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Part II

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Employment Standards Administration
Wage and Hour Division

29 CFR Part 500

Migrant and Seasonal Agricultural Worker
Protection Act; Final Rule

DEPARTMENT OF LABOR**Employment Standards Administration****Wage and Hour Division****29 CFR Part 500**

RIN 1215-AA93

Migrant and Seasonal Agricultural Worker Protection Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document amends the regulations under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to implement statutory changes to MSPA concerning the relationship between workers' compensation benefits and the benefits available under the MSPA. The statutory amendments to MSPA specifically require changes in the MSPA regulations concerning disclosure of workers' compensation information and additionally require reconsideration of the MSPA-required transportation liability insurance. This document also amends existing regulations to provide for expedited proceedings before an Administrative Law Judge (ALJ) on actions initiated by the Administrator of the Wage and Hour Division to revoke, suspend, or refuse to issue or renew a Farm Labor Contractor Certificate of Registration, and for expedited review by the Secretary of Labor in such cases. Lastly, this document amends the regulations to indicate that the Certificate of Registration issued to farm labor contractors will reflect the maximum number of farm workers authorized to be transported.

EFFECTIVE DATES: The amendments to the authority citation for part 500 and to §§ 500.48, 500.121, and 500.122 are effective on May 16, 1996. *See: Dates of Applicability* below. The amendments to §§ 500.224, 500.262, and 500.268 are effective on July 15, 1996. The amendments to §§ 500.75 and 500.76 are effective on August 14, 1996.

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formats available are large print, electronic file on computer disk and audio-tape.

SUPPLEMENTARY INFORMATION:**I. Paperwork Reduction Act of 1995**

The paperwork requirements contained in the proposed regulations were submitted for review to the Office of Management and Budget pursuant to section 3507(d) of the Paperwork Reduction Act of 1995. OMB has approved these requirements under OMB No. 1215-0187 through April 30, 1999.

Title: Worker Information, Form WH-516.

Summary: This Final Rule amends sections 500.75 and 500.76 of Regulations, 29 CFR Part 500, to require disclosure to migrant and seasonal agricultural workers of certain information regarding the availability of workers' compensation insurance.

Need: Various sections of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 et seq., require that each farm labor contractor, agricultural employer and agricultural association disclose in writing the terms and conditions of employment to: (a) migrant agricultural workers at the time of recruitment (section 201(a)(1)); (b) seasonal agricultural workers, upon request, at the time of employment (section 301(a)(1)); and (c) seasonal agricultural workers employed through a day-haul operation at the place of recruitment (section 301(a)(2)). Sections 201(b) and 301(b), which relate to posting in a conspicuous place at the place of employment a poster provided by the Secretary setting forth the rights and protections afforded covered workers under MSPA, also require that each such employer provide to each worker (upon request in the case of seasonal agricultural workers) a written statement of the terms and conditions of employment. In addition, sections 201(g) and 301(f) require that such information be provided in English, or as necessary and reasonable, in a language common to the workers, and that the U.S. Department of Labor (DOL) make forms available to provide such information. Optional Form WH-516, Worker Information, is made available by DOL for these purposes. As an alternative to use of the Form WH-516, employers may disclose the terms and conditions of employment in writing to migrant workers (or upon request to seasonal workers), using any other format provided the required information is contained within the disclosure.

Pub. L. 104-49 provides in section 4 for the disclosure to the employee of certain additional information regarding workers' compensation insurance, i.e., whether workers' compensation is provided and if so, the name of the workers' compensation insurance carrier, the name of the policyholder of such insurance, the name and the telephone number of each person who must be notified of an injury or death, and the time period within which this notice must be given. Optional Form WH-516 has been revised to include this new statutorily-required information. The workers' compensation disclosure requirement can alternatively be met by the employer furnishing the worker with a photocopy of any notice regarding workers' compensation insurance required by law of the State in which such worker is employed. It is important to note that the information on the terms and conditions of employment required to be disclosed (including the workers' compensation information) is to be disclosed to prospective employees. Outside of an investigation context in which the employer is specifically requested to provide a copy of any written disclosure made to workers, this information is not to be forwarded to, nor will it be maintained by, the Federal government.

The public was invited to provide comments regarding estimates of the burden of the collection of information, the information collection requirements, and the disclosure requirements during the comment period for the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on Monday, March 18, 1996 (see 61 Federal Register No. 53, Pg. 10911-10918). The comment period for the NPRM ended on Wednesday, April 17, 1996. Comments were received concerning meeting the workers' compensation disclosure requirement by providing a copy of any State-mandated disclosure only if it included all the information required by the optional DOL form. In response to these comments, this limitation has been deleted from the final rule as discussed below in connection with §§ 570.75 and 570.76. The change does not, however, affect the burden estimates.

