

BEFORE THE
DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
WASHINGTON, D.C.

Modernizing Recruitment Requirements for the
Temporary Employment of H-2A Foreign Workers
in the United States

Docket No. ETA-2018-0002

COMMENTS OF THE NEWS MEDIA ALLIANCE
(December 19, 2018)

The News Media Alliance (“the Alliance”), a trade association representing nearly 2,000 U.S. newspapers and their multi-platform businesses, hereby respectfully submits comments on the Department of Labor’s (“DOL’s”) proposed revisions to its labor certification program that would change the way employers must inform U.S. workers about temporary agricultural employment opportunities before offering those jobs to nonimmigrant foreign workers.¹

The H-2A positive recruitment provisions adopted under the Immigration Reform and Control Act of 1986 “were clearly promulgated for the particular benefit of United States workers.” *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334 (D. Mass. 1999). To ensure that agricultural job opportunities are made known to U.S. workers before they can be offered to foreign workers, employers must place recruitment ads in generally accessible and available media, easy to

¹ 83 *Fed. Reg.* 55985 (Nov. 9, 2018), *comment period extended*, 83 *Fed. Reg.* 63456 (Dec. 10, 2018).

locate, compliant with specific legal requirements (20 C.F.R. §655.152), and verifiable.

As a trade association representing nearly 2,000 U.S. newspapers and their multi-platform businesses, the Alliance is baffled by the Department's proposal to eliminate the requirement to use a proven medium consumed by more than 130 million adults a week – one that is the only means some workers have to access job information. The Department's proposal to replace the print advertising requirement entirely with electronic job postings will not expand positive recruitment to better achieve the statutory goals. On the contrary, it will reduce the availability of recruitment ads and could enable unscrupulous employers to game the system in order to import foreign workers willing to accept lower pay.²

Accordingly, the Alliance opposes the proposed deletion of the current 20 C.F.R. §655.151(a) requirement that employers place two print advertisements in a newspaper of general circulation serving the area of intended employment. Instead, the Department should retain the current print advertising requirement and adapt current industry practice by requiring employers to use the Internet as well. Updating the rules to conform to current recruitment methods would make optimal use of both print and digital distribution in positive recruitment outreach to U.S. workers.

² Unfortunately, there are U.S. employers that prefer to import foreign workers who would accept lower wages. Such employers can be expected to make at best the minimum effort required to satisfy the preconditions for H-2A visas. DOL should not be making it easier for such employers to simply “go through the motions” or otherwise game the system.

I. ANY MODIFICATION OF THE POSITIVE RECRUITMENT REGULATION SHOULD EXPAND, NOT REDUCE, OUTREACH TO U.S. WORKERS

Congress prefers that U.S. employers hire U.S. workers. For that reason, the law requires U.S. employers actively to recruit U.S. workers in the area of intended employment before hiring nonimmigrant foreign temporary agricultural workers. If DOL seeks to modify the current positive recruitment condition in 20 C.F.R. §655.151, it should require employers to make recruitment ads as broadly accessible and available as possible in the area of intended employment, easy to locate, compliant with specific legal requirements (20 C.F.R. §655.152), and verifiable.³

A. Newspapers Continue To Be The Best Medium To Reach The Broadest Pool Of U.S. Workers

In proposing to eliminate the print advertising requirement in 20 C.F.R. §655.151, the NPRM displays an incorrect and incomplete understanding of the role of newspapers in job recruitment. Most importantly, the NPRM overlooks that newspapers have long been, and remain today, the primary way in which many millions of U.S. workers receive information, including notices of job opportunities, in their areas, and are the only medium capable of reaching all U.S. workers seeking employment opportunities.

³ Employers must maintain records sufficient to demonstrate their satisfaction of these requirements before petitioning for permission to use foreign workers.

1. Newspapers have unparalleled reach in areas of intended employment

The NPRM makes a critical mistake by significantly understating newspapers' readership, which is a key predicate to its proposal to replace newspaper ads with digital ads. It does so by comparing newspaper subscribership (n.6) with Internet job search website page views (*id.*), which is an apples-to-oranges comparison. Unlike websites, where each unique pageview is normally a single person, print newspapers are on average read by more than two people.⁴ Accordingly, the number of actual newspaper readers is more than double reported paid subscriber levels.

