

# GROWERTALKS

JZ on D.C.

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## Dealing With Labor Issues Post-COVID & Beyond

*Jennifer Zurko*

### **Don't forget to register for Impact Washington!**

Registration is now open to attend AmericanHort's 2021 Impact Washington Summit, being held September 20-22 in Washington, D.C. The summit will feature a program of subject matter experts, Congressional champions for the industry, and meetings with lawmakers to discuss important issues impacting the green industry and participants' own business.

Delivering this year's keynote is Bob Worsley, former Republican State Senator (AZ), entrepreneur, innovator and author who'll deliver remarks on the challenges of the current political divide and how it affects efforts for comprehensive immigration reform.

For more information and to register, go to [americanhort.org/impact-washington-summit](https://americanhort.org/impact-washington-summit) or contact [hello@americanhort.org](mailto:hello@americanhort.org) or (614) 487-1117.

—JZ

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### **Dealing With Labor Issues Post-COVID & Beyond**

Among the large breadth of educational sessions during AmericanHort's Cultivate'21 event in July, there were a couple that focused on advocacy and government affairs.

During one titled "Policy & Labor: Impact on Greenhouses & Nursery Growers," Tom Bortnyk, VP & General Counsel for másLabor, and Shawn Packer, Principal at JPH Law, spoke about what they're seeing with regard to labor issues moving forward post-COVID and into the future.

During the last few years, participation in the H-2A visa program has increased 20% every year and there was a lot of scrambling to handle temporary measures when the program was stalled during the height of COVID-19. "Eventually, initial caution gave way to a rebound," said Tom, and COVID highlighted how important the H-2A program is, so the Department of Labor (DOL) eventually eased some of the restrictions.

Shutdowns at consulates in other countries closed off many H-2A sources in the early stages of the pandemic. Operations have resumed, but there are still some travel restrictions. The State Department has since expanded its interview waiver program to minimize the need for in-person visa interviews. More workers were considered eligible for the program, but there was a higher rate of rejections and 221(g) form "administrative processing" cases

(meaning there were discrepancies being questioned on the form).

Tom said that “normalcy is slowly returning, especially in Mexico.” But there are still some challenges, including the question of whether employers can, or should, make the COVID vaccine mandatory. Tom said that you can make it mandatory, but there are legal (like medical/religious exemptions) and logistical issues (coordinating a mass vaccine clinic) to consider.

It’s unclear whether the COVID variants will play a role in periodic or intermittent restrictions, so Tom highly suggested employers have a backup plan just in case.

The DOL continues to play an “outsized role” in the H-2A program, said Tom and, unfortunately, the ag/hort sectors have been “the canary in the coal mine,” as these companies are seeing problems with the DOL first.

For example, during the past year, ag/hort employers have seen increased scrutiny on temporary need requirements for certain industries perceived to have year-round needs—and that includes horticulture.

Tom said DOL has asserted on occasion that operations with indoor production are “inherently year-round” and the scrutiny has extended to outdoor production in warmer climates, as well. Even long-time users of the H-2A program have seen DOL challenge their eligibility. So Tom had some suggestions:

- For existing users: Be mindful of the potential for extra scrutiny and try to avoid significant changes to your contract period. If a change is unavoidable, be proactive and appropriately explain your reasoning.
- For new users: Consider the impact on future H-2A filings—your contract period should be consistent year-to-year.
- Both Tom and Shawn said that if you’re challenged, fight back! “DOL treats all of its victories as precedent,” said Tom. Shawn agreed, saying, “DOL will always use the same reasoning against you until they can’t anymore.”

So far, there hasn’t been a substantial shift in how the Biden administration’s Wage & Hour Division (WHD) enforces wage rates and it’s largely the same three things they care about—wage issues (like underpaying workers), proper housing (common source of violations because even the smallest detail can count) and documentation (document EVERYTHING and stay organized).

Tom said they’ve heard sporadic cases of audits, mostly for H-2B users and for no rhyme or reason, and companies who use both H-2A and H-2B, presumably because they’re checking for fraud. But he preached calm and professionalism.

“Be firm, but polite,” he said. “Chances are you know the program better than the auditor does.”

