



In the Matter of:

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

PROSECUTING PARTY,

v.

FRANK'S NURSERY LLC

RESPONDENT.

ARB CASE NOS. 2020-0015  
2020-0016

ALJ CASE NO. 2018-TAE-00028

DATE: August 25, 2021

**Appearances:**

*For the Prosecuting Party, Administrator, Wage and Hour Division:*  
Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus,  
Esq., Maria Van Buren, Esq., James M. Morlath, Esq.; U.S.  
Department of Labor; Washington, District of Columbia

*For the Respondent:*  
Stephen E. Menn, Esq.; Law Office of Stephen E. Menn; Houston,  
Texas

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,  
*Administrative Appeals Judges*

**DECISION AND ORDER**

PER CURIAM. This case arises under the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA), as amended, and the H-2A

program's implementing regulations.<sup>1</sup> The INA's H-2A program allows employers to hire foreign, nonimmigrant workers to temporarily fill agricultural positions in the United States.

On January 4, 2018, the Administrator of the United States Department of Labor's Wage and Hour Division (Administrator)<sup>2</sup> issued a Notice of Determination finding that Respondent Frank's Nursery LLC (Respondent) violated multiple H-2A program regulations. The Administrator assessed back wages and civil money penalties (CMPs) against Respondent for the violations.

Respondent requested a hearing, and the matter was referred to the Office of Administrative Law Judges. The Administrative Law Judge (ALJ) assigned to the case issued a Decision and Order (D. & O.) on October 15, 2019, in which he affirmed certain violations and denied others.

The Administrator and Respondent filed cross appeals with the Administrative Review Board (ARB or the Board). After considering the record and the parties' arguments, we affirm the D. & O. in part and reverse it in part.

## BACKGROUND

Respondent operates a fourteen acre nursery in Richmond, Texas, where it grows and sells a variety of flowers, plants, bushes, and mulch.<sup>3</sup> Respondent employs seasonal workers, including nonimmigrants employed pursuant to the H-2A program, to fill temporary agricultural jobs at the nursery.<sup>4</sup>

As a participant in the H-2A program, Respondent was required to meet various requirements delineated by the H-2A program's implementing regulations.<sup>5</sup> The Administrator investigated Respondent for compliance with the H-2A program requirements for the period of February 6, 2015, to April 2, 2016.<sup>6</sup> On January 4,

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<sup>1</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2014); 8 U.S.C. § 1188 (2000); 20 C.F.R. Part 655, Subpart B (2021); 29 C.F.R. Part 501 (2021).

<sup>2</sup> Unless otherwise specified, for simplicity we use the term "Administrator" to also refer to the Wage and Hour Division itself, including any officers or agents thereof.

<sup>3</sup> Administrator's Exhibits (AX) A, D, E.

<sup>4</sup> *Id.*

<sup>5</sup> See 20 C.F.R. § 655, Subpart B.

<sup>6</sup> D. & O. at 1. The Secretary of Labor, through the Administrator, enforces the wage and working condition requirements for workers in the H-2A program. 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.1(c). The Administrator is authorized to conduct investigations and inspections to determine an employer's compliance with the provisions of the H-2A program. 29 C.F.R. §§ 501.6, .15. Among other enforcement powers, the Administrator may

2018, the Administrator issued a Notice of Determination, alleging that Respondent committed multiple violations of the H-2A program requirements and assessing \$33,066.35 in back wages and \$25,713.40 in CMPs against Respondent.<sup>7</sup> As relevant to this appeal, the Administrator found that Respondent committed the following violations:

1. Failing to disclose the existence of a drug screen policy on its H-2A job order, in violation of 20 C.F.R. § 655.121(a)(3). For this violation, the Administrator assessed a CMP of \$1,160.60.
2. Failing to include Respondent's Federal Employee Identification Number (FEIN) on its pay statements, in violation of 20 C.F.R. § 655.122(k). For this violation, the Administrator assessed a CMP of \$7,200.
3. Failing to meet the applicable housing safety and health standards for employer-provided housing, in violation of 20 C.F.R. § 655.122(d)(1). For this violation, the Administrator assessed a CMP of \$1,326.40.
4. Making impermissible deductions for Social Security and Medicare taxes from the H-2A workers' pay, in violation of 20 C.F.R. § 655.122(p). For this violation, the Administrator assessed back wages of \$12,036.16 and a CMP of \$2,700.<sup>8</sup>

