as they occur, rather than actively enforcing the provisions.

A. Background

Congress enacted the Farm Labor Contractor Registration Act of 1963³ (FLCRA), to protect agricultural workers — the most vulnerable participants in agricultural production. The agricultural worker’s employment had been “historically characterized by low wages, long hours and poor working conditions.”⁴ The Committee observed that “[t]he focus of the 1963 Act, prior to the 1974 amendments, was clearly the crew leader, a middleman who recruited, transported and supervised migrant and seasonal workers and who was thought to be not only the primary violator, but most unscrupulous.”⁵

Still, the farmworker remained unprotected. In 1972, Congress ex-

¹ Telephone interview with Alejandro Correa, Deputy Labor Commissioner, at the *Division of Labor Standards Enforcement*, State of California. (November 19, 1990).

² The Secretary of Labor authorizes all investigators to perform functions as required under the Labor Code, including those investigators working in the Wage and Hour Division.

³ H. REP. NO. 885, 97th Cong., 1st Sess., *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 95 Stat. 2583 (1983) (codified at 29 U.S.C. §§ 1801-1872).

⁴ *Id.* at 4547.

⁵ *Id.* at 4548.

tended the Act's coverage by creating stronger enforcement provisions, including a civil remedy for those injured by violations of the Act.⁶ In 1974, further amendments refined the FLCRA. The new provisions prohibited farm labor contractors from knowingly recruiting, employing, or using the services of undocumented workers and required labor contractors to tell employees if there was a strike or other work stoppage.⁷ Despite these laws, the 1982 House Subcommittee on Agricultural Labor found that abuse of agricultural workers had not abated. The committee was given 103 examples of migrant worker abuse at the hands of farm labor contractors and employers: farmworker wages remained scandalously low.⁸ The Act had been ignored because of lack of enforcement. Thus, migrant and seasonal agricultural workers remained the most abused of all workers in the United States.⁹

As a consequence, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA),¹⁰ which paralleled the FLCRA, but expanded liability to *any* entity providing farm labor services or employing farm workers.¹¹ The Act gave similar definition to "migrant" and "seasonal" agricultural workers. Both must be employed in agricultural employment on a seasonal or other temporary basis; however, migrant workers differ from seasonal workers in that they are required to be absent from their permanent place of residence overnight.¹²

⁶ *Id.* at 4548.

⁷ S. Vaupel and P. Martin, *Activity and Regulation of Farm Labor Contractors*, GIANNINI INFORMATION SERIES NO. 86-3. DIVISION OF AGRICULTURE AND NATURAL RESOURCES, U.C. Davis, 1986, at 7-8.

⁸ See H. REP. NO. 885, *supra* note 3, at 4548.

⁹ *Id.* at 4548.

¹⁰ Pub. L. No. 97-470, 96 Stat. 2583 (1983), effective April 14, 1983. The AWPA is codified at 29 U.S.C. § 1801-1872 (1983). Regulations to carry out the AWPA have been issued. See 29 C.F.R., Part 500 (1989).

¹¹ The legislative history of AWPA clearly emphasizes the theme of regulation of agricultural work performed by migrant and seasonal workers that Congress intended to apply under the Act. See H. REP. NO. 885, *supra* note 3, at 4547.

¹² 29 U.S.C. § 1802 (1983).

¶ "Migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(r) "Seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.

B. Scope of Comment

This comment consists of three sections. The first part is an overview of the protections given to migrant and seasonal agricultural farmworkers under AWP. The second part is an analysis of funding and manpower allocations to the Department of Labor. The analysis is supported with budget appropriation statistics for the eight years from 1982 to 1990 for the enforcement division of the Department of Labor. Manpower allocation is analyzed as a comparison of compliance officer positions (manpower) for the eight years, and the number of investigations completed. The final section analyzes the agricultural worker's right to private action under the Act, addresses the handicaps under which the migrant farmworker lives, and discusses the worker's access to the courts.

