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Summary. Farmworkers struggle on a daily basis with many serious problems, including employers' failure to pay wages due, exposure to toxic pesticides, unscrupulous recruitment practices, and unbearable working conditions. The following article describes developments during the past year in the area of farmworker law. It covers litigation brought under the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act, as well as developments with respect to the use of pesticides, occupational safety and health, income transfer programs, the temporary foreign worker program, migrant education, and other issues affecting the farmworker client community.

I. Introduction

According to one congressional committee, farmworkers "remain today, as in the past, the most abused of all workers in the United States." /1 And yet, "as a group, they are . . . without public voice or power to make their way or improve their lot." /2

Migrant and seasonal agricultural workers often are called the poorest of the working poor. Farmworkers today are among the nation's lowest-paid workers. A study completed several years ago found that a farmworker earned an average of $4,638 per year.

Furthermore, farmworkers suffer long periods of unemployment. Their employment is extremely vulnerable to the uncertainties posed by drought, crop disease and insects, equipment failure, poor market conditions, or an oversupply of labor.

While some farmworkers find work on their own, substantial numbers of farmworkers find jobs through the crewleader system. Crewleaders act as the intermediaries between the growers and the workers, contacting growers to find out where workers are needed and then recruiting migrants for the jobs. Crewleader abuse of farmworkers has been well documented. There have been many cases, particularly in the eastern stream, of crewleaders subjecting workers to debt and physical peonage and using beatings and threats to control workers. Other abuses include failing to pay workers, misleading workers about working arrangements and conditions of employment, failing to keep accurate records of the hours worked and wages paid, and failing to pay taxes deducted from workers' wages.
Besides being subjected to deceptive and abusive labor practices, farmworkers face other difficulties. Farm work is enormously dangerous, due to both the machinery used and the toxic pesticides and herbicides to which workers are exposed on a daily basis. As a result, farmworkers suffer high rates of serious, occupation-related illness and injury. In addition, they are often forced to live in squalid, substandard housing, have little or no education, rarely receive pension benefits or health insurance protection in their old age, and are excluded from most social welfare statutes. Their children often are destined to repeat the same cycle of poverty and humiliation.

In addition to language and cultural barriers, farmworkers' long work hours and transiency make the provision of legal services to this group difficult. And yet the daily difficulties faced by farmworkers are exactly the reason that the efforts of migrant legal services workers are so important.

II. Migrant and Seasonal Agricultural Worker Protection Act

A. AWPA and State Workers' Compensation Statutes

This Term, the Supreme Court will consider for the first time a case involving the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). The outcome of this case may determine whether farmworkers have a full and complete remedy for violations of the AWPA. The case is Adams Fruit Company, Inc. v. Barrett. The issue is federal preemption of the exclusive remedy provision of Florida's workers' compensation law.

In Adams Fruit, a group of farmworkers in Florida were injured, some of them seriously, in an accident that occurred while they were being transported to work in a vehicle owned and operated by their employer. The vehicle did not comply with the safety provisions of the AWPA, 29 U.S.C. Sec. 1841. The workers received workers' compensation benefits, but also sued for damages and injunctive relief to recover for the employer's violations of the AWPA and to prevent future abuses. The AWPA authorizes aggrieved farmworkers to seek awards of actual damages or statutory damages of up to $500 per violation of the Act.

The district court held that the claims for violations of the AWPA were barred because the Florida workers' compensation statute provided the exclusive remedy for employment-related injuries. The Eleventh Circuit reversed, holding that AWPA preempted state law. In reaching its conclusion, the Eleventh Circuit ruled that a Department of Labor regulation that recognized the exclusive remedy provisions of state law was inconsistent with the AWPA. The Fourth Circuit had previously reached the opposite result, enforcing the exclusivity provision of South Carolina's workers' compensation statute to prevent an AWPA recovery for a farmworker injured by pesticides. Recently, in Fletes v. John I. Haas, Inc., a federal district court in Oregon followed the lead of the Eleventh Circuit in Roman v. Sunny Slope Farms, Inc.

The AWPA is the major protective statute for farmworkers in the United States. It provides virtually the only means of recovery for injured farmworkers in the federal courts. Reversal of
the Eleventh Circuit's decision in Adams Fruit would diminish the ability of workers to ensure compliance with the AWPA through private damages actions. Such enforcement is crucial, since federal enforcement of the statute has proven to be ineffective.

B. Joint Employer Status

The concept of joint employment is central to the AWPA regulatory concept. Under both the AWPA and the Fair Labor Standards Act (FLSA), a worker may be simultaneously employed by more than one employer. For example, a migrant worker may be an employee of both a farm labor contractor and a grower. Several recent cases have addressed the issue of joint employment under the AWPA.

1. Salinas v. Birkhold

In Salinas v. Birkhold, /12 a federal district court in Ohio ruled that a pickle grower and a farm labor contractor jointly employed the farmworkers who picked the farm's cucumbers. This case was especially significant in that the district court distinguished Salinas from the Sixth Circuit's ruling in Donovan v. Brandel, /13 which is one of the very few cases to hold that a grower did not employ migrant workers.

2. Gonzales v. Puente

In Gonzales v. Puente, /14 a packing shed was determined not to be a joint employer of the farmworkers who picked produce that was sold under contract to the packing shed. The court found compelling the Tenth Circuit's decision in Hodgson v. Okada, /15 cited in the AWPA legislative history. In Hodgson, a farm labor contractor and a pickle grower were held to be joint employers, but the packing shed that purchased the pickles was not a joint employer.

C. Terms and Conditions of Employment

In Colon v. Casco, Inc., /16 an agricultural employer fired several migrant workers because they refused to work on Memorial Day weekend. The court found that a long-standing company policy that weekend work was optional was common knowledge for its workers and became part of the working arrangement, even though the company had not explicitly communicated the policy to the workers before they were hired. The company argued that it could unilaterally change the policy. The court disagreed, stating that the company's position would make meaningless the AWPA requirement that an employer comply with the terms of the working arrangement.