Before the ALJ, the Administrator and Respondent filed cross motions for summary decision. The parties subsequently agreed that the ALJ could resolve the case on the record as submitted in the summary decision briefs, without a hearing.<sup>9</sup>

In the D. & O., the ALJ agreed with the Administrator that Respondent violated the H-2A regulations by failing to include its FEIN on its pay statements, failing to satisfy the applicable housing safety and health standards, and making deductions for Social Security and Medicare taxes.<sup>10</sup> Absent any challenge from Respondent as to the reasonableness or amounts of the Administrator's assessments, the ALJ ordered Respondent to pay the \$12,036.16 in back wages and

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institute appropriate administrative proceedings to recover unpaid or back wages and impose sanctions in the form of CMPs. *Id.* §§ 501.16, .19.

<sup>7</sup> D. & O. at 1-2.

<sup>8</sup> *Id.* The Administrator also charged Respondent with other violations which are not before the Board in this appeal.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 7-9.

\$11,226.40 in CMPs assessed by the Administrator for these violations.<sup>11</sup> However, the ALJ found that Respondent did not violate the H-2A regulations by failing to disclose its drug screening program or requirement in its job order.<sup>12</sup>

The Administrator and Respondent filed cross appeals to the Board challenging the ALJ's findings with respect to all four violations.

## JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law and fact from ALJ decisions in cases under the INA's H-2A provisions.<sup>13</sup> Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."<sup>14</sup>

## DISCUSSION

### 1. Drug Screening

An employer seeking to participate in the H-2A program must file a "job order," in the form of a Form ETA-790 prepared by the Department of Labor's Employment and Training Administration (ETA).<sup>15</sup> The job order is first used to attempt to recruit domestic workers through the appropriate state workforce agency (SWA), and then to secure certification from the Office of Foreign Labor Certification, a component of the ETA, to hire nonimmigrant, foreign workers.<sup>16</sup> As relevant to this case, the employer must disclose on the job order all material terms and conditions of employment for the position the employer seeks to fill.<sup>17</sup> One item

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5-6.

<sup>13</sup> *See* 8 U.S.C. § 1188(g)(2); 29 C.F.R. §§ 501.42; *see also* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>14</sup> 5 U.S.C. § 557(b); *accord Three D Farms, LLC*, ARB Nos. 2016-0092, -0093, ALJ No. 2016-TAE-00003, slip op. at 5 (ARB Feb. 12, 2019).

<sup>15</sup> 20 C.F.R. § 655.121(a)(1).

<sup>16</sup> *Id.* §§ 655.121(a)-(d), .130(a), .140 to .145.

<sup>17</sup> *Id.* §§ 655.121(a)(3) (requiring job orders to meet the requirements specified for agricultural clearance orders under 20 C.F.R. Part 653, subpart F); 653.501(c)(1)(iv), (c)(3)(viii) (requiring agricultural clearance orders to include material terms and conditions of employment); *see also id.* §§ 655.103(b) (defining "job order" as "[t]he document containing the material terms and conditions of employment . . . ."), .155 (stating that SWAs

specifically identified on the Form ETA-790 that an employer must disclose is whether it requires a “drug screen” for the position.<sup>18</sup>

It is undisputed that Respondent imposed an extensive drug testing policy on its workforce, including its H-2A employees, which thoroughly regulated the activities of its employees on and off the job.<sup>19</sup> Respondent also concedes that it drug tested every one of its employees, including its owner, his wife, and his family.<sup>20</sup> Respondent imposed this drug screening program without disclosing it on the job order.<sup>21</sup> We agree with the Administrator that, in doing so, Respondent violated the H-2A regulations.

“Material” means “[o]f a nature that knowledge of the item would affect a person’s decision-making; significant; essential.”<sup>22</sup> Drug screening is a condition of employment that surely could affect an H-2A worker’s decision to apply for or accept employment with Respondent, and has a significant impact on the employer-employee relationship. Employees, especially those like H-2A workers who take the extraordinary step of leaving their home countries to accept temporary employment in the United States, should know before applying for or accepting a position that

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“may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment.”).

<sup>18</sup> AX E at 3. The Form ETA-790 contains a checklist of thirteen potential job requirements and directs employers to “check all requirements that apply.” “Drug screen” is listed as one of the requirements.