II. Background

Public Law 104-49 amends the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) provisions dealing with the private right of action, the regulatory process for setting minimum transportation liability insurance requirements, and disclosure obligations to agricultural workers. The

Act requires the Secretary to reexamine the current MSPA transportation insurance regulations and to amend the regulations governing disclosure. The insurance rulemaking must be completed and a final rule published within 180 days of enactment, or no later than May 13, 1996. The disclosure regulations, while under no statutory deadline, provide important new information to agricultural workers and require regulations before they become effective. In addition, the Department has determined that it is necessary to modify Form WH-511 (Farm Labor Contractor Certificate of Registration) to reflect the seating capacity of any vehicle(s) authorized for use in transporting covered workers (this modification will result in no additional burden or data collection as the information is already collected on Form WH-510—the Application for a Farm Labor Contractor Certificate of Registration).

The final regulation gives adjudication priority to administrative actions denying, revoking, or suspending a farm labor contractor (FLC) certificate. Currently, some FLCs continue to lawfully operate for extended periods awaiting an administrative hearing and final order on a certification action. This amended regulation establishes deadlines for Administrative Law Judge and Secretarial review proceedings in MSPA certificate actions.

The Department of Labor published a Notice of Proposed Rulemaking in the Federal Register on March 18, 1996 (61 FR 10911–10918). The public comment period on the proposed regulatory changes closed on April 17, 1996.

III. Analysis of Comments

A. Comments to the Proposed Rule

Comments to the Notice of Proposed Rulemaking (NPRM) were received from 27 organizations and individuals, representing the views of 69 organizations, public officials and individuals. Comments were received from five growers, 12 agricultural associations (with three organizations endorsing other's comments as well), two Congressional letters on behalf of five Members of the U.S. House of Representatives, four farmworker organizations (on behalf of 39 organizations and individuals), two attorneys who have represented farmworkers injured in traffic accidents, one individual, one insurance trade association, and one State government agency.

The comments were primarily focused on three subjects: disclosure of

the terms and conditions of workers' compensation by providing farmworkers with a photocopy of the State-mandated notice; the minimum amount of vehicle liability insurance required under MSPA; and further elaboration on the meaning of "actual costs" in determining whether or not a "carpool" is subject to MSPA transportation and/or registration obligations.

B. Summary of Comments

The comments submitted by two growers expressed displeasure with any insurance obligation under MSPA. Three expressed the view that insurance should be lowered from the current levels.

The comments submitted by most of the agricultural employer associations raised certain common issues. First, these commenters asserted that requiring the State-mandated workers' compensation notice to contain all the information required in the MSPA disclosure was not required by Pub. L. 104–49 and that the proposed regulations should be changed to delete this provision. Second, these commenters contended that DOL should retain the current MSPA insurance regulatory structure of two classes of vehicles, those with seating capacities of 15 and fewer and sixteen and more, and merely lower the minimum insurance required for each vehicle category. The insurance trade association echoed these views. Finally, most of the agricultural employer associations and organizations suggested that the Department should further explain the circumstances under which "carpool" arrangements will be considered legitimate (therefore, outside the scope of MSPA regulations) and when such arrangements will be considered not to be carpools (therefore, within the scope of MSPA regulations).

In addition to these broad themes running through many of the agricultural employer associations' comments, several commenters raised insurance issues and suggested other changes. Florida Citrus Mutual suggested a \$10,000 to \$25,000 per seat requirement because it would more closely approximate insurance levels for privately-owned noncommercial vehicles required under State laws. The California Grape and Tree Fruit League recommended insurance minimums of either \$100,000 per person/\$300,000 per accident or \$250,000 per person/\$500,000 per accident. The Nisei Farmers League recommended \$300,000 to \$500,000 for vehicles transporting fewer than 14 workers and \$500,000 to \$1 million for those transporting 15 or more workers. The New England Apple

Council recommended insurance coverage based on 6 different seating capacity categories: \$500,000 for up to 10 passengers; \$600,000 for 11–20; \$700,000 for 21–30; \$800,000 for 31–40; \$900,000 for 41–50; and \$1 million for 50 and above. The Florida Fruit and Vegetable Association recommended \$300,000 for vehicles transporting 12 or fewer, and \$500,000 for vehicles transporting more than 12.