II. AN OVERVIEW OF GENERAL PROTECTIONS AND A SPOTLIGHT ON SPECIFIC PROVISIONS OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT OF 1983

AWPA protects the migrant and seasonal workers through information and recordkeeping requirements, housing safety, and transportation guidelines.¹³ Although the Act became law in 1983, regulations were not written and adopted by the Department of Labor until 1989.¹⁴ As a result of the delay in formulating the regulations, the Act did not have interpretive guidelines for six years. Perhaps the lack of guidelines resulted in inconsistent or arbitrary enforcement efforts during those years.

A. Information and Recordkeeping Requirements of the Act

The legislative history reveals that Congress intended agricultural workers recruited by labor contractors to be fully informed about their destination and working conditions before they start working.¹⁵

¹³ See 29 U.S.C. §§ 1801-1872 (1983).

¹⁴ See 29 C.F.R., Part 500 (1989).

¹⁵ The following disclosures must be made in writing:

. . . [t]he place of employment; the wage rates to be paid; the crops and kinds of activities in which the worker may be employed; the period of employment; the transportation, housing and other employee benefits to be provided and the charges, if any, associated with those benefits; the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by the employees at the place of employment and the existence of any arrangements with any establishments in the area of employment under which the entity which recruited the employees is to re-

Congress defined recruitment to cover the entire process from pre-employment discussion between the recruiter and the migrant worker to the filing of job orders with the interstate recruitment system established by the Wagner-Peyser Act.¹⁶ Congress intended that every employer have a continuing duty not to violate the terms of the working arrangement without justification.¹⁷

The information and recordkeeping provisions of the Act require the employer¹⁸ to give written notice of certain types of information to the worker; once the migrant or seasonal worker starts working, the employer must post a description of the rights and protections under this Act in a conspicuous place.¹⁹ If the employer provides housing for the migrant workers, a statement of the terms and conditions of housing can be given to the worker.²⁰ In addition to posting requirements, the employer must keep and maintain payroll records for three years, give the worker a statement of payroll withholdings, and pay the wages when they are legally due.²¹ Finally, the Act protects employees by prohibiting "kick-back" schemes when workers purchase goods or services.²²

ceive a commission or any benefit resulting from sales by such establishment to the employees.

See H. REP. NO. 885, *supra* note 3, at 4559-60.

¹⁶ *Id.* at 4559.

¹⁷ *Id.*

¹⁸ Employer includes an agricultural association, agricultural employer or farm labor contractor. See 29 C.F.R. § 500.20 (1989).

(c) "Agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(d) "Agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(k) "Farm Labor Contractor" means any person — other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association — who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

¹⁹ *Id.* at 4560.

²⁰ *Id.* at 4561.

²¹ *Id.*

²² *Id.* at 4563.

B. Safety and Health of Housing and Transportation Provisions Under the Act

Congress was aware of deplorable housing conditions and intended a broad interpretation of the housing provisions of the Act.²³ The Act requires that farm worker housing comply with federal and state safety and health standards.²⁴ The House Subcommittee intended that violations endangering the health or safety of the migrant worker or his or her family not be limited to technical or procedural violations.²⁵ The federal safety and health standards are defined²⁶ under the Employment and Training Administration and the Occupational Safety and Health Administration Housing Standards.²⁷ The Act requires that employers using farm labor contractors must ensure the contractor complies with the health and housing laws.²⁸

In addition, the Act requires certification of the housing facility by state or local health authorities.²⁹ The vehicles which transport the workers must comply with the Department of Transportation standards adopted by the Secretary of Labor.³⁰

The Act requires an insurance policy or liability bond, which must be issued by a licensed insurance carrier for each vehicle used to transport any migrant or seasonal agricultural worker.³¹

An employer must take reasonable steps to insure contractor compliance with registration requirements, even though the term "reasonable steps" is not defined.³² Unlike the housing requirements, an employer is not liable for a contractor's noncompliance with the transportation rules.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 4564.

²⁶ See 29 C.F.R. § 500.133 (1989).

²⁷ See 29 C.F.R. § 500.132 (1989). The standards promulgated by the Employment and Training Administration are found at 20 C.F.R. § 654.404 (1985) and the Occupational Safety and Health Administration at 29 C.F.R. § 1910.142 (1985).