<sup>19</sup> AX L; *see* Respondent’s Response Brief to Administrator’s Petition for Review (Resp. Response Br.) at 3, 5. For example, the drug policy applies to employees while on any company property, including, presumably, the housing provided to the H-2A and domestic workers, and applies whether the employees were on duty or not. The policy restricts the use of not only illegal drugs, but also alcohol and prescription and over-the-counter medication that may “affect safety, workability, alertness, coordination, judgment, [or] response.” The policy also gives Respondent the right to consult with a medical doctor and restrict employee’s usage of prescription and over-the-counter medication based on the results thereof. Respondent also has the ability to drug test employees at random, and makes it a violation if the employee “is found to have detectable levels or identifiable trace quantities of a prohibited substance in their system, regardless of when or where the drug or substance entered that person’s system, without an explanation satisfactory to” Respondent.

<sup>20</sup> Resp. Response Br. at 3.

<sup>21</sup> AX E at 3.

<sup>22</sup> BLACK’S LAW DICTIONARY (11th ed. 2019); *accord* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6906 (Feb. 12, 2010) (stating that the job order is essential to give prospective employees “sufficient information to make informed employment decisions.”).

they may be subjected to drug testing, and that they could be disqualified, disciplined, or terminated based on the results thereof. The fact that H-2A workers' employment may be conditioned on their willingness and their ability to take and pass a drug test makes this a material term of employment.

Our holding is consistent with the decisions of administrative bodies in other contexts that have held that drug testing policies are material terms of employment, affect the employment relationship, or otherwise may impact an individual's decision-making when it comes to accepting an employment offer.<sup>23</sup> It is also significant that the ETA, which is the agency tasked with preparing job order forms, specifically identified "drug screen" as one of the job requirements that an employer seeking to employ H-2A workers must disclose on its Form ETA-790.<sup>24</sup> This form put Respondent on notice that it was required to disclose any drug screening program or requirement before one could be imposed on its workforce. Respondent left that requirement unchecked, thereby effectively certifying that drug screening would not be a term or condition of the position.<sup>25</sup>

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<sup>23</sup> *Crust & Crumb v. Oliva-Lara*, BALCA No. 2011-PER-02196, ETA No. A-08256-86573, slip op. at 2-3 (BALCA May 1, 2014) (stating that criminal background check and drug testing requirements make a position "less favorable" than positions that do not require them, under PERM regulations of the INA); *Yiannis Elec., Inc. v. Hernandez-Diaz*, BALCA No. 2011-PER-00112, ETA No. A-08210-73491, slip op. at 5 (BALCA Feb. 15, 2012) (stating that criminal background check and drug testing are requirements that must be disclosed in applications for foreign labor under the PERM regulations of the INA because they "could prevent [ ] workers who might otherwise apply for the position from doing so."); *In re Ramada Plaza Hotel*, Nos. 29-CA-25181, -25501, 341 NLRB No. 39, 2004 WL 390651, \*13 (N.L.R.B. Feb. 27, 2004) (adopting the recommendation of the ALJ, which stated that a handbook that, among other things, added a drug and alcohol testing program "in certain material ways, changed the terms and conditions of employment.").

<sup>24</sup> AX E at 3; *see also* Comment Request for Information Collection for the Agricultural and Food Processing Clearance Order, ETA Form 790, Extension With Revisions, and the Agricultural and Food Processing Clearance Memorandum, ETA Form 795, Extension Without Revisions, 77 Fed. Reg. 28,625, 28,625 (May 15, 2012) ("The changes made to ETA Form 790 are intended to streamline the information in the Form for specificity and clarification relating to the type of job offer information that is **required** from agricultural employers." (emphasis added)). Respondent's assertion that the Form ETA-790 was silent as to the requirement to disclose the existence of a drug policy is erroneous, as the cited exhibit reflects. Respondent's citation to Form OMB No. 1235-0002 (WHD Optional Form WH516) is also misplaced. Respondent's Exhibit (RX) 4. Although Respondent is correct that the form does not require the disclosure of drug testing, the form is used in connection with the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and has no bearing on the H-2A program or the employer's disclosure requirements thereunder.