Comments were submitted by four farmworker advocacy organizations on behalf of a number of individuals and organizations, including labor unions, State and county elected officials, religious service organizations serving farmworkers, a college professor, a trial lawyer organization, community organizations, and farmworker legal services providers. These commenters were concerned that the disclosure of workers' compensation information should be complete, timely and in a language the workers can understand and that the minimum amount of insurance necessary remain at the proposed \$100,000 per seat in order to insure against reasonably foreseeable risk. One farmworker advocate sought clarification that transportation advances provided to a farmworker would not subject the farm labor contractor, agricultural employer or association providing the advance to the MSPA transportation requirements. Two attorneys with experience representing farmworkers involved in transportation accidents also commented in favor of the Department's proposed insurance provisions.

Comments were also submitted by five Members of the U.S. House of Representatives and one State agency, addressing three issues. Regarding the Proposed Rule's provision that the state-mandated workers' compensation poster would not satisfy MSPA disclosure requirements if the poster lacked information specified in Pub. L. 104–49, all five Members expressed the view that the proposal was contrary to the statutory directive. Regarding the levels of vehicle liability insurance prescribed in the Proposed Rule, two Members (the Honorable Bill Goodling and Cass Ballenger) suggested that the Department should either devise a different regulatory formula or set lower minimum levels, and three Members (the Honorable Calvin M. Dooley, Gary A. Condit and Vic Fazio) noted "concerns that ICC insurance levels are unnecessarily high for those in agriculture transporting workers" and urged that the MSPA regulation assure a balance between protection of farmworkers and affordable insurance for transportation providers. All five

Members requested further clarification regarding "carpooling". The State agency (Virginia Department of Labor and Industry) expressed the same views as the Members regarding the use of the state-mandated workers' compensation poster and the desire for further "carpooling" guidance, and suggested a modification of the Proposed Rule's formula for liability insurance levels.

As further explained below, the Final Rule has been revised to incorporate some of the suggestions received from the comments. First, the Rule on workers' compensation disclosure will make it clear that the State-mandated notice used by the employer does not have to include all the MSPA-specified information; the Rule will further provide that if the state workers' compensation law mandates that supplemental information be provided to the worker in the event of an injury, the disclosure of such information is required for the employer's continued compliance with the MSPA regulation. Second, the liability insurance regulation will cap insurance requirements at \$5 million regardless of the seating capacity of the insured vehicle. Therefore, no transporter will be required to purchase more insurance than under the current regulation and most will be required to purchase less.

C. Workers' Compensation Disclosure Requirements

The MSPA was amended by Pub. L. 104-49 to require farm labor contractors, agricultural employers and agricultural associations who recruit or hire agricultural workers subject to the requirements of the Act to provide the workers certain additional information about the terms and conditions of workers' compensation coverage, if such coverage is provided by the employer. This information must be in written form, and that disclosure document must be given to each agricultural worker to be retained in the event that the information contained therein becomes useful or necessary.

Under current regulations, the information to be disclosed to agricultural workers includes the place of employment, the period of employment, wage rate(s), crops and activities, whether transportation or other benefits are provided, housing and its cost (if provided), information about any strike, work stoppage, slowdown, or interruption in operations, and information about any employer charges for goods or services provided by the employer. The disclosures required by MSPA, including the new workers' compensation disclosure requirements under Pub. L. 104-49, must be given to

each migrant agricultural worker at the time of recruitment. If the workers' compensation information required to be disclosed is unavailable at the time of recruitment, it must be disclosed to each worker at the earliest possible time that the information becomes available - but in no event later than the commencement of employment. Seasonal agricultural workers are entitled to the same information in the same form upon request.

It is important to note that Pub. L. 104-49 does not alter the requirement under MSPA that all other terms and conditions of employment be disclosed to covered workers at the time of recruitment. The provision added by Pub. L. 104-49 allowing an employer to delay full disclosure of the required workers' compensation information until it is available (but in no event later than the commencement of employment), applies only to the disclosure of required workers' compensation information.

Pub. L. 104-49 provides that migrant agricultural workers are entitled to receive, in writing, the name of the workers' compensation insurance carrier, the name of the policy holder of such insurance, the name and telephone number of each person who must be notified of an injury or death, and the time period within which such notice must be given. Seasonal agricultural workers must also receive the same workers' compensation information in writing if so requested by the worker(s). This Final Rule amends §§ 500.75 and 500.76 to include these new statutorily-required disclosure items.