One way to avoid an audit is to always be mindful of both programs’ limits. Overtime requirements for workers handling product you didn’t grow strips away their federal overtime exemption for that workweek. Also, H-2A workers may do SOME product installation if you grew it, but they may not perform landscaping duties. And if you’re using both programs, make sure these workers maintain a clear separation—they should never perform the same duties side-by-side.

Shawn said that DOL is currently working on wage rates based on specific tasks. During the Trump administration, things like trucking/delivering were separated out, and because this task is considered a job with a higher wage rate, it means you’d have to pay ALL of your H-2A workers this rate, whether they drive a truck or not. “Equipment operator” IS included in the list of tasks under H-2A, so you don’t have to worry about your workers using transplanter or pot-filling machines, but if you need someone to do long-hauling driving, Shawn suggested you just hire someone from outside the realm of H-2A.

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## H-2B Legislation Introduced

Reps. Henry Cuellar (D-TX), Dave Joyce (R-OH) and a bipartisan group of Representatives introduced H.R.3897, the “H-2B Returning Worker Exception Act of 2021” on June 15. The bill would do the following:

- Permanently exempt from the 66,000 annual H-2B cap workers who’ve been admitted to work in the United States on an H-2B visa during one of the past three fiscal years
- Require the Departments of Labor (DOL), Homeland Security (DHS) and State to create a single online filing portal that would eliminate the need to express mail paper documents
- Require DOL to maintain an online jobs registry
- Include some program integrity measures and increase the maximum penalties that could be levied against employers who willingly and repeatedly violate the program’s requirements
- Address misconduct by foreign recruiters and strengthen workers safety standards for H-2B employees while in the United States

We will continue to keep everyone updated on the status of H-2B legislation. In the meantime, please take a few moments to reach out to your Representative to support the “H-2B Returning Worker Exception Act” at [takeaction.americanhort.org/landing-pages/h2bvisas](https://takeaction.americanhort.org/landing-pages/h2bvisas).

—Laurie Flanagan, Chair of the H-2B Workforce Coalition, and Craig Regelbrugge, VP of Government Relations & Research, AmericanHort

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## Trucking Bill Update

With the passage of a surface transportation bill in the House in early July, AmericanHort needs folks to take action and urge co-sponsorship of the DRIVE Safe Act as they head toward potential bicameral negotiations. The bill would bring partial, long-term relief to the commercial driver shortage, as it creates an apprenticeship program that would allow, upon completion, for drivers aged 18 to 20 to travel beyond state lines. Go to [tinyurl.com/DRIVESafeAct](https://tinyurl.com/DRIVESafeAct) to easily tell your representatives to support the DRIVE Safe Act.

—Source: AmericanHort’s Capitol Wire newsletter

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## Palmetto State Push for Action

Special thanks to Metrolina Greenhouses co-CEO Art VanWingerden and to Costa Farms' SVP Arianna Cabrera de Ona for speaking out on behalf of horticulture at press events in Greenville and Columbia, South Carolina. Art and Arianna called on the Senate to move an immigration reform package that includes a Senate version of the House-passed Farm Workforce Modernization Act.

The Palmetto State events targeting Sens. Lindsey Graham and Tim Scott were organized by the American Business Immigration Coalition, with which AmericanHort has partnered on similar events around

the country. More are in planning stages.

Meanwhile, Judiciary chairman Sen. Dick Durbin (D-IL) continues to lead a group of seven Democrats and seven Republicans who are discussing a reform package, though progress hasn't been swift. Sens. Mike Crapo (R-ID) and Michael Bennet (D-CO) are leading on an agriculture-specific dialogue, which Sens. Thom Tillis (R-NC) and Dianne Feinstein (D-CA) are expected to join shortly. If this dialogue isn't fruitful, the stalemate may mean another steep increase in the H-2A wage rates for 2022 and new employer-unfriendly H-2A rule changes from the Department of Labor.

—Source: AmericanHort's Capitol Wire newsletter

*Pictured: Art VanWingerden of Metrolina Greenhouses speaking in support of immigration reform at a press event in South Carolina.*