D. Recruitment
In Buenrostro v. Washington Apple Commission, /17 a Washington state court dismissed class AWPA claims against the Washington State Apple Advertising Commission and its advertising agency, because the defendants were not "farm labor contractors" under the AWPA or the Washington State Farm Labor Contractors Act. Plaintiffs had alleged that the Commission provided false and misleading information to migrant workers recruited through a media campaign.

E. Definitions

1. Migrant Agricultural Worker

In Avalos v. La Conca D'Oro, Inc., /18 a federal court in Pennsylvania issued a declaratory judgment that mushroom workers were engaged in seasonal or other temporary work. The court determined that each worker was engaged in temporary or seasonal agricultural work at least during his or her first year of continuous employment. The court ruled that, as a matter of law, workers who had lived in the employer's farm labor camp for less than one year were "migrant agricultural workers" under the AWPA.

2. Agricultural Employer

A Department of Labor ALJ ruled that a farmer who operated a vineyard and orchard and who recruited workers for his own operation was an "agricultural employer" under the AWPA, and was, therefore, not a farm labor contractor even though he earned two thirds of his income from conducting farm labor contracting activities on behalf of neighboring farms. /19 The ALJ noted that if the farming operation had been a sham operation, defendant would have been determined to be a farm labor contractor.

3. Agricultural Employment

A federal district court in Michigan found that the harvesting of uncultivated evergreen boughs was not employment in agriculture under the Fair Labor Standards Act, but was agricultural work for purposes of the AWPA. /20 The court acknowledged that the definition of agriculture was broader under the AWPA.

F. Housing


In Avalos v. K & D Farms, Inc., /21 a federal district court in Texas ruled that a vegetable grower and its crewleaders violated the AWPA's housing provisions by housing migrant workers in two seriously dilapidated hotels. The workers were the sole occupants of the hotels. Even though other persons owned the hotels, the court determined that the grower and
crewleaders "controlled" the housing. Because the hotels were not open to the general public, the court ruled that the AWPA exemption for housing provided on a commercial basis did not apply.

2. Hardy v. Toy

In Hardy v. Toy, plaintiff migrant workers settled claims against employees of the South Carolina Employment Security Commission (SCESC). The court-approved settlement required the SCESC to implement specific measures with respect to preoccupancy housing inspections and clarified key terms used in federal temporary labor camp requirements.

In addition to agreeing to enforce permanently the AWPA labor camp health and safety standards contained in 29 U.S.C. 1823 and its implementing regulations at 29 C.F.R. Sec. 1910.142, the state agency agreed to close loopholes in the housing requirements by defining what constitutes a "stove," requiring inspectors to test heating and hot water equipment, adopting the Military Barracks specifications relating to temperature and adequacy of hot water, establishing the ratio of toilets and showers to numbers and sex of users, and further defining wastewater requirements.

III. Fair Labor Standards Act

Unlike 1988, when major developments in Fair Labor Standards Act (FLSA) case law occurred, 1989 was a fairly uneventful year in the courts. Migrant farmworkers continue to litigate successfully their right to a minimum wage under the Fair Labor Standards Act. In those few cases in which farmworkers have been unsuccessful in some aspect of their cases, appeals are pending in the circuit courts.

In Ruiz v. Young, plaintiffs have appealed to the Sixth Circuit the lower court's refusal to apply FLSA's three-year statute of limitations to their claims. The lower court had found that the statute's two-year statute of limitations applied to plaintiffs because they had failed to prove that the defendant acted willfully in violating the farmworkers' FLSA rights. This case is significant, since it is one of the first cases to reach the appellate court level after the U.S. Supreme Court's decision defining willful conduct for purposes of the application of the FLSA's three-year statute of limitations.

Another appeal is pending before the Fifth Circuit involving a disturbing and inconsistent decision by the lower court regarding waiver of rights, waiting time, liquidated damages, and statute of limitations. While ruling that plaintiff packing shed workers must be compensated for waiting time between 15 and 45 minutes, the district court denied compensation for waiting time of less than 15 minutes and more than 45 minutes. In reaching this decision, the court placed substantial weight on a finding that the workers allegedly agreed not to be compensated for this time by continuing to work for the employer and by not complaining. On appeal, plaintiffs argue that this finding is inconsistent with numerous
Supreme Court decisions holding that FLSA rights may not be waived by contract or otherwise. /26 Plaintiffs also take issue with the court's application of waiting time case law.

Finally, the case of Sperling v. Hoffman-LaRoche Inc. /27 is awaiting decision by the U.S. Supreme Court. Although this case does not involve farmworkers, it concerns an important issue in the litigation of their rights under FLSA. On October 2, 1989, the Supreme Court heard oral argument on the question of whether the federal district court has the authority in Age Discrimination in Employment Act (ADEA) cases that are subject to the requirement that class members must opt in to approve issuance of notice of the pending suit to putative class members who have not yet filed consents to join the action. The issue arises under section 16(b) of the FLSA, 29 U.S.C. Sec. 216(b). This section of the FLSA also applies in ADEA cases. The circuits are divided on the authority of the trial court to authorize these opt-in notices. A decision is expected in winter 1990.

The major news on the FLSA legislative front was President Bush's veto of H.R. 2. This measure would have raised the minimum wage to $4.55 an hour, phased in over a three-year period until the new minimum wage was reached in 1991, and would have provided a 60-day training wage. Migrant and seasonal farmworkers were exempted from the training wage under this bill. President Bush stated that he would sign into law an increase in the hourly wage to $4.25 an hour, which would have been phased in over a three-year period and which contained a six-month training wage for all new hires. After the President's veto and the failure of Congress to override the veto, new minimum wage legislation was introduced in the House and Senate.