<sup>25</sup> *See* 20 C.F.R. § 655.121(e)(2) ("The employer may not amend the job order on or after the date of filing an Application for Temporary Employment Certification."). We recognize that this conclusion could imply, illogically, that an employer could never change material terms and conditions of employment after the job order has been filed without risking a

As it did below, Respondent contends that drug screens are so prevalent in the industry and area as to make them an implied or “unwritten” condition of employment that need not be disclosed on a job order. We disagree. The fact that a term or condition of employment is widespread or common does not resolve the question of whether it is material and, therefore, must be disclosed on a job order. Materiality and commonality are not inversely proportional or mutually dependent. A widespread condition may be material, or it may be immaterial; likewise, a material condition may be common, or it may be rare. Even if drug testing or screening is widespread in the Texas agricultural industry, we nevertheless hold that it is a material term of employment, and, therefore, had to be disclosed on Respondent’s job order.<sup>26</sup>

For the foregoing reasons, we reverse the ALJ and hold that Respondent’s failure to disclose the drug testing program to which it subjected its workers was a violation of the H-2A regulations. Respondent did not challenge the amount or reasonableness of the penalty assessed by the Administrator for this violation. Accordingly, we reinstate the penalty and order Respondent to pay a CMP of \$1,160.60 for this violation.

## 2. FEIN

Employers are required to provide H-2A workers with written pay statements that must include, among other things, the employer’s Federal Employer Identification Number (FEIN).<sup>27</sup> It is undisputed that pay statements issued by Respondent in this case did not include Respondent’s FEIN.<sup>28</sup> Nevertheless, Respondent urges the Board to overturn the ALJ’s ruling that

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violation, even where unforeseeable exigent circumstances at the workplace practically require such a change. However, in this case we have no evidence that this occurred or that the employer made any effort to revise the job order, such as through communications with the Administrator or OFLC, or otherwise even informed prospective employees of the drug policy implemented after the job offer was finalized. At the very least, such evidence would likely mitigate the civil monetary penalty assessed.

<sup>26</sup> As the Administrator concedes, some requirements or conditions, such as the requirement that an employee follow a supervisor’s directions, may be so universal or imbedded in the fabric of the employment relationship as to make it unnecessary for them to be disclosed on a job order. We do not find drug testing or screening to be in this category, particularly because Respondent failed to put forth any evidence as to how widespread or common drug testing or screening was in this industry or area, or evidence that nonimmigrant, foreign workers applying for the position would be aware that drug testing was the norm.

<sup>27</sup> 20 C.F.R. § 655.122(k)(8).

<sup>28</sup> D. & O. at 7; AX M, N; RX 5.

Respondent violated this program requirement. We reject each of Respondent's arguments and affirm the ALJ.

Respondent first argues that it was not required to issue pay statements at all, let alone pay statements listing its FEIN. In support of this proposition, Respondent cites guidance and a sample pay statement issued by the Department of Labor with respect to the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).<sup>29</sup> The FLSA and the MSPA are distinct federal labor laws that have no bearing on the H-2A program's requirements or on Respondent's obligations as an H-2A employer in this case. Regardless of what the FLSA or the MSPA require,<sup>30</sup> the applicable H-2A regulations require employers to issue pay statements identifying their FEIN.<sup>31</sup> It is undisputed that Respondent did not issue H-2A-compliant pay statements. Therefore, it violated the H-2A program requirements.

Respondent next contends that, even if it was in technical violation of this regulatory requirement, it should nevertheless be relieved of liability. Specifically, Respondent asserts that it withheld the FEIN from the workers' pay statements for "privacy reasons" and to help prevent identity theft resulting from workers being careless with their pay statements.<sup>32</sup> Respondent also asserts that no harm resulted from omitting its FEIN. According to Respondent, the purpose of including a FEIN on a pay statement is to ensure that the workers, the Wage and Hour Division (WHD), and the Internal Revenue Service can easily and specifically identify the employer. Respondent states that its identity was known to all interested parties, and, in any event, the workers' end-of-year W-2s included Respondent's FEIN.

These arguments do not relieve Respondent of the burdens imposed on it under the H-2A program. Even if Respondent was acting altruistically or, with the benefit of hindsight, caused no harm by its omission, the regulation is clear that a

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<sup>29</sup> Respondent's Brief in Support of Petition for Review (Resp. Br.) at 4-6 (citing RX 5; *Fair Labor Standards Act Advisor: Are pay stubs required?*, ELAWS ADVISORS, <https://webapps.dol.gov/elaws/faq/esa/flsa/018.htm> (last visited Aug. 5, 2021); *Questions and Answers About the Fair Labor Standards Act (FLSA)*, WAGE AND HOUR DIVISION, <https://www.dol.gov/agencies/whd/flsa/faq> (last visited Aug. 5, 2021)).