In particular, Sunday editions of print newspapers – in which recruitment ads must be published under the current regulation – have a large and engaged audience, with more than 34 million adult subscribers in the United States every week.⁵ This figure does not count the additional readers of each copy within a household or public place such as a library. And news media reach more than 136 million readers each week through print and digital combined. These readers certainly include job seekers in areas where employers seek to hire temporary agricultural workers.

DOL asserts that farmworkers in the U.S. rarely learn about job opportunities through print newspaper ads. 83 *Fed. Reg.* 55987 (citing one survey, DOL audit experience, and anecdotal evidence). It goes on to assert that

⁴ This is similar to the pass-along rate for weekly newspapers as well. See <https://www.nnaweb.org/about-nna?articleCategory=community-facts-figures>.

⁵ Pew Research Center for Journalism and Media, <http://www.journalism.org/fact-sheet/newspapers/>.

U.S. workers are more likely to search for work on the Internet than in classified ads in newspapers. It does so despite conceding that more than 30 percent of American workers search for job opportunities in print publications. 83 *Fed. Reg.* 55987.

Perhaps it is common today to assume, as does the NPRM, that of course the Internet is a superior source of information. But there is ample evidence that Internet notices simply are not seen, and that newspapers are far more effective in providing important information to the relevant local public.

For example, in September 2016, the Michigan Department of Environmental Quality (“MDEQ”) was allowed to post exclusive notice on its website of its draft approval of a proposal to allow Nestle Waters North America to extract significantly more groundwater in Osceola County for its Ice Mountain bottling plant in the state. Although the notice had been posted on the MDEQ website for 42 days, citizens in Michigan were unaware of the proposal until a local newspaper, the *Grand Rapids Press*, published a story about it in print and on its website. Although no comments had been received through October, more than 3,000 were received by early December after the newspaper article brought the matter to light.⁶

The point is that the Internet “notice” had gone “unnoticed” for more than 40 days, and only after a newspaper article was published did the public become

⁶ A similar outcome occurred in Arkansas in 2012, when a corporation was allowed to publish exclusive notice of its permit filing to build a hog farm on a river ban and on the state Department of Environmental Quality website. The agency received no comments, and neighbors, unaware of the “notice” on the corporation’s website, were quite surprised when construction began on the farm near their homes. Hundreds of thousands of dollars have since been spent defending and settling lawsuits over the farm. See *generally* Buffalo River Watershed Alliance, <https://buffaloriveralliance.org/page-1545624>.

aware of this local development. Similar stories exist around the nation.

Newspapers are read, and notices are seen, in their local communities. The same cannot be said of the Internet.

2. Newspapers disseminate recruitment ads beyond the host newspaper to other print and online media

Newspapers routinely arrange for wider distribution of print recruitment ads beyond their primary publication. For example, newspapers typically include the ad in other print publications, such as free distribution newspapers (which may be delivered by mail, available in boxes, or distributed in grocery stores or hotels/motels), and Spanish-language editions. For example, the *Gambit* – a free distribution newspaper published by The New Orleans *Advocate* in the New Orleans market, is the highest rated job search medium in that market, exceeding websites such as Indeed.com, Craigslist, Monster.com, and Glassdoor. This free publication distributed on Sundays and its companion website provide the widest reach within the New Orleans market, but their distribution is not included in the circulation counts of the primary daily newspaper.

Newspapers are also instrumental in republishing recruitment ads online. When an employer publishes an ad in the Sunday edition of a newspaper, the newspaper either upon request of the employer⁷ or as a public service, will post the ad on its own website as a free service. For example, both the large metropolitan Houston *Chronicle* and the small, rural St. Martinville (Louisiana)

⁷ For example, the Bay Area News Group reports that approximately 30 percent of their recruitment advertisers request online advertising in addition to its substantial print distribution.

Teche News publish 100 percent of their recruitment ads online, and many other newspapers do the same. Typically, such ads remain posted for 30 days, a period longer than the 14 days the NPRM would require.

Furthermore, as the NPRM acknowledges, many newspapers post recruitment ads on social media, job boards, and on recruitment websites such as Monster.com or CareerBuilder when the newspaper has a partnership with those platforms. This often is facilitated by a service such as recruitology.com, which not only can power the newspaper's own digital job postings but also can distribute the ad further to online job aggregator sites. For example, the Orlando *Sentinel*, which serves a DMA of more than 4,000,000, has more than 550,000 readers of its Sunday edition, and through its online website, its proprietary jobs site, and its distribution partners, has 5.8 million unique readers combined monthly.⁸ Through these services, the newspaper, in effect, serves as a local agency to ensure the broadest delivery of recruitment ads within an area of intended employment.