²⁸ See 29 C.F.R. § 500.130 (1989).

²⁹ See H. REP. NO. 885, *supra* note 3, at 4564; 29 C.F.R. § 500.135 (1989).

³⁰ See 29 C.F.R. § 500.101 (1989).

³¹ See 29 C.F.R. § 500.120 (1989).

³² See H. REP. NO. 885, *supra* note 3, at 4566.

III. ENFORCEMENT AND FUNDING FOR IMPLEMENTING THE ACTS

A. *A Continuing Concern: The Department of Labor's Ability to Enforce the Laws*

Congressional intent to enforce the Act in 1990 is different than it was in 1982. In 1982, the Congressional Record revealed no budget increase would be necessary for AWPAs.³³ The Department of Labor claimed it would efficiently enforce the provisions of AWPAs, because its duties and responsibilities were clear.³⁴ More importantly, the Department of Labor expected no decreases in enforcement personnel,³⁵ and the House Subcommittee declared its intention to actively oversee enforcement of AWPAs.³⁶

These promises were not kept. Congress failed to monitor the Labor Department's operations;³⁷ the Department of Labor suffered substantial decreases in enforcement personnel; moreover, the number of investigations has not supported a promise to concentrate on true abuses.

B. *Statistical Analysis of Budget Funding for Investigative Positions from 1982 to 1989*

1. Budget Funding

The Federal Wage and Hour Division, an agency within the Employment Standards Administration of the Department of Labor, enforces minimum wage laws, overtime laws, child labor laws, employment standards under the Fair Labor Standards Act, the FLCRA, compliance with AWPAs, and wage garnishment provisions in Title III of the Consumer Credit Protection Act.³⁸ The actual funding appropriation for program and financing is allocated to the Employment Standards Administration. The following table shows the funds allocated to the Wage and Hour Division.

³³ See H. REP. NO. 97-885, *supra* note 3, at 4568.

³⁴ *Id.* at 4550.

³⁵ *Id.* at 4550.

³⁶ *Id.* at 4550.

³⁷ A search of all House documents indicates that there have been no hearings or reports submitted by the Department of Labor on AWPAs in the last four years.

³⁸ Appendix to the Budget for Fiscal Year 1984, at I-013.

Table 1
Funding to the Wage and Hour Division
(in thousands of dollars)

<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
63,374	69,528	70,454	73,746	71,850	78,323
(In 1988 and 1989, the figures are estimates of 81,909 and 90,035).					

In the five years from 1982, the average yearly increase in funding to the Wage and Hour Division was \$9,385,000. The yearly increase was not allocated to new positions.

While the actual position allocations to the Wage and Hour Division are unavailable, the personnel compensation and personnel positions can be estimated by using the percentage of total funding for the Employment Standards Administration to the Wage and Hour Division. In using this percentage to make the estimates, an assumption is made that the proportion is consistent with the total funding allocation to the Wage and Hour Division. Table 2 shows this percentage figure.

Table 2
Percentage of Funding Allocated to
Wage and Hour Division

<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
35%	36%	34%	34%	36%	37%	35%	36%

Using the percentage figures computed above, Table 3 shows the compensation for full-time permanent personnel in the Wage Hour Division.³⁹

³⁹ Appendix to the Budget for Fiscal Year 1984, I-O13-14; 1985, I-O12-13; 1986, I-O13-14; 1987, I-P14-15; 1988, I-P11-12; and 1989, I-P10-11.

The actual and budgetary figures were given only for the Employment Standards Administration for positions and compensation. These figures were used to estimate the number of positions and amount of compensation allocated to the Wage and Hour Division.

The following full-time compensation for permanent personnel were allocated to the Employment Standards Administration: 1982 — \$114,528; 1983 — \$119,984; 1984 — \$121,903; 1985 — \$126,749; 1986 — \$125,461; 1987 — \$126,294; 1988 (estimate) — \$132,900; and 1989 (estimate) — \$139,641.