<sup>30</sup> Although the FLSA may not require an employer to issue a pay statement, the MSPA, like the H-2A program, does in fact require employers to issue a pay statement that includes the employer's FEIN. 29 C.F.R. § 500.80(d). Additionally, although Respondent states that the Department of Labor's sample MSPA pay statement does not include space for a FEIN, the form clearly includes a field for "Employer identification number." RX 5.

<sup>31</sup> 20 C.F.R. § 655.122(k)(8).

<sup>32</sup> Resp. Br. at 4; Respondent's Reply in Support of Petition for Review (Resp. Reply Br.) at 4. Respondent failed to provide an evidentiary basis for many of the factual proffers it made in its briefs below and on appeal, including with respect to this assertion.



FEIN must be included in each case. Respondent's policy- and purpose-driven arguments cannot override the plain language of the regulation.<sup>33</sup>

Finally, Respondent contends that it should be relieved of liability because the omission was the fault of Respondent's third-party payroll vendor, to which it outsourced responsibility for preparing its pay statements and managing its payroll. Respondent does not cite any authority for the proposition that it may shift responsibility for its failure to comply with H-2A program requirements to a third party. The regulation states that "[t]he employer" is responsible for furnishing a compliant pay statement, and the regulation does not make any provision for shifting responsibility or liability to another entity.<sup>34</sup> Of course, an employer may delegate payroll preparation tasks to another entity. However, the duty to ensure that H-2A workers receive a compliant pay statement, and liability for the failure to do so, inexorably remain with the H-2A employer.<sup>35</sup>

Accordingly, we affirm the ALJ's ruling that Respondent violated the H-2A program requirements by failing to provide pay statements identifying its FEIN. Absent any argument from Respondent below or on appeal as to the reasonableness or amount of the CMP assessed by the Administrator for this violation, we order Respondent to pay the CMP of \$7,200 assessed by the Administrator.

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<sup>33</sup> See *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Advanced Prof'l Mktg., Inc.*, ARB No. 2012-0069, 2008-LCA-00017, slip op. at 10 (ARB June 3, 2014) ("If the plain language of a statute or regulation is clear, there is no need for further inquiry and the plain language of the statute will control its interpretation.") (internal citations and quotations omitted).

<sup>34</sup> See 20 C.F.R. § 655.122(k)(8).

<sup>35</sup> In the context of the FLSA, federal courts have found that third-party payroll vendors serve as an extension of the employer with respect to payroll, recordkeeping, and pay obligations and that liability for such duties is non-delegable. See *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 943 (8th Cir. 2008) ("For purposes of the FLSA, [the payroll company] is an extension of the employers.") (internal citations and quotations omitted); *Curry v. M-I, LLC*, No. 2:18-CV-306, 2020 WL 486790, \*1 (S.D.Tex. Jan. 30, 2020) ("FLSA payroll compliance is nondelegable. Any violations of the party fulfilling the payroll function is attributable to the employer.") (internal citation omitted); *Majchrzak v. Chrysler Credit Corp.*, 537 F. Supp. 33, 37 (E.D.Mich. 1981) ("[T]he responsibility for making, keeping, and preserving accurate records of the number of hours worked by the plaintiff rested solely on the defendant. This duty, imposed by law, is neither delegable nor dischargeable.") (internal citation omitted).

### 3. Sanitary Housing

The H-2A implementing regulations require employers to provide housing at no-cost to their H-2A workers.<sup>36</sup> The employer-provided housing must meet the Department of Labor Occupational Safety and Health Administration’s (OSHA) standards.<sup>37</sup> Among other things, the OSHA standards require that “[t]he grounds and open areas surrounding the [housing] shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse” and that “[e]ffective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.”<sup>38</sup>

The Administrator and the ALJ determined that the housing Respondent provided to its H-2A workers violated the OSHA standards. We agree. Photographs in the record show a significant amount of debris and garbage in the area immediately surrounding the housing, including a stove, overturned trash cans, discarded mattresses, and piles of refuse.<sup>39</sup> A photograph also reflects what appears to be rat or other pest feces in a kitchen cabinet.<sup>40</sup> Tellingly, Respondent’s owner also conceded that he “absolutely” would not want to live in the conditions reflected in the photographs, and stated that the workers were “living like pigs.”<sup>41</sup>

However, Respondent asserts that any violation of the OSHA standards was de minimis and quickly remedied. Specifically, Respondent contends that the WHD investigator only found a smattering of droppings, and that Respondent hired an exterminator to remediate the issue. Respondent’s arguments do not persuade us to overrule the ALJ. Additionally, the presence of feces was only one basis for the ALJ’s decision that Respondent violated the OSHA standards. As stated above, Respondent also violated the OSHA standards by allowing significant amounts of garbage and debris to accumulate on the grounds surrounding the housing. Respondent ignored this other portion of the violation. Respondent’s argument is also undermined by the admission of Respondent’s owner that the H-2A workers were “living like pigs” and that he “absolutely” would not want to live in the conditions in which the workers were housed.<sup>42</sup> Therefore, we reject Respondent’s de minimis argument.