IV. Independent Contractor Issues

Several cases were decided in 1989 in various substantive areas concerning the issue of whether workers were employees or independent contractors. While these cases involved different substantive areas, the employee/independent contractor analysis involved the application of either the common-law control test or the economic realities test, both of which are applicable in cases involving migrant farmworkers.

In a historic decision, the California Supreme Court ruled that cucumber workers, paid on the basis of a share of the crop, were employees and entitled to workers' compensation coverage. /28

This decision, will affect an estimated 20,000 farmworkers and may eliminate share-farming in California and force growers to comply with a variety of worker protection laws that are based on the employee-employer relationship. Applying the common-law control test, the court found that the grower maintained all necessary control over the work, even though the grower maintained no field supervision and the workers set their own hours, provided their own tools and transportation, and decided when to irrigate the crop. Unlike true "sharefarmers," these workers had no real financial investment in the grower's business.

In another case involving farmworkers working in cucumbers, the Wisconsin Court of Appeals, reversing a decision of the lower court, held that the grower unlawfully failed to pay
unemployment insurance taxes on behalf of the farmworker employees. /29 As in the California case, the Wisconsin appellate court found that, under the control test, the employer failed to prove that the workers were free from his control or direction over the performance of the work.

The U.S. Supreme Court decided a case during its 1989 Term that is useful to farmworker advocates because the Court applied the control test in a case interpreting the Copyright Act and concluded that the worker was an independent contractor. /30 At issue was whether a sculptor, hired by a homeless advocacy group to create a sculpture for its Christmas display, was an employee of the homeless group or an independent contractor. Even though the homeless group controlled the artist's work to ensure that he produced a sculpture that met their specifications, the Court found that "the extent of control the hiring party exercised over the details of the product is not dispositive." All of the other factors weighed against a finding that the sculptor was an employee. The sculptor was engaged in a skilled occupation, supplied his own tools, and worked 40 miles from the homeless organization's offices. Furthermore, the regular business of the homeless group was not creating sculptures. Because of these factors, the Court affirmed the appellate court's finding that the sculptor was an independent contractor. This decision provides an example of the type of work that can be considered independent contract work, and provides a useful contrast to migrant farmworker cases involving tax, social security, unemployment insurance, and workers compensation issues in which the control test is used to determine the employment relationship.

Federal appellate courts reversed the decisions of two lower courts that originally found the workers to be independent contractors under the economic realities test used in determining the employment relationship under the FLSA. These cases are useful to farmworker advocates because of the similarities between the nature of the work performed by the plaintiff/workers and the work of farmworkers. In the first case, McLaughlin v. Seafood, Inc., /31 the Fifth Circuit found that workers working in a crabmeat and crawfish processing plant were employees. The lower court had held that these workers were independent contractors because defendant exercised virtually no control over the workers and because the workers worked for brief, intermittent periods. In reversing this decision, the Fifth Circuit held that the workers were not "specialists" or "in business for themselves." Instead, they were unskilled workers. The fact that the workers moved frequently from employer to employer did not make them independent contractors.

Similarly, the Tenth Circuit in Dole v. Snell /32 found that cake decorators were not independent contractors under the FLSA. This case is significant because the Tenth Circuit has decided few independent contractor cases under the FLSA. While the court suggests in its opinion that, had the workers worked at a variety of bakeries as jobs were offered to them instead of for defendants for an indefinite period of time, they would be more like independent contractors. The court's analysis of the "permanence" factor is disturbing, because migrant farmworkers typically work for a variety of employers in the course of a season. However, this decision goes on to cite to other cases, including a 1987 farmworker case in which transient workers were found to be employees. /33

These independent contractor cases illustrate that there is much confusion among the lower courts in the application of the factors used in the employment relationship test. Because of
migrant farmworkers' lack of skill and lack of significant financial investment in their work, they should never be treated as independent contractors. When these cases do arise, farmworker attorneys must be especially careful in developing the case and presenting it so that the trial court will not make errors in its analysis of the working relationship.

V. Pesticides

A. Administrative Activity

The issue of pesticide safety captured public attention in 1989 with the publication of the Natural Resources Defense Council's study on food safety. The study concluded that the allowable pesticide residues of alar on apples posed substantial health risks to children. EPA did not move to suspend alar's registration, but the chemical's manufacturer immediately halted sales and recalled the product from users with stocks on hand.

EPA inaction also directly affected farmworkers. More than a year has passed since the agency issued proposed worker protection regulations, but no final regulations have yet been promulgated.

By contrast, several states have stepped forward to protect farmworkers from pesticide exposures. In the wake of the alar scare, Washington State passed a law that would (1) require posting of warning signs in treated fields with reentry periods of more than 24 hours; (2) set up a pesticide incident reporting system; (3) require all employers who apply pesticides to keep records of all applications; (4) increase procedural rights in administrative proceedings for victims of pesticide poisoning; and (5) virtually eliminate the exemption for small farmers in the workers' compensation law. In addition, in California, where restricted-use pesticides have been regulated for several years, the California Department of Food and Agriculture proposed regulations that would require employers to keep records of all pesticide applicators.

B. Litigation

During 1989, two federal court of appeals decisions were issued concerning EPA's authority to settle cancellation actions and permit continued use of existing stocks of dangerous pesticides. In National Coalition Against Misuse of Pesticides v. Environmental Protection Agency, the D.C. Circuit upheld EPA's decision to permit continued use of existing stocks of a carcinogenic chemical on the ground that it enabled EPA to remove the chemical from the market more quickly than if the agency had pursued a full cancellation proceeding. Shortly thereafter, the Ninth Circuit, in Northwest Food Processors Association v. Reilly, adopted the same reasoning in upholding a settlement cancelling the registration of dinoseb, but allowing use of this teratogenic chemical for up to two years on selected crops. Dinoseb, unlike chlordane, however, can cause birth defects in an unborn child of a pregnant farmworker from a single exposure to a small quantity of the chemical. Nonetheless, the dinoseb decision
is positive in that it denied pesticide users the right to contest cancellation in cases in which the manufacturers did not do so and the product is not available for any other lawful purpose.