Pub. L. 104-49 provides that information concerning workers' compensation may be given to the worker in one of two ways. The farm labor contractor, agricultural employer, or agricultural association may provide the specified information in writing. The March 18 NPRM provided that this disclosure could be accomplished via the optional written disclosure form (Optional Form WH-516) made available by the Department. In the alternative, the farm labor contractor, agricultural employer or agricultural association may communicate the necessary workers' compensation information by giving the agricultural worker a photocopy of any notice regarding workers' compensation insurance required by the law of the State in which the worker is employed. To remain consistent with the underlying intent for the disclosure requirement, the Department included in its March 18 NPRM a proviso that giving a copy of a State-required workers' compensation form (or notice)

to covered workers would be deemed to satisfy the disclosure requirement so long as the copy contains all of the workers' compensation information that must be disclosed.

During the comment period for the NPRM, five Members of Congress (the Honorable Bill Goodling, Cass Ballenger, Calvin Dooley, Gary Condit, and Vic Fazio), the Chairman of the Commonwealth of Virginia's Interagency Migrant Worker Policy Committee (Theron J. Bell), the American Insurance Association, and eleven grower associations expressed concerns about the proposed regulation which would recognize compliance with the workers' compensation disclosure requirement by providing the worker a copy of a State-mandated workers' compensation poster only if the poster contains the same workers' compensation information specified in Pub. L. 104-49. These commenters took the position that the proposed regulation was too restrictive, that it was contrary to the language of Pub. L. 104-49 regarding the use of State-mandated posters, and that it should provide employers more flexibility relative to the disclosure of workers' compensation information.

Four worker advocacy groups writing on their own and on behalf of thirty-five other worker assistance and advocacy groups, supported the Department's proposal in the NPRM regarding the workers' compensation information disclosure requirements.

After careful consideration of the comments received on the NPRM, the Department has determined that the plain language of the statute (Pub. L. 104-49) does not require that a State-mandated workers' compensation notice must contain information not already required by the State workers' compensation law. Accordingly, the NPRM proposal that would have allowed the State-mandated notice to be used only if it contained all of the information specified in Pub. L. 104-49 has been deleted in the Final Rule. However, it should be noted that although initial compliance with MSPA disclosure requirements can be met by providing the State-mandated notice, many State workers' compensation laws require additional disclosures to the worker if an injury occurs. If an employer chooses to comply with the MSPA workers' compensation disclosure obligations by providing the State-mandated notice but these state-mandated supplemental disclosures are not made to a worker, the failure to do so would constitute a failure to meet the workers' compensation disclosure requirements. In such cases, in order to

remain in compliance with the MSPA disclosure requirements in the event of an accident or some other event that would trigger the applicability of workers' compensation, the State-mandated additional disclosures must be made by the employer. It is the Department's view that this interpretation imposes no new Federal requirements—rather, it provides employers subject to the State's workers' compensation law(s) with an added incentive to make full and accurate disclosures of the information necessary in order for the worker to properly file a claim for workers' compensation in the event of a covered injury or illness.

D. Transportation Insurance Under MSPA

Under the MSPA, agricultural employers, agricultural associations, and farm labor contractors who use or cause to be used a vehicle to transport agricultural workers subject to the Act must comply with certain minimum transportation safety requirements and provide a minimum level of financial security to insure against liability for damage to persons or property of workers or third parties. Pub. L. 104–49 amended the MSPA provision regarding the determination of the level of financial security to be required.

MSPA provides three means by which farm labor contractors, agricultural employers, or agricultural associations may insure against liability for damage to persons or property arising from the ownership, operation or causing to be operated a vehicle used to transport agricultural workers. The security may be in the form of (1) a vehicle liability insurance policy that insures employees and nonemployees; (2) a workers' compensation policy along with a certificate of liability insurance covering transportation whenever nonemployees and employees may be transported under circumstances not covered by workers' compensation; or (3) the posting of a \$500,000 liability bond. Pub. L. 104–49 required the Secretary to re-examine the previous minimum liability insurance requirement and make any changes indicated by May 13, 1996.

While the Final Rule modifies only the minimum liability insurance levels per occurrence for such transportation, this discussion responds to commenters' concerns for clarification regarding the obligations under MSPA if a farm labor contractor, agricultural employer, or agricultural association chooses workers' compensation as the primary transportation insurance coverage for the agricultural workers being transported. Further, in response to

commenters and to the legislative history of Pub. L. 104–49, which indicates a need to reaffirm and further explain the circumstances under which carpooling arrangements among workers fall outside of the scope of MSPA (Joint Statement of Legislative Intention, Rep. William F. Goodling, E1943, Cong. Rec., Oct. 13, 1995), this discussion provides needed clarification on these issues.