Although the NPRM relies on data suggesting that job searchers are more likely to turn to the Internet than to print, it does not take into account that many online job ads in fact are attributable to newspapers.⁹ To be sure, the NPRM

⁸ Also in Florida, the print Sunday edition of the Sarasota *Herald Tribune* reaches 21.5 percent of the adults in its local market. If one adds in online distribution, its job recruitment ads reach 35 percent of the market, compared with Internet recruitment websites that reach 1 to 3 percent of the market.

⁹ The Pew Research Center report, upon which the NPRM relies heavily, consisted of telephone interviews using a prepared set of questions. *Id.* at 23. None of the questions asked interviewees what entity operated the online websites that they used. That report thus gives DOL no basis for knowing how prevalent newspapers are in online recruitment advertising. The NPRM's implicit assumption that newspapers play no role in online job recruitment is certainly invalid.

properly acknowledges that newspapers “now offer online classified employment listings using multi-platform content providers, and popular online job search websites power the job boards of thousands of newspaper sites.” 83 *Fed. Reg.* 55979. However, the NPRM does not appear to understand the essential role of print ads in making that happen.

Put simply, print ads provide the revenue that enable newspapers to verify content, republish in free distribution publications, and convert the ads into digital recruitment postings. It is precisely the current 20 C.F.R. § 655.151 print advertising requirement that creates the opportunity and financial support for newspapers to disseminate job recruitment ads online as well. The NPRM would eliminate the mechanism that funds these online job recruitment services. Indeed, because newspapers typically offer website advertisements as part of their ad package, the effect of the NPRM proposal would be to *reduce* the availability of recruitment ads for job seekers by eliminating the paid print ad that enables the digital postings.

3. Newspapers are the preferable job recruitment medium for rural workers

The NPRM notes that nearly one-third American workers search for job opportunities in print publications.¹⁰ That proportion is likely higher in rural areas, regions of the nation where unemployment and underemployment are particular problems, and where agricultural workers perform their duties.

¹⁰ Citing Pew, the NPRM states that 32 percent of Americans research jobs in print ads. 83 *Fed. Reg.* 55987.

First, the Pew research cited in the NPRM states that rural residents are less likely to search for jobs online than residents of urban or suburban areas. It also found that under half of rural adults searched for jobs online.¹¹

Second, that Pew finding is consistent with Federal Communications Commission data indicating that nearly 40 percent of Americans living in rural areas lack access to fixed broadband Internet service.¹²

Third, not only are rural communities more difficult for Internet service providers to reach, but they also tend to have weaker cellular reception and less robust mobile Internet service.¹³

Finally, newspapers in rural areas tend to have higher circulation penetration, and thus reach an even higher percentage of adults, than those in metropolitan urban areas. This is because of the advertising dynamics in their local market, and their exclusive content.¹⁴

For these reasons, print advertising is the better means of reaching those workers. While placing an ad on a single website may be less expensive for an employer, print provides much more robust reach and effectiveness, especially in rural areas.

¹¹ Pew Research Center, *Searching for Work in the Digital Era*, at 10 (Nov. 19, 2015).

¹² The FCC recently reported that over 24 million Americans lack fixed terrestrial broadband service at speeds of 25 Mbps/3Mbps, and that 30 percent of rural areas lack mobile LTE broadband. Broadband penetration, both terrestrial and mobile, is far lower in rural areas than in urban areas. See Federal Communications Commission, 2018 Broadband Deployment Report (Feb. 2, 2018) (available at <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>).

¹³ *Id.*

¹⁴ See https://www.cjr.org/tow_center_reports/local-small-market-newspapers-study.php.

4. Newspapers help ensure that positive recruitment ads satisfy legal requirements

Finally, the NPRM ignores the significant role newspapers play in ensuring that job recruitment ads satisfy legal requirements. By reviewing ad copy, newspapers can verify that employers have met their obligations in good faith and made jobs available to U.S. workers. The *Houston Chronicle*, for example, has one employee whose sole responsibility is to handle immigration ads. That staffer is trained on all applicable laws, and often guides the employer through the process to ensure that they are in compliance. It is the revenue from print advertising that enables newspapers to pay individuals for this work. Will online websites offer a similar service?