In summary, farmworker advocates during 1989, as in other years, have continued to bring lawsuits to seek damages for victims of pesticide exposure. /43

VI. Occupational Health and Safety

A. The Field Sanitation Standard

Although OSHA finally issued the field sanitation standard after 14 years of litigation, /44 the agency has yet to begin effective enforcement of its provisions. In 1989, in a blatant attempt to gut the standard, OSHA took the position that the standard only applies in situations in which 11 or more workers are engaged in hand labor operations in a particular field. After strenuous protests from farmworker advocates, the agency backed down and admitted its error. In a subsequent directive to the field, it admitted that the standard applies to any employer who, in any day in the last 12 months, has employed 11 or more workers. Problems remain: OSHA is slow to inspect alleged violations and reluctant to issue fines even in cases in which wholesale noncompliance is found.

By contrast, positive developments have occurred this year on the state level. In settlement of a pending lawsuit, Michigan issued a field sanitation standard to cover all farms in the state, not just those employing more than 11 workers. /45 Michigan's earlier efforts at promulgating a field sanitation standard had been blocked by a joint legislative committee, which is empowered to approve all new state agency rules. Farmworker advocates then brought suit, challenging the joint legislative committee as unconstitutional, in violation of the state constitution's separation of powers provision.

Under the newly promulgated Michigan Field Sanitation Standard, farms employing fewer than 11 workers must provide access to toilets, drinking water, and handwashing facilities, but the requirements are somewhat more lenient than the federal standard. For example, small farms may locate their toilet and handwashing facilities within a five-minute ride of the field (by employer-provided vehicle), rather than within one-quarter-mile distance, as is required by the federal standard. For larger farms, the requirements are largely comparable to the federal standards, with a few exceptions--e.g., moist towelettes may be provided in lieu of handwashing water. New Jersey has also held hearings on proposed state field sanitation regulations that would protect workers on all farms. /46

B. The Hazard Communications Standard

1. Regulatory Action

Although the federal Hazard Communication Standard, as promulgated, protects farmworkers, /47 OSHA has ceased its enforcement of the standard with respect to pesticides. Instead,
OSHA and EPA are negotiating an arrangement whereby EPA will extend "right to know" protection to farmworkers. No regulations have yet been issued. Nonetheless, by transferring jurisdiction to EPA, OSHA has eliminated the threat that federal law will preempt stronger state "right to know" provisions covering farmworkers, similar to Texas' statutory provision. /48

2. Litigation

Preemption of state "right to know" laws was the focus of several lawsuits in 1989. In New Jersey Chamber of Commerce v. Hughey, /49 the Third Circuit held that part of New Jersey's Worker and Community Right to Know Act /50 survives the promulgation of the federal Hazard Communication Standard. At issue in this case was the viability of the New Jersey "universal" labeling provisions that require labeling of all chemicals in the workplace, regardless of whether they are hazardous. Federal law, by contrast, only requires labeling of hazardous chemicals.

Under the Occupational Safety and Health Act, /51 state health and safety standards are, with limited exceptions, preempted to the extent that they "relat[e] to any occupational safety or health issue with respect to which a [f]ederal standard has been promulgated." In an earlier decision in the same case, /52 the Third Circuit held that the state standard was "expressly" preempted only "insofar as the [law] pertains to protection of employees' health and safety," and "only to the extent that a federal standard regulating the same issue is already in effect." The "overarching principle" is that there is no express preemption if the primary purpose of the state statute is not directed at employee safety.

In the Third Circuit's later decision, the court's analysis focused on whether there was any "implied" preemption by the federal standard. The Chamber of Commerce argued that the state law would pose an obstacle to accomplishing the purpose of the federal standard because workers would be confused by the presence of two different labeling systems, with differing contents. The appellate court was not persuaded and ruled that state labeling of nonhazardous chemicals was not preempted.

In another decision, /53 a federal district court upheld the New York State Community Right to Know law against the claim that it was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under the challenged state law and regulations, commercial pesticide applicators are required to provide their customers with a list of the pesticides that they intend to apply; to inform them of any warnings that may appear on those pesticides' labels; to post signs around the perimeter of the property instructing people not to enter for 24 hours; to give the customer a pesticide notification "cover sheet" that provides additional warnings and safety information; and, in some instances, to notify the public by newspaper advertisements of pending pesticide applications of large areas. The applicator plaintiffs argued that these requirements constituted a pesticide "label" or "labeling," which FIFRA places exclusively within EPA's purview. The court disagreed and held that these requirements came within the state's authority to regulate the "sale and use" of pesticides.
VII. The Temporary Foreign Agricultural Worker (H-2) Program

The Immigration Reform and Control Act of 1986 (IRCA) /54 codified in the Immigration and Nationality Act an agricultural guestworker program that had previously been largely regulatory. The program allows agricultural employers to import and employ nonimmigrant workers on a temporary basis only if (1) there are not enough workers in the United States who are able, available, and willing to do the work, and (2) the admission of H-2A workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S. /55 The U.S. Department of Labor (DOL) is charged with determining whether these preconditions to admission of H-2A workers have been met. /56

After IRCA, DOL promulgated new H-2A regulations that largely mirrored the regulations used for a decade for the pre-IRCA H-2 program. However, it made two important changes, both of which reduced protections to U.S. farmworkers. First, DOL changed its method of calculating the adverse effect wage rate (AEWR), a special minimum wage that must be offered by employers seeking to import H-2A workers and that is supposed to prevent the importation of foreign guestworkers from "adversely affecting" the wages of U.S. workers. Second, it altered its regulation governing piece wage rates to remove provisions that required piece rates to be increased to keep pace with increases in the AEWR.