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<sup>36</sup> 20 C.F.R. § 655.122(d)(1).

<sup>37</sup> *Id.* § 655.122(d)(1)(i) (incorporating 29 C.F.R. § 1910.142).

<sup>38</sup> 29 C.F.R. § 1910.142(a)(3), (j).

<sup>39</sup> AX O-1 to -5.

<sup>40</sup> *Id.* at O-8.

<sup>41</sup> AX B at 72, 92.

<sup>42</sup> *Id.*

Respondent also contends that it satisfied the OSHA standards by supplying clean and sanitary housing to its H-2A workers at the outset of their occupation of the premises. According to Respondent, the subsequent unsanitary conditions resulted from the H-2A and other domestic workers' lifestyle and treatment of the premises, for which it should not be held responsible.

As the ALJ correctly ruled, OSHA standards suggest, in certain regards, that an employer has an ongoing responsibility to help ensure that employer-provided housing meets the applicable standards throughout the period of occupation.<sup>43</sup> Even so, we also appreciate Respondent's argument that there may be shared responsibility between the employer and the employees to maintain the premises once occupation begins and that the employees' conduct may be germane to an employer's liability for the condition of the housing.

However, the circumstances of this case do not require us to explore the bounds of any shared responsibility that may exist with respect to the OSHA standards or the precise extent of Respondent's ongoing responsibilities once H-2A workers begin occupying the premises. Respondent presented essentially no evidence that it took even minimal steps to help maintain the property after the H-2A workers moved in. Although Respondent states in a conclusory fashion that it "tried to keep the premises sanitary," the only specific examples Respondent offered regarding its efforts in this regard was that it hired an exterminator upon the discovery of feces and that the city provided a weekly trash service.<sup>44</sup> In fact, contrary to Respondent's assertion on appeal, Respondent's owner testified that he effectively passed full responsibility for the property to the employees.<sup>45</sup> Moreover,

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<sup>43</sup> For example, the OSHA standards require the grounds to be "maintained in a clean and sanitary condition." 29 C.F.R. § 1910.142(a)(3). "Maintain" is defined as "[t]o **continue** (something) or "[t]o care for (property) for purposes of operational productivity or appearance; to engage in general repair and **upkeep**." BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). Federal courts have also held that employers have an ongoing or continuing obligation to meet similar federal housing requirements throughout the period of occupancy in the context of the MSPA, and that mere proof of compliance therewith at the start of occupancy is not sufficient. *E.g.*, *Villalobos v. N.C. Growers Ass'n, Inc.*, 252 F. Supp. 2d 1, 32 (D.P.R. 2002); *Sanchez v. Overmyer*, 891 F. Supp. 1253, 1258 (N.D. Oh. 1995); *Howard v. Malcolm*, 658 F. Supp. 423, 432-33 (E.D.N.C. 1987).

<sup>44</sup> Resp. Br. at 7; Resp. Reply Br. at 6-7. Respondent's owner testified as to the existence of a trash service provided by the city (AX B at 72), but we found no evidence in the record that Respondent hired an exterminator.

<sup>45</sup> AX B at 72 ("Once I turn the house to them, legally, I cannot go into the house. So they don't—we don't ever see. The city pick up the trash twice a week. If they don't put the trash in a can—see, there's a can provided by the city. If they don't put the trash in the can or they don't pull the can to the street, I'm not responsible for that. I believe people, they have to be responsible for living well."), 86 ("They will be caring for the place where they live. They will be cleaning the place where they live. They will take care of stuff like it is

even if, as Respondent suggests, the employees rebuffed Respondent's efforts to maintain the interior of the premises in a sanitary condition, or that Respondent was compelled to honor the employees' right to privacy in the housing, Respondent has not explained why it could not at least maintain the grounds and keep the common areas outside of the housing free of the discarded appliances, furniture, and other trash discovered by the WHD investigator.