The number of positions allocated to the Employment Standards Administration were as follows: 1982 — 4,266; 1983 — 4,264; 1984 — 4,268; 1985 — 4,180; 1986 — 4,067; 1987 — 4,100; 1988 (estimate) — 4,192; and 1989 (estimate) — 4,238.

Table 3
Employee Compensation Allocated to
Wage and Hour Division
(in thousands of dollars)

<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
40,084	43,194	41,447	43,094	45,166	46,728	46,515	50,270

Table 4 shows the position allocation for the Wage and Hour Division using the same percentage figure.

Table 4
Personnel Positions in the
Wage and Hour Division
(in thousands of dollars)

<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
1,493	1,535	1,451	1,421	1,464	1,517	1,467	1,525

All of the above figures are the basis for analyzing the investigative positions for the Wage and Hour Division.

2. Statistical History of FLCRA Enforcement

A brief history of statistics illustrates the Department of Labor's failure to adequately enforce the AWPA. In 1982, the House Subcommittee on Agricultural Labor seriously doubted the ability of the Department of Labor to adequately enforce the provisions of the FLCRA because of the decreases in personnel from 1979.⁴⁰ In 1972, FLCRA enforcement was moved to the Wage and Hour Division where approximately 1,100 compliance officers enforced the FLCRA, the Fair Labor Standards Act (FLSA) and 80 other statutes.⁴¹ After 1972, the Wage and Hour Division measured enforcement by enforcement hours devoted to FLCRA or AWPA (two thousand compliance hours equal one person-year).⁴²

The number of investigators throughout the United States fell from 58 in 1979 to 40 in 1982, a 31% decrease over four years.⁴³ These investigators were charged with the duty to determine abuses against the FLCRA. In 1979, 5,708 investigations of FLCRA abuses were

⁴⁰ See H. REP. NO. 885, *supra* note 3, at 4567.

⁴¹ See Vaupel, *supra* note 7, at 11.

⁴² *Id.* at 11.

⁴³ See H. REP. NO. 885, *supra* note 3, at 4567.

conducted at an average of 8.2 investigations per investigator per month.⁴⁴ In 1982, the projected investigations had dropped to 3,600, or an average of 7.5 investigations per investigator per month, a 37% decrease over four years.⁴⁵ According to the Department of Labor budget, 40 positions were assigned to FLCRA and AWPAs in 1982.⁴⁶

3. Statistical Information of AWPAs Positions

In 1983, 1,535 positions were allocated to the Wage and Hour Division, of which 41 positions were assigned to FLCRA and AWPAs.⁴⁷ The FLCRA/AWPA positions fell to 38 in 1984, one year after AWPAs was passed, a five percent decrease in investigative personnel. In 1985, the positions remained constant at 38, and increased by one position in 1986. In 1987, the position allocation increased to 40, finally reaching the pre-AWPA enforcement level. In 1988, the positions dropped to 39. In 1989, the estimated personnel positions rose to 40.⁴⁸ Figure 1 shows the allocation of compliance officer positions for FLCRA/AWPA from 1982 through 1989.

⁴⁴ *Id.* at 4550.

⁴⁵ *Id.*

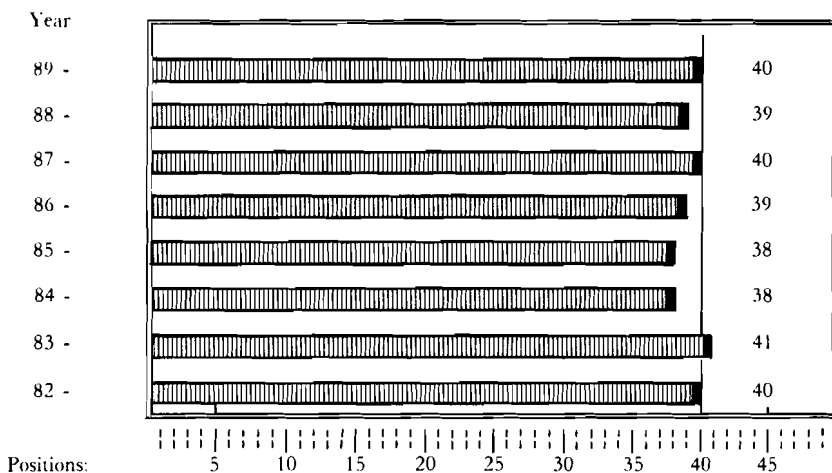
⁴⁶ See Appendix to the Budget, *supra* note 39, at I-O13; there were 4,266 actual positions allocated to the Employment Standards Administration in 1982. Forty actual positions were allocated to FLCRA and AWPAs within the Wage and Hour Division. Other years can be computed by multiplying the percent of the total allocation to the Wage and Hour Division (2.68%) times the amount allocated to FLCRA and AWPAs (1,493).