Migrant farmworkers, joined by the AFL-CIO, challenged both the AEWR and piece rate regulations in federal court. The district court declared in separate opinions that both the hourly AEWR regulation and the piece wage rate regulation were unlawful changes of policy that did not protect U.S. workers. /57 Although its appeal was pending, DOL repromulgated the AEWR regulation with a revised explanation. /58 The court of appeals then dismissed DOL's appeal as moot because of the new regulation. /59 Shortly thereafter, the D.C. Circuit reversed the lower court's decision. /60 The court held that while DOL's previous regulations had the effect of increasing the wages of above-average piece rate workers, that was not the purpose of the regulations. Therefore, DOL's failure to protect above-average piece rate workers in the new regulation was not a change in policy. A challenge to the new AEWR regulation was brought in the form of a second suit, which is now pending. /61

Decisions were rendered in three cases challenging DOL's nonenforcement of wage protections and grower noncompliance with the regulations. That litigation had mixed results. In Morrison v. United States Dep't of Labor, /62 a suit arising out of the 1986 apple harvest, workers obtained a ruling that DOL had unlawfully approved low wage rates, but the court refused to award restitution, because the growers offered and paid the wage rate that DOL had approved.

Workers had better luck in Frederick County Fruit Growers Association v. McLaughlin, /63 a case arising out of the 1985 apple harvest. In that case, growers had promised to pay the piece wage rate required under DOL regulations--regulations DOL that was enforcing only because it was under a permanent injunction to do so. However, as soon as the growers' H-2 workers arrived, the growers refused to pay the promised piece wage rate, paid instead a rate that was approximately 20 percent lower, and sued DOL in an attempt to void their commitment to pay
the piece rate. Workers intervened in that action and counterclaimed for wages for the 1985 harvest, as well as for the 1983 and 1984 harvests. Finding that the growers had in 1985 acted in a "self-serving and duplicitous manner," the court granted plaintiffs' claim for back wages, with prejudgment interest, for the 1985 and 1983 harvests, but denied the claim for the 1984 harvest. The court certified a class of farmworkers and awarded back wages against a class of over 300 growers. It is estimated that the back wages for 1985 alone total more than $2 million.

In a third case, NAACP, Jefferson County Branch v. McLaughlin, DOL had found that in 1986 Virginia H-2 apple growers had paid piece wage rates that were 20 percent below the rate required by law. However, DOL neither required the growers to make restitution as a condition of continued use of H-2 workers nor imposed any other penalty on the growers. Workers sought to have DOL held in contempt of a permanent injunction requiring it to enforce its piece rates. The district court held that because the regulations setting out penalties that could be imposed by DOL gave DOL complete discretion as to whether any penalty would be imposed for a violation, DOL's refusal to impose a penalty against the violating H-2 growers was a nonreviewable agency action.

The AEWR and piece rate cases, along with other DOL actions since IRCA, indicate that DOL is disregarding IRCA's mandate that it prevent the wages and working conditions of U.S. workers from being adversely affected by the importation of temporary foreign workers. Reports from various states also indicate widespread disregard of the regulations by H-2A growers.

**VIII. Public Housing**

A recent administrative decision of a hearing panel that considered the practices of a local Idaho housing authority granted farmworkers some requested changes in local Rental Assistance Program (RAP) operating procedures. In In re Herlinda Ortiz, Idaho Legal Aid Services' Migrant Law Unit petitioned the Wilder Housing Authority (WHA) for a formal hearing in June 1988 on behalf of farmworkers who charged WHA with failing to provide tenants at the Chula Vista housing complex with adequate information on the Rental Assistance Program, failing to screen applicants for RAP eligibility, and failing to maintain an adequate waiting list and notification procedures. Since WHA oversees the Chula Vista complex as its main project, they function as the same entity. The farmworkers also challenged Chula Vista's policies of permitting only "immediate family" members to reside in the same household and of requiring tenants to notify management of all overnight visitors.

The farmworkers obtained a substantial portion of the requested relief. In particular, the hearing panel recommended that, at the housing authority office, handouts in English and Spanish be distributed and posters be conspicuously displayed explaining RAP, eligibility criteria, and the waiting list operating policies and procedures. The panel also recommended that WHA improve its waiting list procedures and that Chula Vista change its overnight guest policy to permit tenants to have guests for up to 48 hours without notifying management. However, the panel did not recommend a change in the "immediate family" household policy. Nor, as the farmworkers had requested, did the panel require WHA to screen all applicants for
rental assistance eligibility. Only 15 of 70 possible units are currently occupied by families receiving rental assistance.

In other developments, on April 13, 1989, the Farmers Home Administration (FmHA) proposed revisions to the farm labor housing regulations. These proposed rules reflect 1987 and 1988 amendments to the authorizing legislation for farm labor housing programs. Based on these statutory amendments, the new rules expand the definition of eligible farm laborer to include retired and disabled farmworkers. Furthermore, the statutory amendments changed the definition of farm labor from an employment test to an activities test. The proposed rule incorporates this change but does not define "agricultural commodity" and several other terms used in the definition of farm labor. Finally, the proposed rule adds a new provision dealing with priorities for the tenants' initial occupancy. This provision is provided for in the statute.

IX. Income Transfer Programs

A. The Food Stamp Program

The Third Circuit's decision in Robinson v. Lyng should benefit migrant farmworkers living with their siblings. The court ruled that Pennsylvania's and USDA's application of the food stamp regulations, which resulted in all siblings living at the same address to be treated as a single household, is inconsistent with the Food Stamp Act. Plaintiffs argued that the state's implementation of the federal rule eliminated the evidentiary issue of whether or not the siblings actually "live together" by living at the same address. The court concluded that siblings can live under the same roof but not "live together under all of the circumstances" and hence not be covered under the sibling/single household rule. This issue is significant for migrant farmworker families who, while they are in the migrant stream, often live with their siblings' families.