1. Workers' Compensation as Primary Transportation Insurance

Workers' compensation coverage is a partial alternative to meeting transportation liability obligations under MSPA and the Department's regulations. However, workers' compensation coverage alone does not completely satisfy the legal obligations under MSPA. The regulations also require that if an employer chooses workers' compensation as the primary coverage, additional liability insurance in a specified minimum amount must also be provided to compensate employees and nonemployees for property damage and bodily injuries not covered by workers' compensation benefits whenever there is a possibility that workers may be transported under circumstances not covered by workers' compensation insurance. Employers who are certain that the transportation will occur only under circumstances covered by workers' compensation are not obligated to secure additional bodily injury coverage but they do so at their own risk. In such circumstances, the employer would be in violation of the MSPA insurance obligations if they transport workers outside the scope of workers' compensation coverage, and would be exposed to suits for actual damages. The regulation at 29 CFR 500.122(c)(2) has required this supplemental coverage since MSPA was enacted and nothing in this Final Rule is intended to alter this obligation.

2. Transportation Under MSPA and Carpools

As stated previously, the legislative history of Pub. L. 104–49 indicated a need to reaffirm and clarify what constitutes a legitimate *carpool* arrangement among workers, which would be beyond the scope of the MSPA transportation requirements (including minimum insurance obligations).

Carpooling is described in the regulation at § 500.100(c). The NPRM proposed no amendment to this regulation, and it remains unchanged in this Final Rule. However, in the Preamble to the NPRM and in this discussion, the Department has provided further guidance and clarification.

Under the regulation, carpooling is a voluntary arrangement among workers for transportation to and from work using a worker's own vehicle. The workers may contribute to offset the costs of the transportation to reasonably reflect the actual costs of the transportation. Any compensation or other valuable consideration in excess of the actual costs means the transportation provider is considered a farm labor contractor and thereby subject to the registration and transportation requirements of the Act and the regulations. Likewise, any arrangement in which a farm labor contractor participates will not be considered a carpool. If any agricultural employer or association directs or requests such transportation arrangements or provides money or other valuable consideration (other than the travel advances discussed below) for the transportation service, such an arrangement is not a carpooling arrangement among workers.

Several commenters responding to the NPRM Preamble sought further clarification of the circumstances under which a transportation arrangement will be considered to be a "carpool" beyond the scope of MSPA regulations or, on the other hand, when transportation will be deemed not to be a "carpool" and therefore subject to MSPA regulation.

A number of commenters raised questions about the scope of "actual costs" for purposes of determining whether or not the transportation arrangement is "for any money or other valuable consideration paid or promised to be paid," and therefore potentially subject to the farm labor contractor provisions of the Act and regulations.

Some of the agricultural employer advocacy organizations expressed the view that a transportation-providing worker operating the vehicle should be entitled to receive remuneration from the passengers to offset the cost of the transportation. Some stated that the worker should be able to receive compensation for such transportation related expenses as gas, oil, insurance, vehicle depreciation, wear on tires, etc. and still be deemed to be a carpool. Others contended that if the driver received no money from the farm labor contractor, agricultural employer or agricultural association, the amount that was received from the passengers should be of no legal consequence. One commenter suggested that the driver should be able to accept from each passenger whatever amount the passenger would pay for public transportation, if public transportation were available.

Based in the language of MSPA itself, by definition, a farm labor contractor is "any person—other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity." 29 U.S.C.1802(7); 29 CFR 500.20(j). Transporting any migrant or seasonal agricultural worker "for any money or other valuable consideration paid or promised to be paid" thus constitutes performing a farm labor contracting activity. 29 U.S.C. 1802(6); 29 CFR 500.20(i). As stated above, the Department's regulations recognize bona fide carpool arrangements among workers, and exempt such arrangements from passengers, the driver must be able to show how the charges were calculated and that the charges are reasonable and directly related to the transportation provided to the carpool. Guidance regarding making such showing may be found in the regulations for the Fair Labor Standards Act provision allowing the employer to claim wage credit for the "reasonable cost" of meals or lodging furnished to employees, 29 CFR 531.3.

Another reasonable measure of actual costs is the reimbursement rate for federal employees who use private automobiles for official business. The federal government reimburses those employees at a rate of 30 cents per mile to compensate for gas, wear and tear, and other costs associated with the operation of the vehicle. If the operator of a carpool multiplies the miles to and from the worksite by 30 cents and charges each occupant of the vehicle a pro rata share of those costs, those charges would be considered a sufficient approximation of "actual costs" to satisfy the carpooling regulations. (See 41 CFR 301-4; 59 FR 66626, Dec. 27, 1994. Transporters should note that the amount of reimbursement changes periodically to reflect changes in costs.)