In the absence of evidence that Respondent took any meaningful effort to help ensure the employees' housing was maintained in a sanitary condition, we agree with the Administrator and the ALJ that Respondent failed to fulfill its obligation to provide housing that met the applicable OSHA standards. Absent any argument from Respondent below or on appeal as to the reasonableness or amount of the CMP assessed by the Administrator for this violation, we order Respondent to pay the CMP of \$1,326.40 assessed by the Administrator.

#### 4. Social Security and Medicare Tax Deductions

The final issue in this appeal concerns the deductions Respondent made from its H-2A workers' pay for Social Security and Medicare taxes. The Administrator and the ALJ determined that these deductions violated the H-2A regulations because the employees did not owe such taxes. We agree.

The H-2A's implementing regulations prohibit employers from making undisclosed or unauthorized deductions that reduce H-2A employees' pay below the minimum amounts required by the H-2A program.<sup>46</sup> Although an employer may ordinarily make tax deductions even if they would cause the H-2A workers' pay to drop below the statutory minimum, the taxes must actually be owed by the employees and forwarded to the appropriate governmental agency to avoid a violation.<sup>47</sup>

Non-resident H-2A workers do not owe Social Security or Medicare taxes, as the IRS publications cited by the Administrator and by Respondent make clear.<sup>48</sup>

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their own stuff, because I'm telling all my employees, 'You should care—whatever is here, you should take care as is your own stuff.'")

<sup>46</sup> 20 C.F.R. § 655.122(p)(2).

<sup>47</sup> *See id.* (incorporating the regulations at 29 C.F.R. Part 531 to determine whether deductions for payments to third persons are permissible); 29 C.F.R. § 531.38 (stating that "[t]axes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as 'wages' . . .").

<sup>48</sup> AX J ("Foreign agricultural workers temporarily admitted into the United States on the H-2A visas are exempt from U.S. Social Security and Medicare taxes . . ."), K ("The following classes of nonimmigrants and nonresident aliens are exempt from U.S. Social Security and Medicare taxes: . . . An H-2A nonimmigrant admitted into the United States

Thus, the deductions Respondent made for these taxes were not permissible and, because they brought the H-2A employees' pay below the statutory minimum,<sup>49</sup> constituted a violation of the H-2A program requirements.

However, Respondent contends on appeal, as it did below, that the H-2A workers authorized Respondent to make deductions from their pay by executing IRS Form W-4s, on which they did not claim an exemption from tax withholdings. An executed Form W-4 in which an employee fails to claim an exemption from withholdings does not give the employer carte blanche to deduct for any and all taxes, including those that the employee does not actually owe. In fact, the instructions to Form W-4 in effect at the time relevant to this appeal directed non-resident aliens, which includes those employed on H-2A visas, not to claim an exemption from withholdings.<sup>50</sup> Therefore, the absence of a claimed exemption cannot authorize Respondent to make deductions for taxes that the H-2A employees did not owe.

Respondent also argues that it should not be held responsible for this violation because the deductions were made by its third-party payroll vendor, which it trusted to make appropriate tax deductions on its behalf. We reject this argument for the same reasons set forth in Section 2 with respect to Respondent's failure to include its FEIN on its pay statements. Respondent may not shift responsibility or liability for complying with the H-2A requirements to a third party.

Next, Respondent argues that it should not be held liable because it did not profit from or abscond with the amounts deducted for Social Security and Medicare taxes. Rather, Respondent asserts it remitted the workers' full gross wages to its payroll vendor and that any deductions were then ultimately returned or refunded

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temporarily to perform agricultural labor."); RX 7 ("One such exemption [from withholding for social security and Medicare taxes] is for foreign agricultural workers on H-2A visas, who are exempt from social security and Medicare taxes."); IRS Publication 51, *Agricultural Employer's Tax Guide*, at 11, available at <https://www.irs.gov/pub/irs-pdf/p51.pdf> ("[C]ompensation paid to H-2A workers for agricultural labor performed in connection with this visa isn't subject to social security and Medicare taxes."); IRS Publication 519, *U.S. Tax Guide for Aliens*, at 44, available at <https://www.irs.gov/pub/irs-pdf/p519.pdf> ("Agricultural workers temporarily admitted into the United States on H-2A visas are exempt from social security and Medicare taxes . . .").

<sup>49</sup> Respondent has not disputed that it paid its H-2A workers no more than the statutory minimum.