The settlement of an appeal of a fair hearing decision should assist farmworker advocates in understanding the Food Stamp Program's rules on anticipating income. The issue in Malacara v. Idaho Department of Health and Welfare was the application of the program's anticipated income rules that resulted in a farmworker family receiving a drastically reduced food stamp grant. The family appealed the determination of the food stamp grant award, arguing that when income is uncertain, federal regulations require that the uncertain income not be budgeted. The fair hearing examiner concluded that the local office's estimate of the family's income based on the earnings of similarly situated farmworkers in previous seasons was consistent with state policy. An appeal was taken to state court. The case was settled shortly after the family filed its brief. The state agreed not only to pay the family retroactive food stamp benefits but also to change its written policy by providing clearer guidelines on determining income in cases in which the household's income fluctuates or is uncertain.

On two consecutive days in early summer 1989, USDA published final and interim final rules that have an impact on migrant farmworkers. The June 6 rules implement amendments to the Food Stamp Act contained in the Disaster Assistance Act of 1988 and make technical
corrections to rules promulgated in 1988. Two of the provisions of this rulemaking are of special importance to farmworkers. The first eliminates the proration of the initial month’s benefits when the farmworker household has participated in the Food Stamp Program within 30 days prior to application. The second provision excludes any emergency general assistance or public assistance vendor payments as income while the farmworker household is in the migrant stream.

The June 7 rulemaking implemented provisions of the Hunger Prevention Act. Of the many provisions that should assist farmworkers in their receipt of program benefits, the most significant is the provision that mandates that households that have completed all verification and have applied for benefits after the fifteenth of the month must receive their prorated benefits for the month of application and the next month's full allotment in one combined issuance.

B. Public Benefits

The Social Security Administration has revised its policy for determining the residency of a SSI recipient for purposes of state supplementation and medical assistance (Medicaid) in cases in which the individual's residency cannot be resolved from available evidence. Residency is an important issue in the SSI program because, depending on the state of residence, the SSI recipient may be entitled to a state supplement to the federal SSI grant and to a greater range of Medicaid benefits. Both the SSI state supplement and range of Medicaid benefits vary by state. According to the new SSA policy, the state of residence is either the state in which the individual is living with the intent to remain permanently (or for an indefinite period) or the state that the individual enters because of a job commitment or to seek employment. In cases in which the individual's residence cannot be determined from available evidence, such as when a farmworker's aged parent travels with the farmworker for six months of the year, the state of residence is where the individual is physically located.

X. Employment Rights

A. Right of Organizational Recognition

In 1989, the New Jersey Supreme Court issued an important ruling concerning recognition of an organized group of workers under a state constitutional provision. In COTA v. Molinelli, the New Jersey Supreme Court adopted a federal labor law remedy in a case in which an employer refused to bargain with a recognized union, in violation of the state constitution. While the state constitution guarantees the right to organize and to collective bargaining, neither it nor any statute provides a remedial mechanism for private employees.

This case arose in 1985, when farmworkers joined the Comite Organizador de Trabajadores Agrícolas (COTA) and sought to initiate collective bargaining with their employer, Molinelli Farms. The employer refused to bargain, so the employees brought suit to compel union recognition. Shortly thereafter, the employer fired all union members, declared that he was
farming "part-time," and hired a new crew of "part-time" farmworkers. Even after the court declared COTA to be the exclusive bargaining agent for the farm, based on a unanimous election by the former employees, Molinelli persisted in his refusal to bargain. Meanwhile, other than farming half as much acreage, the activities of Molinelli and his new farmworker crew remained essentially unchanged.

When the union sought judicial relief, the lower court found that antiunion animus had played a role in the employer's decision, but that he would have cut back his farming operation in any case due to economic difficulties. Consequently, the court ordered the employer to bargain over the "effects" of his change in operation, but denied workers the right to bargain over the employer's decision to curtail his operation. In addition, the court denied workers reinstatement and back pay while negotiations took place. The appellate division affirmed the ruling, stressing its inability to award or even calculate money damages for the former employees.

In formulating a remedy, the New Jersey Supreme Court looked to federal labor law and adopted the Wright Line test, which is used in "mixed motive" cases. Under this test, the employee has the initial burden of showing that the employer's action was motivated by antiunion animus. If that showing is made, the employer must prove by a preponderance of the evidence that it would have taken the same action even in the absence of its antiunion sentiment. Here, the supreme court held that the farmworkers met their initial burden, but that the employer had rebutted their showing. Consequently, it affirmed the order that the employer need only bargain over the effects of its actions. However, the court found that Molinelli's refusal to engage in "effects" bargaining violated the New Jersey Constitution, even in the absence of antiunion animus. Thus, it reversed the lower courts' rulings as to the remedy. Again looking to federal law, the court ruled that the employees should be "made whole" through a limited back pay award and/or reinstatement. The case was then remanded to the lower court to fashion the appropriate order.

**B. Wrongful Discharge**

Several wrongful discharge actions were filed during 1989 on behalf of farmworkers fired for union activity. In Iturriaga v. Oregon Garden Products, /80 a nursery worker who was fired for union organizing filed suit claiming his discharge violated the public policy in Oregon's Little Norris-LaGuardia Act and breached an implied covenant of good faith and fair dealing in his employment contract. Plaintiff also claimed that the employer's conduct constituted willful misrepresentation. The trial court dismissed plaintiff's claim and he appealed to the Oregon Court of Appeals. While the appeal was pending, the defendant nursery filed for Chapter 11 reorganization. Under these circumstances, Iturriaga settled his claim for $5,000 in damages.