Another issue raised by the commenters concerns employer involvement in carpooling arrangements. A bona fide carpool is strictly voluntary and is done for the convenience of the workers involved, *not* at the direction of an FLC, agricultural employer or agricultural association. An FLC, agricultural employer or agricultural association may indicate to workers that there is no prohibition against carpooling if any workers wish to make such arrangements, and may even encourage workers to do so.

It was suggested by one agricultural association that encouraging carpools is consistent with and perhaps even required by certain pollution abatement laws and regulations. Nothing in the current regulations nor in this discussion is intended to prevent agricultural employers or associations from encouraging agricultural workers to carpool in order to serve the laudable public policy goal of reducing pollution. However, where the FLC, agricultural employer or agricultural association organizes or helps to organize the carpool(s), or makes carpooling a condition of employment, the activity is deemed to be "causing to be transported" and requires compliance with MSPA.

All the commenters agreed with the Department's analysis of the "raitero" practice but some requested further clarification of the employer's obligation, if any, when raiteros provide transportation. Nothing in the carpool regulation nor in the discussion of raiteros in the Preamble to the NPRM alters the test of employer responsibility for transportation by third parties. Unless the agricultural employer or association "caused" the transportation by the raiteros to occur, the agricultural employer or association is not responsible for the transportation.

Finally, a farmworker advocacy organization identified another transportation-related practice that should be clarified. Where a farm labor contractor, agricultural employer, or association provides the worker a travel advance to cover travel expenses to the worksite, and the worker is free to choose how to use that travel advance, the farm labor contractor, agricultural employer, or agricultural association will not be deemed to have "caused" the transportation used by the worker and will not be subject to MSPA with regard to such transportation.

3. Proposed Revision to the MSPA Minimum Transportation Liability Insurance Regulation

Public Law 104-49 eliminated the MSPA requirement that the liability insurance required by the Secretary in regulations must be at least the amount required for the carriers of passengers under the Interstate Commerce Act (hereinafter referred to as ICA). Instead, Pub. L. 104-49 requires that the liability insurance amount is to be determined by the Secretary through consideration of "at least the factors set out in [MSPA Sec. 401(b)(2)(B) regarding vehicle safety] and similar farmworker transportation requirements under State law." Pub. L. 104-49 further requires the Secretary to establish insurance

levels under this law within 180 days of enactment (*i.e.*, no later than May 13, 1996).

The NPRM proposed to implement the insurance provisions of Pub. L. 104-49 by amending the MSPA minimum liability insurance regulations to depart from the current ICA-based structure in favor of a more flexible regulatory scheme. As explained in the Preamble to the NPRM, the proposed amendment would eliminate the current vehicle capacity categorization found in the ICA regulations (which may well relate to general interstate passenger transportation patterns) while at the same time ensuring adequate insurance levels to protect injured persons and property when accidents occur. The proposal linked the required insurance amount to the actual capacity of each vehicle, rather than mandating one of two levels of insurance tied to vehicle capacity categories of 15 and below or 16 and above. The proposal required that the insurance be at least equal to \$100,000 for each seat in a vehicle, instead of the current flat requirement of \$1.5 million and \$5 million for each vehicle category, respectively.

In developing the NPRM and this Final Rule, the Department adhered to the requirements of Pub. L. 104-49. The Department carefully considered the factors set out in MSPA Sec. 401(b)(2)(B). Additionally, the Department searched for, but was unable to find, any similar farmworker transportation requirements under State law; none were identified by the commenters.

The overriding concern, as stated in Sec. 401(b)(2)(B) of MSPA, is the protection of the health and safety of migrant and seasonal agricultural workers. The legislative history of MSPA makes clear that the requirements to provide safe vehicles and adequate levels of vehicle insurance are key worker protections in the Act (Report of the House Committee on Education and Labor, Rept. No. 97-885, 97th Cong., 2d Sess.; 1982 U.S. Code Cong. and Ad. News 4547 (hereinafter referred to as Report), at 4565). The House Education and Labor Committee Report accompanying the original MSPA enactment noted that "[t]he overriding concern of the Secretary shall be the protection of the health and safety of the workers." *Id* at 4565. The Committee also noted the "* * * often dangerous conditions under which agricultural workers are transported." *Id* at 4566.