Present budget constraints may impair the ability of the Department to monitor compliance with the positive recruitment requirement. Having experienced, skilled newspaper staff assist employers through the process adds value that would be lost if the print ad revenue that helps to fund those positions goes away as the NPRM proposes.

* * *

In short, newspapers today play a vital role in H-2A visa positive recruitment. Newspapers have wide circulation in the relevant regions, print ads persist as long as the newsprint exists, and, indeed, already play a key role in making job opportunities available online in the absence of a regulatory obligation to do so. The proposed NPRM would eliminate all of these services for U.S. farm workers.

B. Eliminating Print Advertising Would Exclude Non-Online And Digitally Uncomfortable Workers From Job Opportunities

The government should not be making it more difficult for U.S. workers to find access to job opportunities. Yet the NPRM would entirely exclude from positive recruitment U.S. workers who are not online and would impede job searches by the significant segment of U.S. workers uncomfortable with digital technology.

Some U.S. workers are not online at all. The NPRM would make job information unavailable to them.

Furthermore, the digital divide that makes quality Internet connections less available in some parts of the nation would hamper job searching. The same Pew Research report upon which the NPRM relies to say that job search information is more commonly found online also determined that 19 percent of the then-unemployed say it would not be easy to find available jobs in their area online.¹⁵ Rural areas are less wired for broadband Internet and what connections they have are generally slower connections than in more urbanized areas, and there are fewer providers of broadband services in rural areas.

Mobile Internet is not a cure-all. Nearly half of job seekers that use smartphones have experienced difficulties accessing or reading job-related content on those devices. *Id.* at 5.

The H-2A visa process pertains to temporary agricultural jobs that are likely to appeal to the very classes of U.S. workers who have no access to

¹⁵ See Pew Research Center, *Searching for Work in the Digital Era*, at 14.

broadband Internet service. These are the rural, low income, low educational attainment, and minorities. DOL should not be making their ability to learn about these jobs more difficult.

Considered together, these factors mean that shifting the “positive recruitment” efforts to online ads will make searching for jobs more difficult for those Americans who lack online access, or are uncomfortable searching online, or that rely upon their smartphones.

C. Online Advertising Should Be Required In Addition To, Not Instead Of, Newspaper Recruitment Ads

The NPRM’s misunderstanding of the role of newspapers in the job market does not mean that online job recruitment is a bad idea. Indeed, as mentioned above, newspapers are leaders in posting recruitment ads online, routinely supplementing their print ads by reposting them on their own websites or on websites operated by their partners, such as CareerBuilder and Monster.com.

The NPRM solicits comments on alternative regulations that would more broadly and effectively disseminate information about available job opportunities to U.S. workers. 83 *Fed. Reg.* 55988. To advance the statutory goal of preferring U.S. to foreign workers and to ensure “that the maximum number of U.S. workers learn about job opportunities,”¹⁶ recruitment ads should to be broadly available.

¹⁶ 83 *Fed. Reg.* 55990.

As just discussed, the current practice in the recruitment market is to rely on both print and digital distribution. Based on its members' substantial experience in job recruitment services, the Alliance recommends that a combination of print and online advertising would make more U.S. workers aware of job opportunities than either alone.¹⁷

II. THE NPRM IGNORES OR UNDERSTATES CHARACTERISTICS OF ONLINE JOB ADVERTISEMENTS THAT RENDER THEM UNSUITABLE AS THE SOLE MEANS OF POSITIVE RECRUITMENT

The NPRM proposes to eliminate the print advertising requirement and substitute a requirement that positive recruitment ads be posted on the Internet.

The NPRM bases that proposal on the following assumptions:

- (1) That eliminating newspaper ads would not impair the ability of U.S. workers to find job opportunities, nor would it impose any costs on the public or the community;
- (2) That online ads have a wider audience than print;
- (3) That online ads are free and more convenient, which is untrue as to many popular third-party sites and untrue as to employers' own sites, which would need to be redesigned to meet the new regulations; and
- (4) That employers would incur no costs for website design, viewability, record-keeping, and other newly imposed regulations.

Each of these assumptions is seriously flawed. As a consequence, the NPRM has seriously miscalculated its costs and benefits, and the cost-benefit analysis upon which it is premised is invalid.