In another case, a federal district court in Illinois dismissed a wrongful discharge action filed by a farmworker who alleged that he had been terminated due to his union activities. /81 In Villegas v. Princeton Farms, Inc., /82 the farmworker argued that his discharge violated Illinois's public policy, embodied in its Little Norris-LaGuardia Act, which declares "yellow dog" contracts to be against public policy and unenforceable. "Yellow dog" contracts, which were commonly used in the 1930s, were employer-exacted promises that their workers would refrain from union activity. The court reasoned that "the anti-yellow dog provision does not by
its terms guarantee workers the right to participate in labor organizations free from retaliation by their employers." Nonetheless, because an Illinois court might "glean from the anti-yellow dog provisions a public policy for the protection of workers' rights vis-a-vis employers," the court granted plaintiff leave to dismiss voluntarily the federal court action and refile his claim in state court. The employer's appeal of that ruling is now pending before the Seventh Circuit.

XI. Immigration

Several significant cases involving the rights of special agricultural workers (SAWs) in the amnesty program under the Immigration Reform and Control Act of 1986 were decided in 1989. The Eleventh Circuit ruled that the district court did not abuse its discretion in granting a preliminary injunction ordering the Immigration and Naturalization Service (INS) to change its legal standard for adjudicating SAW applications. This class action challenged the SAW adjudication process in Florida, Georgia, and Alabama and resulted in the review of all SAW denials for a determination of whether INS applied an incorrect standard of proof. Furthermore, aliens whose SAW applications were denied without a specific reason for the denial must be notified of the reason for the denial and given an opportunity to cure any deficiencies in their applications.

On the West Coast, plaintiffs reached a settlement with INS in their case challenging SAW adjudication practices. This settlement covers a class consisting of the northern and western INS regions. It is estimated that the class covers 75 percent of the SAW applicants nationwide. Under the settlement, INS will abandon its practice that resulted in the discrediting of much of the documentation and testimony submitted to prove applicants' prior work history in agriculture. SAW denials will be reexamined under the terms of the settlement to ensure conformity with the newly agreed upon procedures. Furthermore, INS will review denial notices and send out more complete notices.

As the result of a settlement in another West Coast case, INS agreed to provide replacement work permits and extend the application deadlines for hundreds of farmworker legalization applicants whose documents were improperly confiscated by immigration officials at the U.S.-Mexico border or at inland checkpoints.

Sugar cane workers were unsuccessful in their attempt to challenge their exclusion from the SAW program. The issue before the court was a second set of SAW regulations issued by INS excluding sugar cane workers. Unlike a first set of regulations, which the court found invalid, the court found these rules consistent with the Administrative Procedure Act. Furthermore, the court found no agency bias against sugar cane workers in the promulgation of these rules. This case is now pending before the D.C. Circuit. While the appeal is pending, INS agreed to issue or renew work authorizations for those sugar cane workers who filed skeletal SAW applications.

In August 1989, INS issued proposed rules on the adjustment of status of SAW legalization applicants from that of temporary residents to permanent residents. Under the proposed rule, at the expiration of their temporary residence period, SAWs would only have to appear at
an INS office in order to receive the Alien Registration Receipt card. Adjustment itself is automatic and is not subject to any special conditions.

INS has also issued rules in the form of interim final regulations concerning the Replenishment Agricultural Worker (RAW) Program. The RAW Program allows the admission into the U.S. of alien agricultural workers for temporary resident status when the Department of Labor and USDA determine that there exists a shortage of domestic agricultural workers. The interim rules describe the procedures for registering for the RAW program and the selection process. It is still unclear whether a labor shortage will be declared for either 1989 or 1990.

Litigants were successful in two cases against INS challenging various aspects of INS's practices relating to the detention of allegedly undocumented aliens. In the first case, a federal court in California invalidated the standard notice that INS sends to owners of vehicles that it seizes after charging the owners with smuggling undocumented aliens. The court held that the notice, which failed to inform persons that they can challenge the seizure without having to post a bond, violates due process.

In the second case, plaintiffs, after eight years of litigation, won their suit challenging INS's practices concerning stopping vehicles when INS agents suspect the presence of an undocumented alien. In February 1989, the district court entered a declaratory judgment making permanent the salient features of the preliminary relief ordered in 1984. In July, trial commenced on plaintiffs' claims for money damages against several Border Patrol agents in their individual capacities. In August, the court issued an opinion and judgment in favor of the plaintiffs, holding that the fourth amendment requires a reasonable suspicion of illegal alienage (not mere alienage) for pedestrian stops as well as vehicle stops. The court assessed damages against the defendants.

**XII. Migrant Education**

Several significant events occurred in 1989 with respect to migrant education. First, new final regulations were published for the Chapter 1 Migrant Education Program to become effective no earlier than late 1989. These regulations were issued as a consequence of the passage of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, which made several significant changes to the Chapter 1 Migrant Education Program. Significant aspects of the regulations include the parent involvement requirements, service priorities, the requirements for submission of a project application to the State Education Agency (SEA), changes in the calculation of SEA grant awards, the requirements for the annual needs assessment, state rulemaking and other SEA responsibilities, the requirements for program evaluation assessments, and the applicability of provisions of the U.S. Department of Education's General Administrative Regulations (EDGAR).

Second, the National Commission on Migrant Education, established by section 1439 of the 1988 reauthorization act, has begun its work. The Commission is composed of 12 members--4 appointed by the President, 4 by the Speaker of the House (including 2 House members), and 4 by the President pro tem of the Senate (including 2 senators). The Commission is charged with
studying a variety of issues. These issues include the role of federal, state, and private sectors in migrant affairs; unserved or underserved migrant children; demographics of migrant children; school dropout issues; and the role of the Migrant Student Record Transfer System (MSRTS). The Commission will issue reports on these questions. The first meeting of the Commission was held September 27, 1989, in Washington, D. C. /96 The presidentially appointed chair of the Commission is Linda Chavez.