The statute directs that the Secretary should consider a number of factors, including type and capacity of the vehicle and the extent to which the

regulation will create an undue burden on the regulated community, in determining both the substantive vehicle safety standards and the required minimum insurance amounts. In the NPRM, the Department sought ways to lessen the burden on the regulated community while still maintaining adequate protection for workers. By departing from the ICA's 15 and fewer and 16 and more seating capacity categories in favor of a more flexible regulatory scheme, the proposal enables the regulated community to structure its transportation practices without regard to the arbitrary vehicle capacity distinction in the current regulation, obtain insurance based on actual practices and transportation needs, and in most cases, to realize a per vehicle reduction in the minimum insurance required.

4. Data and Other Information Considered in NPRM and Final Rule

In developing the NPRM, the Department considered the reasonably foreseeable risks to farmworkers from transportation accidents. As the Preamble explained, the Department gathered information concerning the incidence of fatalities and injuries, the damages resulting from such injuries, and the likelihood that farmworkers would be made whole in the absence of adequate insurance coverage. The Department also considered whether or not the insurance could be made more flexible and, consistent with the obligation to protect farmworkers, reduce the level of required insurance.

The NPRM Preamble expressly requested information from the commenters concerning certain factual matters that bear on the issues of adequate insurance, transportation injuries to farmworkers, and undue burden on the regulated community. Among the information requested was specific information, with documentation, evidencing the financial burden created by the insurance requirement; a comparison of costs between the 1983 and 1992 insurance requirements; information about individual accidents and the resulting damages; the extent to which the 1992 minimum insurance requirement increases resulted in transporters being unable to secure and/or afford insurance coverage; and any similar State laws governing farmworker transportation. While some commenters provided anecdotal information, and some commenters gave general or conclusory information without the underlying supporting data, most of the Department's requests for detailed information received no response.

In commenting on the NPRM, the American Insurance Association (hereinafter referred to as AIA) provided limited information about average claims paid for accident years 1990 through April 1994. AIA stated that the average claim paid for the 65 bodily injury claims included in its data compilation for that period was \$17,430. The AIA comment did not disclose any underlying data, such as the range of claims paid, the geographic scope of the data, whether or not the 65 referenced claims were the entirety of the accidents involving agricultural workers, the circumstances of the accidents, and whether or not the claims paid include all the damages in each incident or merely the amount paid by an insurance carrier. The AIA summary statement does suggest that the damages suffered by farmworkers in accidents are extremely high when compared to average losses for other occupational groups. Based on information which AIA provided to the Department during the development of the Proposed Rule, the average \$17,430 claim for agricultural workers is approximately four times higher than average claims paid for the next highest occupational group, truck drivers, at \$4,300 per claim paid.

AIA also provided summary information for "a large group of risks with severity characteristics similar to transporters of migrant workers." AIA stated that its data show that, for the group surveyed, the risk of loss greater than \$500,000 is less than 0.3%. AIA did not provide the underlying data which was summarized in this statement, and did not describe or identify the "large group" or the "severity characteristics." It is therefore difficult to discern what is being measured and whether or how the survey is relevant to the MSPA liability insurance analysis. The Department made an informal request to AIA for clarification of this information; apparently the survey group are employees riding in van pools or other employer-provided vehicles.

Farmworker advocates' comments also provided information concerning risk of injury to farmworkers in transportation accidents and the extent of damages when accidents occur. The comment from the Migrant Farmworker Justice Project of Florida Legal Services included a chart prepared by the Florida Department of Labor and Employment Security listing accidents involving farm labor contractors from January 1, 1990, through March 1996. This chart shows that 59 accidents resulted in 48 fatalities and 352 non-fatal injuries during this period. Also included were media

reports on farmworker accidents and an analysis of agricultural accidents in Florida during 1990 by Prof. William J. Becker of the University of Florida. According to that study, 38% of the 39 agricultural work-related fatalities were the result of motor vehicle accidents on public roads.

Finally, Florida Rural Legal Services also provided information about specific recoveries for farmworkers represented by FRLS, and excerpts from a data base showing settlements and verdicts awarded to farmers in motor vehicle accidents. It is not clear to what extent the information concerning farmers is comprehensive or selective. The settlements/verdicts ranged from \$843 to \$6,000,000. The 59 cases reported in the documents resulted in average settlements/verdicts of \$381,903.62.

The Department has carefully and fully considered the information provided by the commenters in response to the requests in the NPRM. The information concerning recoveries in specific cases involving farmworkers and farmers, confirms the data previously compiled by the Department concerning the extent of loss suffered in vehicular accidents. The information provided by AIA was helpful but lacked the detail or specificity to MSPA-regulated transportation practices to persuade the Department to substantially change the insurance proposal.