¹⁷ The Alliance does not support the alternative that employers be allowed to offer electronic advertisements as an *alternative* means of satisfying the existing print advertising requirement in section 655.151. 83 *Fed. Reg.* 55988. Retaining print advertising is vital for the reasons discussed in these comments.

A. The NPRM Does Not Take Into Account The Harm That Limiting Positive Recruitment Ads To Online Would Make Them Unavailable To Some U.S. Workers

The NPRM states that advertisements posted on websites “will provide greater exposure of agricultural job opportunities to U.S. workers than the print newspaper advertisements than section 655.151 currently requires, because they can be more easily accessed by U.S. workers across a much larger geographic area and for a longer period.” The NPRM’s optimism overlooks that online job postings are not a panacea with no downside. A number of characteristics of online recruitment advertising makes it unsuitable as the sole means of positive recruitment.

Consider first that the NPRM’s proposal to eliminate the requirement of newspaper ads will immediately and automatically deprive U.S. workers lacking Internet access of job opportunities. Many of these would be the less-educated and low-income workers that might be interested in the temporary agricultural jobs.

Second, requiring employers to post ads online only would not reach the “passive” information seekers who either do not go online or, if they do, do not know where to look for temporary jobs.

Third, the digital-only proposal would also impede the ability of U.S. workers in areas with poor Internet services to find agricultural job opportunities.

This reduction in positive outreach cannot be treated as somehow “outweighed” by the NPRM’s unproven assumption that online ads are more widely viewed. As discussed above, newspaper *readership* is substantially larger than newspaper subscription levels. And in any given area of intended

employment, the total distribution and readership of the local newspaper, including all of its formats, can easily exceed the number of visits from residents of that area to a third-party job search website. It simply cannot be assumed that an independent third-party website will be more widely viewed in a given area than the local newspaper.¹⁸ For these reasons, the proposal to eliminate the newspaper advertisement requirement would reduce, not enhance, the ability of a significant cohort of U.S. workers to find employment.

B. The NPRM's Assumption That Online Advertising Would Be Costless Is Flawed

The NPRM believes that replacing newspaper ads with online ads will be a “more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that its regulations currently require.” 83 *Fed. Reg.* 55991. Central to this tentative conclusion is its assumption that online job postings are generally costless to employers (*Id.*). That assumption is almost certainly invalid in the real world, particularly as to the major online job sites to which a job seeker likely would first turn, and completely fails to take into account the costs of preparing or posting an online ad.¹⁹

¹⁸ For example, in the Sarasota market, Scarborough data indicates that only 15.5 percent of job searchers in the area have used the Internet or mobile apps in the past 30 days, compared to the 35 percent of the combined print/online reach of the Sarasota *Herald Tribune*.

¹⁹ The NPRM also completely ignores the risk of fraudulent job recruitment sites.

1. The NPRM's assumption that online ads are free is unrealistic

The NPRM states that the Department “have data on three commonly used job-search websites that allow employers to advertise free of charge.” 83 *Fed. Reg.* 55991 n.10. The NPRM does not identify those websites, so the record does not support a finding as to whether those websites would satisfy an employer's positive recruitment obligation. However, many popular job search websites are not free to employers.

For example, prices for advertisements on Monster.com certainly exist, and can vary based on factors such as location, duration, and quantity.²⁰ Monster.com quotes a price for a single ad in the Stockton, California, area starting at \$385; and \$250 each for ten to 24 ads. (visited Dec. 11, 2018). The corresponding prices for ads for the Vidalia, Georgia, area are \$325 and \$220 each, respectively. (visited Dec. 11, 2018).

CareerBuilder prices advertisements differently, but it too charges. See <https://hiring.careerbuilder.com/post-jobs>. The prices shown for a pay per job ad (on Nov. 29, 2018) was \$375 each. Other pricing plans are available as well.

Not all job search websites are free – many are not. Nor has DOL shown that the websites that offer free listings will satisfy the requirements established in 20 C.F.R. §655.152. Finally, the record does not support a conclusion that websites that offer free listings, and that could assure compliance with 20 C.F.R. § 655.152, would reach significant numbers of job searchers in the area of intended employment.

²⁰ See <https://hiring.monster.com/recruitment/standard-postings.aspx>.