Third, the Elementary and Secondary School Improvement Amendments of 1988 authorized a new educational program called the Even Start Program. This program grants funds to state and local educational agencies to provide "family centered education projects" that provide simultaneous educational services to parents and children. The U.S. Department of Education has stated, "This approach recognized that in some instances parents lack the learning skills needed to assist in early learning for their children. In Even Start, these parents will be instructed in basic skills and in how to become partners in the education of their children." /97 Final regulations for the program were issued on May 25, 1989. /98

In addition to the basic program, 20 U.S.C. Sec. 2743(a) requires the Secretary to reserve three percent of the appropriated program funds for use by the Office of Migrant Education "to conduct programs consistent with" the Even Start program.

Finally, in 1989 the Pennsylvania Department of Education published a set of training materials that grew out of its three-year study of how states recruit migrant children for the migrant education program and an ethnographic study in which interviewers lived with migrant families. The four volumes are: Recruiter's Guide (to train recruitment personnel); Administrator's Guide (to supervise recruitment personnel); Reference Supplement (including some reports on major issues affecting migrant education and some ethnographic studies); and Trainer's Manual (to instruct in the use of the materials in training recruiters). Accompanying the Trainer's Manual are slides referenced to the trainer's manual and a videotape with parts of the ethnographic research. This project was funded under section 143 of the federal migrant education statute.

The ethnographic study is entitled The Effects of Migration on Children: An Ethnographic Study (1989) and was authored jointly by Joseph O. Prewitt-Diaz, professor of education at Penn State University, Robert Trotter, chairman of the Anthropology Department at Northern Arizona University, and Vidal Rivera, former National Director of the U.S. Department of Education's Migrant Education Program. The book is divided into four sections. Part I discusses the demographics of agricultural migrants and the patterns of migration; Part II describes the ethnographic method used, includes a collection of interviews, and analyzes the data; Part III describes migrant workers' lifestyles, at home and on the road, and the process, patterns, and effects of migration; and Part IV outlines the educational services provided to migrant children.

footnotes
3. 29 U.S.C. Secs. 1801 et seq.
5. 29 U.S.C. Sec. 1854.
7. Barrett, 867 F.2d 1305.
8. 29 C.F.R. Sec. 500.122.
11. Roman, 817 F.2d 1116.
32. Dole v. Snell d/b/a Cakes by Karen, 875 F.2d 802 (10th Cir. 1989) (Clearinghouse No. 45,144).
33. See Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) (a migrant farmworker case); Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988), modified, as Lexis U.S. Appeals No. 4338 (1988) (a case involving nurses).
34. See Judge Easterbrook's concurring opinion in Secretary of Labor v. Lauritzen, 835 F.2d at 1545 in which he concludes that "[m]igrant farm hands working for a temporary placement agency are "employees' under the FLSA--without regard to the crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort."
36. Id. at 2.
37. EPA Update of Activities 1 (June 8, 1989).
40. See Initial Statement of Reasons for Proposed Changes in the Regulations of the California Department of Food and Agriculture Pertaining to Pesticide Use Reporting (Sept. 5, 1989).
42. Northwest Food Processors Ass'n v. Reilly, Nos. 88-4339, 88-4389 (9th Cir. Sept. 27, 1989) (dinoseb).
43. See, e.g., Mitschelen v. Weldun Int'l, Inc., No. 89-1016-No-H (Mich. Cir. Ct., Berrien County, filed 1989) (farmworker who was directed to enter area before reentry interval elapsed and who was directly sprayed, suffered severe neurological damage and sued for assault and battery, negligence, strict liability, and breach of contract); Hernandez v. Clarkfield Fertilizer Co., C.A. No. 3-88-537 (D. Minn. Aug. 5, 1989) (farmworkers and their children were injured when they were sprayed directly and through drift, while working in the fields).
44. 52 Fed. Reg. 16050 (May 1, 1987).
51. Section 18(b) of the OSHA, 29 U.S.C. Sec. 667(b).
52. Hughey, 774 F.2d at 593.
55. 8 U.S.C. Sec. 1188(a).
56. Id.
60. Id. A petition for rehearing and for rehearing en banc is pending.
63. Frederick County Fruit Growers Ass'n v. McLaughlin, 703 F. Supp. 1021 (D.D.C. 1989),
(Clearinghouse No. 45,141).
(Clearinghouse No. 33,367).
65. 8 U.S.C. Sec. 1188(a).
68. 42 U.S.C. Sec. 1484(f)(3).
70. 7 C.F.R. Sec. 273.1(a)(2)(D).
71. Id. at Sec. 273.10(c)(1).
72. Malacara v. Idaho Dep't of Health & Welfare, No. 92238 (Idaho Dist. Ct., Ada County,
Apr. 21, 1989).
73. 54 Fed. Reg. 24149 (June 6, 1989); 54 Fed. Reg. 24510 (June 7, 1989); 54 Fed. Reg.
24518 (June 7, 1989).
74. 54 Fed. Reg. 24155 (June 6, 1989) (to be codified at 7 C.F.R. Sec. 273.10(a)(1)(ii)).
75. 54 Fed. Reg. 24154 (June 6, 1989) (to be codified at 7 C.F.R. Sec. 273.9(c)(1)(ii)(E)).
76. 54 Fed. Reg. 24530-31 (June 7, 1989) (to be codified at 7 C.F.R. Sec. 274.2(b)(2),
(b)(3)).
77. SSA POMS 014100.001; 014100.005 (4/89).
79. N.J. Const. art. I, Sec. 19.
(Clearinghouse No. 44,059).
82. Ill. Rev. Stat ch. 48, Para. 2b (1933).
83. Villegas, slip op. at 4.
84. Id., slip op. at 6.
86. Haitian Refugee Center v. INS, No. 88-6135 (11th Cir. May 23, 1989).
44,067).
(Clearinghouse No. 42,653).