⁴⁷ See Appendix to the Budget, *supra* note 39, at I-O13, I-O12. (2.68% times 1,535 equals 41 positions).

⁴⁸ See Appendix to the Budget, *supra* note 39, at I-O13, I-O12, I-P14, I-P11, I-P10. (1984 — 1,451 times 2.68% equals 38; 1985 — 1,421 times 2.68% equals 38; 1986 — 1,464 times 2.68% equals 39; 1987 — 1,517 times 2.68% equals 40; 1988 (estimate) — 1,467 times 2.68% equals 39; 1989 (estimate) — 1,525 times 2.68% equals 40).

Figure 1.

Positions Allocated to FLCRA and AWPA



The Department of Labor promised the Legislature that it would not cut positions.⁴⁹ The promise was not kept. The year of AWPA passage, 1983, was the only year where there was an increase in positions. The reduction of positions effects the number of investigations completed, and a decrease in investigations causes lack of compliance with AWPA.⁵⁰

4. Statistical Information on AWPA Investigations

The number of FLCRA and AWPA investigations peaked in 1980, averaging 7.5 investigations per investigator per month.⁵¹ In 1983, there were 7.3 investigations per investigator per month, and in 1984, an average of 7.5.⁵²

⁴⁹ See H. REP. NO. 97-885, *supra* note 3, at 4550.

⁵⁰ See Vaupel, *supra* note 7, at 12.

⁵¹ *Id.* at 11.

⁵² The number of investigations was computed using an average of investigations in 1982, 1983 and 1984 per investigator per month. This 3-year average is 7.4 investigations per investigator per month, or 88 per year.

Figure 2.

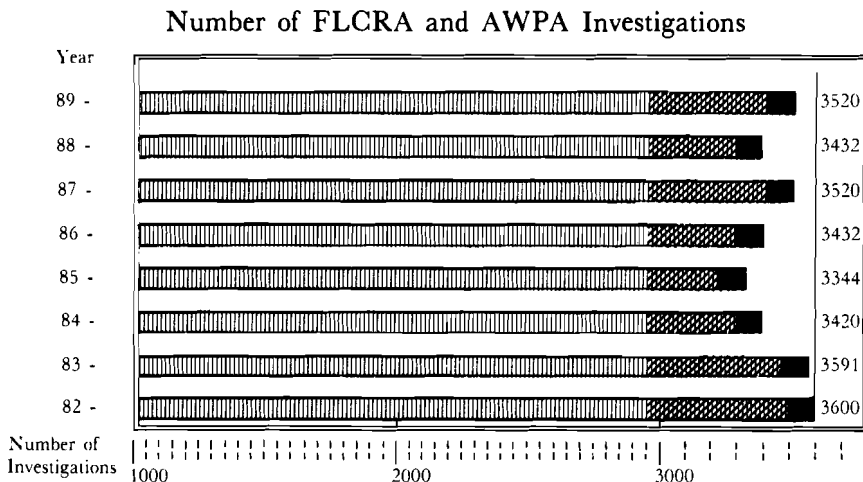


Figure 2 shows the investigations did not surpass the pre-AWPA 1982 amount.⁵³

5. Have Persons Been Aided?

The 1984 Wage and Hour Division Annual Budget predicted that 712,000 persons would be aided through registration and enforcement of FLCRA. Each year, the budget was published with increased estimates of how many people would be helped through enforcement of the Act. In the Annual Budget for the years 1985 through 1987, the Wage and Hour Division predicted that 82,600, 110,000, and 134,000 persons would be aided through enforcement of employment standards for migrant and seasonal agricultural workers.⁵⁴ The 1988 and 1989 predictions were that 146,000 persons would be aided. These predictions were not forecast as a result of investigations completed by compliance officers. Otherwise, the number of investigators and investigations would have increased each year and the statistics show they did not.⁵⁵

⁵³ See Vaupel, *supra* note 7, at 11-12.