2. The NPRM's estimate of the cost of newspaper advertising appears overstated

The NPRM presents an estimate of the average cost of print recruitment classified ads. Although the particular newspapers used in calculating that average are not identified, the NPRM's methodology apparently used ad rates from the largest newspapers in the five states with the most H-2A temporary labor certifications. 83 *Fed. Reg.* 55991. If so, that would be a significant mistake, and the resulting estimate would be excessive.

The largest newspapers in a state may not be the newspapers many employers use, and smaller newspapers typically have lower ad rates than do larger ones. Furthermore, ad rates vary depending upon the size, the number of lines in an ad, and the placement of the ad. The NPRM does not disclose what criteria were used to obtain price estimates.

Regardless of whether the NPRM relies upon accurate newspaper ad rates, the NPRM's analysis is incomplete. As discussed above, the price charged by newspapers typically includes both broader print distribution and digital postings on their own or their partners' websites. These services must be taken into account when considering newspaper advertising costs.

3. The NPRM ignores the new costs that requiring online positive recruitment would impose on employers

The NPRM presumes that the only employer costs it considers consists of "the estimated time required to read and review the proposed rule by a human resources specialist" – which it estimates would amount to a total cost \$65,283 all incurred in the first year. *Id.* The NPRM completely ignores costs that

employers would incur to satisfy the detailed requirements it proposes to ensure that online recruitment ads are fairly and reasonably available to U.S. workers seeking employment.

Such costs are difficult to quantify at this time, because the NPRM has left open what websites would have to comply. Instead, the NPRM asks whether the modified rule should exclude websites maintained by “agricultural associations that serve as agents or sole or joint employers of H-2A workers,” which if done would appear in effect to force employers to use third-party websites. 83 *Fed. Reg.* 55988. How DOL decides this will affect how the particular requirements that websites must meet might be achieved in actual practice.

The NPRM proposes a set of detailed requirements that will require monitoring and enforcement in order to effectively protect U.S. workers. These would impose costs beyond whatever costs were incurred in *placing* the ad. There is no indication that these requirements would apply differently to websites belonging to employers or to third-party providers.

In particular, the NPRM proposes:

- To require employers to advertise the job opportunity on “at least one website that is widely viewed and appropriate for use by U.S. workers who are likely to apply for the job opportunity in the area of intended employment” (Proposed § 655.151(a))
- To require the ad to be “clearly visible on the website’s homepage or be easily retrievable through the website” (Proposed § 655.151(b))
- That the ad must be viewable for at least 14 consecutive days (Proposed § 655.151(b))
- That the ad be “publicly accessible to U.S. workers at no cost “using the latest browser technologies and mobile devices” (Proposed § 655.151(b))

- To require that the employer maintain detailed documentation of compliance, including “screen shots of the web page on which the ad appears (Proposed § 655.151(c))²¹
- To require that the employer maintain “screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement.” (Proposed § 655.151(c))

Complying with these requirements would impose additional costs on employers that are omitted from the NPRM’s cost-benefit analysis.

That there would be additional costs is obvious. Determining what websites are “widely viewed and appropriate for use by U.S. workers who are likely to apply” for the job “in the area of intended employment” would certainly impose some costs on employers beyond a ten-minute scan of the order by someone in a human resources department. The possibility that different websites might be necessary for different categories of jobs could pose still more costs.

What would be the costs of redesigning an employer’s website to meet such standards? What would be the cost of redesigning websites to put the job posting on the home page? The NPRM’s suggestion that it might add another layer of regulation in the form of qualifying criteria that would define “widely viewed” or what types of websites are appropriate for particular occupations (83 *Fed. Reg.* at 55988) could add still more costs or disallow the use of certain sites.

The well-intended requirement that the ad be “clearly visible” on a website’s homepage would likely cause other costs. Employers’ own websites

²¹ This proposed requirement implicitly assumes that the postings were actually made. However, anyone with a passing acquaintance with digital technology could easily fake these screenshots.

seldom post job opportunities on home pages. And even job search websites almost always require some searching to find particular ads. The NPRM’s proposed solution – that “[e]ach navigation choice or interaction that a job seeker has with the website should take him or her closer to the job opportunity being advertised” (83 *Fed. Reg.* at 55988) – would in practice prove both costly and impossible to monitor or enforce. Employers would need to incur costs in retaining screen shots of navigation paths, even while there would be no corresponding requirement to retain screen shots of alternative routes to the same job listing.