<sup>50</sup> IRS Notice 1392 (Rev. Nov. 2013), *Supplemental Form W-4 Instructions for Nonresident Aliens*, at 2, available at <https://www.irs.gov/pub/irs-prior/n1392--2013.pdf> ("Do not claim that you are exempt from withholding on line 7 of Form W-4 (even if you meet both of the conditions listed on that line)."); accord AX G. Whereas H-2A employees do not owe Social Security and Medicare taxes, they may owe regular income taxes. AX J. Therefore, claiming an exemption from withholdings on the W-4 would not be appropriate.

to the workers when they filed their tax returns. However, Respondent proffered no evidence that the amounts unlawfully deducted from the H-2A workers' pay were actually refunded or returned to them.<sup>51</sup> Furthermore, the fact remains that Respondent, through its payroll company, made deductions from H-2A workers' pay which it was not authorized to make, and which caused the H-2A workers' pay to drop below the minimum amounts required by the H-2A program. This constitutes a violation, regardless of whether Respondent profited from the practice.<sup>52</sup>

Finally, Respondent argues that even if it is liable for making unlawful deductions, the Board should reduce the amount of CMPs and back wages assessed by the Administrator. However, Respondent did not make any argument below as to the reasonableness or amount of the Administrator's assessment. The Board typically does not consider arguments presented for the first time on appeal.<sup>53</sup>

Even if we consider Respondent's new request, we will not revise the amount assessed by the Administrator for this violation. Regarding back wages, Respondent contends it should be given a "credit" for the amounts repaid or refunded to the H-2A workers. However, as explained above, Respondent offered no evidence that the H-2A workers were actually repaid the amounts deducted for Social Security and Medicare taxes. Accordingly, there is no basis upon which the board could grant Respondent a credit. However, we expect that before the WHD makes any payments for back wages in this case, it will ensure that the H-2A workers from whom deductions were made for Social Security and Medicare taxes did not previously receive a refund or repayment for the deductions. Making back wage payments to employees who have already been repaid would result in an improper double recovery.

Regarding the CMP, the H-2A implementing regulations provide a series of factors that may be considered in assessing the amount of a penalty.<sup>54</sup> Respondent has not offered any analysis of the relevant factors or otherwise provided a sufficient basis to disturb the relatively small penalty assessed by the Administrator. Respondent argues that there was a "complete lack of wrongdoing" on its part, that it merely committed a "pro forma technical" violation of the regulation, and that it did not engage in any "self-seeking or self-enriching

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<sup>51</sup> Respondent asserts that it "presum[es]" deductions were repaid or refunded, based upon "information and belief." Resp. Br. at 14; Resp. Reply Br. at 6.

<sup>52</sup> While the H-2A implementing regulations prohibit deductions that result in a profit to the employer, this is only one way in which a deduction may violate the H-2A regulations. 20 C.F.R. § 655.122(p)(2). Making unauthorized deductions that reduce the employee's pay below that which is required by the H-2A program is another. *Id.*

<sup>53</sup> *Phillips v. Norfolk S. Ry. Co.*, ARB No. 2015-0059, ALJ No. 2014-FRS-00133, slip op. at 3 n.5 (ARB Aug. 11, 2015).

<sup>54</sup> 29 C.F.R. § 501.19(b).

behavior.”<sup>55</sup> We find Respondent’s excuses unpersuasive and that the magnitude of the violation, which resulted in improper deductions totaling \$12,036.16 from ten H-2A workers, warrants the \$2,700 penalty imposed by the Administrator.<sup>56</sup>

### CONCLUSION

For the foregoing reasons, we **AFFIRM IN PART**, and **REVERSE IN PART**, the ALJ’s D. & O., and hold as follows:

1. Respondent violated 20 C.F.R. § 655.121(a)(3) by failing to disclose a drug screening program or requirement on its job order. For this violation, Respondent is ordered to pay a CMP of \$1,160.60.
2. Respondent violated 20 C.F.R. § 655.122(k) by failing to include its FEIN on pay statements. For this violation, Respondent is ordered to pay a CMP of \$7,200.
3. Respondent violated 20 C.F.R. § 655.122(d)(1) by failing to meet the applicable housing safety and health standards for employer-provided housing. For this violation, Respondent is ordered to pay a CMP of \$1,326.40.
4. Respondent violated 20 C.F.R. § 655.122(p) by making deductions for Social Security and Medicare taxes. For this violation, Respondent is ordered to pay back wages of \$12,036.16 and a CMP of \$2,700.

**SO ORDERED.**

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<sup>55</sup> Resp. Br. at 14; Resp. Reply Br. at 6.

<sup>56</sup> See AX A-3.