⁵⁴ See Appendix to the Budget, *supra* note 39, at I-O13, I-O12, I-O13, I-P14, I-P11, I-P10.

⁵⁵ Each investigator would have aided 2,135 persons in 1985, 2,851 in 1986, 3,350 in 1987, 3,744 in 1988 and 3,650 in 1989, all without regulation guidelines.

6. The Significance of the Statistics

The statistical information presented above shows the lack of progress of the Wage and Hour Division in enforcing AWPAs. Since the enforcement of the Act is accomplished by compliance investigators, a decrease in even one investigative position hinders enforcement. Theoretically, the more investigative positions, the more investigations. Successful enforcement is directly related to the number of investigations of the employer community.⁵⁶ Otherwise, AWPAs would stand for voluntary compliance — or no compliance. The position allocations for compliance investigators decreased in 1984 and never reached the 1983 level. The projection in 1988-89 should be viewed with caution since the positions are only an estimate. Computing investigations at an average of 7.43 per investigator per month, even the investigations of compliance officers in 1989 did not surpass the amount of investigations achieved in 1982. These figures support the premise that there has been a lack of funding and positions to enforce the Acts through the Department of Labor.

As indicative of the problem, the Department of Labor has allocated three positions to cover the San Joaquin Valley of Central California — the most productive food and fiber producing area of the world, which heavily relies on agricultural workers.⁵⁷ An interview with an investigator with the California Rural Legal Assistance, Inc. revealed frustration in her inability to reach these compliance officers.⁵⁸ In most cases, the officers are in the field and have no clerical help. They are available one half-day per week to take telephone calls.

While AWPAs apply to more than farm labor contractors, the majority of farm labor contractors and contractor activity is concentrated in California, Florida and Texas where 64% of contractor wages are paid.⁵⁹ Since the San Joaquin Valley usually accounts for about one-half of all California agricultural labor statistics, the concentration of farm labor contractors here is significant.⁶⁰

To complicate matters, an interview with a California deputy labor commissioner indicated that the California Labor Commissioner and the federal Department of Labor do not share information.⁶¹ Prior to

⁵⁶ See Vaupel, *supra* note 7, at 12.

⁵⁷ *Id.*

⁵⁸ Telephone interview with Gloria Hernandez, Investigator, California Rural Legal Assistance, Inc. (November, 1990).

⁵⁹ See Vaupel, *supra* note 7, at 12.

⁶⁰ *Id.* at 15.

⁶¹ See Interview Correa, *supra* note 1.

1985, the state Labor Commissioner's office had four investigators to cover seven counties⁶² within the San Joaquin Valley. In 1985, the number of positions were reduced by half. There are now two deputy commissioners who cover 21,000 square miles and handle all areas of labor enforcement. The area the two deputy commissioners cover is comparable to the combined square miles of the following states: Connecticut, Delaware, District of Columbia, Hawaii, New Jersey and Rhode Island. The deputy commissioner indicated that the two departments did not work together; many times efforts were duplicated.⁶³ If the departments did share information, the budget cuts and decreases in state and federal positions would have less of an impact on enforcement efforts.