Still other aspects of the proposal would impose burdens with little likely benefit. For instance, the NPRM’s attempt to regulate “search paths” and “viewability” appear intended to prevent unscrupulous employers from manipulating ad placement in order to hide job opportunities from U.S. workers, thus enabling the employers to import nonimmigrant temporary agricultural workers at significantly lower wages. NMA members know, based on their own experiences, that such employers regrettably exist in the United States.²² It is unclear how regulation of “search paths” or the vague concept of “viewability” would have any effectiveness in preventing such employers from “burying” ads in order to minimize the pool of U.S. workers.

²² NMA members have reported that some employers will ask them NOT to post job listings online. Those employers may not be genuinely interested in hiring U.S. workers, and can be expected to seek to bury online job listings in difficult-to-access locations.

Moreover, these requirements may ensnare DOL into intrusive regulation of website design. That would threaten federal regulation of websites' editorial choices regarding commercial speech, which raises First Amendment issues.

The NPRM's requirement that employers post the ads only on websites that are "functionally compatible with the latest commercial web browser platforms" and "easily viewable" on mobile devices – while presumably well-intentioned – is also problematic. This would create a perpetual obligation to monitor improvements in browser and mobile device technology and determine whether the job search websites remain "easily viewable" as browser software and device hardware evolve, and to modify websites as necessary. Yet many potential U.S. workers – particularly those without a job – would be unlikely to possess the latest technology, and thus it would seem necessary that the websites also work with older browser and mobile technology that remains in general use.

4. Newspaper ads do not have these shortcomings

The detailed regulations proposed by the NPRM are intended to address shortcomings in online advertising. Newspaper ads, in contrast, do not have those shortcomings. Newspapers are trusted, verifiable, and local. Their local and regional presence, and their standing in their communities, position them to ensure that employers take the actions necessary to promote available jobs in their local markets.

Second, print classified help wanted ads are easy to find.

Third, there is no issue of the “viewability” of a print classified ad. Nor is there any need to monitor developments in the technical viewability of print advertising.

Fourth, a print newspaper ad automatically generates the necessary proof of publication through tearsheets, affidavits or other documents. There is no need to maintain records of screen shots. Indeed, some newspapers, such as the McClatchy group and the Orlando *Sentinel* (which serves a significant agricultural region in Florida) offer the service of notarizing the ad placement, a service which, to the Alliance’s knowledge, no website offers.²³

Fifth, when a print ad is republished online, the trust and verifiability of the print ad goes online with it. Furthermore, that the ad contains the information required by 20 C.F.R. §655.152 has already been verified by the print ad.

Six, newspaper ad staffs are in position to prevent employers from attempting to bury ads from U.S. workers. The revenue from the print recruitment ads is what allows newspapers to act as a local agency to ensure that an ad is widely distributed in the area of intended employment.

C. The NPRM’s Consideration Of Costs And Benefits Is Flawed

Executive Order 13563 requires an agency to adopt a regulation only upon a reasoned determination that its benefits justify its costs, and when choosing among alternative regulatory approaches, to select the approach “that

²³ Newspapers are accustomed to providing proof of publication of a public notice. In a slightly different context, some states, such as Alabama, require newspapers to provide affidavits attesting to the publication of legally-mandated public notices.

maximize net benefits.” The NPRM overstates the benefits and understates the costs of replacing newspaper job listings with Internet postings.

The NPRM does not consider factors that make online ads an incomplete solution, including specifically the ability of print advertising to reach U.S. workers that do not use the Internet. Many of these problems could be avoided, or minimized, by modifying the regulation to reflect the current practice of having newspapers arrange for digital versions of the recruitment ads.

Consequently, the NPRM’s cost-benefit analysis is invalid. In contrast, the Alliance’s recommended alternative would maximize the protections accorded U.S. workers by requiring “positive recruitment” in both print and digital media. This alternative reasonably could be expected to impose some additional costs on employers. However, the incremental cost of requiring both may be minimal because newspapers currently already arrange for posting of job recruitment ads online. In any event, any additional costs would be outweighed by the significant benefit of ensuring the broadest outreach to U.S. workers.

III. CONCLUSION

If the Department of Labor truly wants to put Americans first and serve U.S. workers, they will continue to require print advertising for temporary agricultural jobs. If any change is made, DOL should require employers seeking

to hire H-2A workers to conduct their positive recruitment efforts in both print and online media.

Respectfully submitted,

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