IV. THE ENFORCEMENT PROVISIONS ALLOW FOR A PRIVATE RIGHT OF ACTION

When a migrant or seasonal worker becomes injured through violations of AWPAs, the Act allows the worker to pursue a private right of action. The United States District Courts have jurisdiction over private suits by aggrieved agricultural workers.⁶⁴ A suit may be filed in any district court having jurisdiction of the parties, without respect to the amount in controversy, citizenship of the parties, and exhaustion of any alternative administrative remedies.⁶⁵ The statutory damages in private actions are limited to \$500 per plaintiff per violation, and in certified class actions, the award is limited to \$500 per plaintiff per violation up to \$500,000 or other equitable relief.⁶⁶ The standing to sue for violations has been granted to immediate parties, but also to third persons showing an actual injury "fairly traceable" to the defendant's violation.⁶⁷

However, there is resistance to this provision under the Act. In 1987, an oversight hearing on the private right of action procedures was held.⁶⁸ The House Subcommittee on Agricultural Labor was consider-

⁶² The seven counties include: Fresno (6,000 sq.mi.), a portion of Kern (3,250 sq.mi.), Kings (1,650 sq.mi.), Madera (2,200 sq.mi.), Mariposa (1,500 sq.mi.), Merced (2,000 sq.mi.), and Tulare (4,400 sq.mi.) for a total of almost 21,000 square miles.

⁶³ See Interview, Correa, *supra* note 1.

⁶⁴ See 29 U.S.C. § 1854 (1983).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See generally H. REP. NO. 50, 100th Cong., 1st Sess., Oversight Hearing on AWPAs (1987), 1-159.

ing a proposal to AWPAs, H.R. 1722, which would change the private right of action section of the Act.⁶⁹ The amendment would require that a plaintiff exhaust all available administrative remedies and attempt to arbitrate; only after these alternatives were unsuccessful, could a private suit be filed.⁷⁰ During the oversight hearing, farm owners testified that the private right of action provision was improperly used.⁷¹ They contended that they were continually harassed by litigation over small infractions under the Act.⁷² Yet the Friends of Farmworkers and others argued that the private right of action, with statutory damages, was designed to promote enforcement of the Act and thus deter and correct the exploitative practices that have historically plagued the migrant farm labor market.⁷³ They argued that growers had incentives not to settle cases and that the AWPAs did not allow for the recovery of attorney's fees by a prevailing plaintiff.⁷⁴ They also argued that Rule 11 of the Federal Rules of Civil Procedure already provided the remedy the growers were asking.⁷⁵ Finally, they stated ". . . [t]he lack of attorney's fees for a prevailing plaintiff, combined with the difficulties of litigating on behalf of farmworkers and the relatively small damages available, already make it virtually impossible to interest private attorneys in farmworker cases."⁷⁶

One of the employers at the hearing was a subsequent litigant in a 1990 landmark case. In that case, the Supreme Court upheld AWPAs as pre-empting state law to the limited extent that it does not permit states to supplant the statute's remedial scheme.⁷⁷ The facts were that migrant farmworkers had been injured in an automobile accident while traveling to work in the employer's van. The farmworkers received benefits under the Florida workers' compensation law for their inju-

⁶⁹ *Id.* at 10.

⁷⁰ *Id.*

⁷¹ *Id.* at 14.

⁷² *Id.*

⁷³ *Id.* at 120 (quoting *Beliz v. W.H. McLeod & Sons Packing Co.* 765 F.2d 1317, 1332 (5th Cir. 1985)).

⁷⁴ See H. REP. NO. 50, 100th Cong., 1st Sess., Oversight Hearing on AWPAs (1987), 1-159. (Statement of the Farmworker Justice Fund, Inc., July 13, 1987, 115, 122).

⁷⁵ Rule 11 allows a court to assess attorney's fees against a party or a lawyer if the claims brought are without foundation or are made for an improper purpose. See H. REP. (Statement), *supra* note 74, at 123.

⁷⁶ See H. REP. (Statement), *supra* note 74, at 124.

⁷⁷ *Adams Fruit Company, Inc. v. Ramsford Barrett, et al.* ____ U.S. ____, 110 S. Ct. 1384 (1990).

ries.⁷⁸ In addition, they filed suit against their employer for intentional violations of the motor vehicle safety provisions under AWPA.⁷⁹ The lower court granted the employer's motion for a summary judgment, but the Court of Appeals reversed, holding that such an exclusivity provision did not bar a private AWPA suit.⁸⁰ Several states, including California, Texas, and the Commonwealth of Massachusetts, joined Florida in asking the Supreme Court "to construe Florida law so as to create a conflict between federal and state legislation".⁸¹ Each [state] has a provision in its state workers' compensation statute making workers' recovery for personal injuries under the state workers' insurance system the exclusive mechanism for personal injury compensation.⁸² The Court affirmed the decision of the Court of Appeals and agreed that the actual damages under AWPA would be offset by the receipt of benefits under the state workers' compensation law.⁸³

A. *Problems with the Private Right of Action*

Since federal and state enforcement of these acts is bleak, the ability of the laborer to file a claim with the district courts as a private right of action may be the only effective means of enforcement. The private right of action, however, ignores the initial handicap under which the migrant farmworker operates. The farmworker is typically illiterate and does not understand the legal process. To complicate matters, the underlying fear of all migrant workers is that they will be deported — even when they are legally in the United States.⁸⁴ Illiterate, ignorant and fearful, they avoid relying on state and federal agencies, including the court system.

The funded legal assistance programs such as the California Rural Legal Assistance, Inc., seem to be the light in the tunnel for the farmworker. The legal assistance programs do not ignore cultural or language differences. Since several years may pass before the issue is heard in the courts, the migrant worker stays in contact with the legal assistance program.⁸⁵ Unfortunately, these agencies have had their

⁷⁸ *Id.* at 1386.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1389.

⁸² *Id.* at 1384, 1389 n.4 (1990).

⁸³ *Id.* at 1384.

⁸⁴ See Interview Correa, *supra* note 1; See also Interview Hernandez, *supra* note 58.

⁸⁵ *Id.*

funding reduced.

B. Recommendations to Expand the Private Right of Action

There is a solution. Congress must expand agricultural worker remedies within their private right of action. Broadening agricultural worker remedies could include recovery of attorney's fees for settlement or trial, in addition to a minimum damages award. Once the worker demonstrates a violation under the Act, the burden of proof should be shifted to the employer to prove the Act has not been violated. If the employer fails to carry this burden, treble damages would be awarded as a sanction for violating the provisions of the Act. There may be instances where the damages are difficult to value, such as violating worker notice requirements. In these instances, a reasonable minimum amount could be defined by statute. Facing treble damages, employers will settle valid claims filed by the agricultural workers. This damage recovery would also encourage private attorneys to assist the farmworker in litigation. To complete this remedy, the court system must be more accessible to the farmworker. The transient nature of the farmworker's lifestyle requires that a claim be settled or resolved quickly. Easy access can be achieved through the expanded use of judge magistrates who are capable of bridging any cultural or language barriers.

Arbitration is an alternative form of dispute resolution. Employers would consider this a welcome requirement, since arbitration was included in the proposed 1987 amendment to the private right of action provision. While it could be an effective means of resolving minor infractions, precautions must be taken to protect against any employer abuses in this area. These precautions could include guaranteed legal representation of the agricultural farmworker during arbitration hearings.

All of the above solutions will realistically enforce the Act, even with the budget deficit. The most effective solution, however, is strengthening the provisions of the private right of action. Strengthening the provisions as an avenue of enforcement achieves Congress' primary goal — to protect the agricultural worker. Other agencies are successful in resolving disputes quickly. For example, in California, if a worker files an obstructed unemployment insurance claim, strict time limits are built in to quickly resolve that claim. Therefore, the same strict time limits can be applied in the case of a private claim filed by a migrant or seasonal worker under AWPA. Streamlining the resolution of such claims will mean the agricultural worker will no longer be the most

vulnerable participant in the agricultural arena.

V. CONCLUSION

Congress has provided a method for alleviating abuses to the migrant and seasonal farmworkers; but not the means. The House Subcommittee charged with overseeing the enforcement of this Act has redirected its attention to other areas. Thirty years of attempts at protection through enforcement have resulted in new laws and tighter provisions, rendered impotent by the lack of money.

In light of continued federal budget deficits, adequate funding appears impossible. Perhaps, real enforcement will be accomplished through the workers' private right of action. While this remedy is the vehicle that could alleviate abuses to the farmworkers, Congress must expand agricultural worker remedies within this provision.

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