5. Regulatory Structure and Minimum Level of Insurance

a. Delinking from the ICA vehicle capacity structure. A number of commenters representing agricultural employers and one representing insurance interests suggested that the Department erred in proposing to delink the MSPA transportation insurance regulation from the ICA structure that divides vehicles into two categories according to seating capacity of 15 and fewer or 16 and more. It was suggested by these commenters that the Department retain the ICA division and simply lower the required minimum insurance amount for each vehicle class. The American Insurance Association supported this position and further asserted that abandoning the ICA structure would require the insurance industry to change the process by which insurance companies write these policies.

The farmworkers advocacy organizations, the two attorneys who have represented farmworkers in transportation accident cases, and the Pennsylvania Farm Bureau all commented favorably on the proposal to delink from the ICA two-level structure

in favor of a structure based on individual vehicle seating capacity. The farmworker advocacy organizations and the attorneys expressed the view that the proposal struck an appropriate balance between creating additional flexibility for the regulated community, reducing the required minimum insurance amounts and associated costs, and ensuring adequate levels of protection in the event of an accident.

The Pennsylvania Farm Bureau commented that the proposal was a positive step in the ability of farmers and farm labor contractors to control vehicle insurance cost, even if the savings may be modest. The Bureau also requested clarification regarding the insurance requirements for a transportation provider who operates a fleet of vehicles. In response, the Department emphasizes that the Final Rule establishes a minimum insurance requirement for *each vehicle* used to transport farmworkers under MSPA. Therefore, each vehicle in a fleet would have a separate requirement for minimum liability insurance depending on the vehicle's seating capacity. For example, a six passenger vehicle must be insured for \$600,000, a 10 passenger vehicle for \$1 million, and a 25 passenger vehicle for \$2.5 million. Even though the aggregate requirement is \$4.1 million, each vehicle is insured individually, not at the \$4.1 million aggregate amount. Under the current two-level regulatory scheme, the same fleet of vehicles would be required to be insured at an aggregate of \$8 million.

After having carefully considered the comments, the Department has concluded that the approach taken in the Proposed Rule delinking the MSPA regulation from the ICA two-level structure is appropriate. The legislation authorized the Department to reexamine this issue and to depart from the ICA structure but did not change the fundamental purpose of the MSPA transportation insurance requirement: to protect the health and safety of agricultural workers. The Final Rule, which sets the minimum liability amounts according to the actual seating capacity of the vehicle being used, as was proposed, provides the regulated community with additional flexibility to structure its transportation practices according to its actual needs and lowers insurance costs by eliminating the current regulation's mandate that transporters purchase insurance above the level necessary to insure against reasonable risk of harm. The Final Rule achieves the statutory purpose of assuring the protection of health and safety of agricultural workers by establishing levels of insurance on a

per-seat standard which would afford recovery for reasonably foreseeable risks.

It was suggested by AIA that changing from the ICA two-class structure to a new structure, such as contained in the Proposed Rule, will require insurance companies to change their underwriting and information systems, thereby adding costs. AIA did not provide information to support this assertion or to establish what the additional costs would be. The Department therefore does not find this to be a sufficient reason to reconsider the Proposed Rule.

b. The Minimum Level of Insurance. Agricultural employers, agricultural employer advocates and the AIA suggested that the Proposed Rule's minimum insurance requirement per seat be abandoned in favor of a flat amount according to the class of vehicle, 15 passengers and below or 16 and above. The overwhelming majority of these commenters proposed \$500,000 for the former and \$1,000,000 for the latter. The commenters asserted that these amounts of insurance are sufficient to insure for damages suffered by farmworkers in transportation accidents and would result in lower premiums for transportation providers.

The AIA asserted that Congress intended that the costs of insurance be reduced. Other commenters echoed this assertion. However, neither the legislative history nor Pub. L. 104-49 requires the Department to issue a rule based on the sole consideration of the cost of insurance to the regulated community. In fact, the legislation directs the Department to consider the factors set out in MSPA Sec. 401(b)(2)(B) concerning vehicle safety. That section of the Act makes clear that the overriding purpose of MSPA transportation standards is the health and safety of migrant and seasonal farmworkers, and further directs that, in determining appropriate safety and insurance requirements, the Department is to weigh any "undue burden" on transportation providers as only one among several factors. In addition, it should be recognized that, regardless of the regulatory structure adopted, it is not within the Department's power to ensure the reduction of insurance premiums, short of eliminating the insurance requirement entirely.

After thorough consideration of the comments, the Department has concluded that the approach taken in the Proposed Rule is appropriate, in that it provides adequate protection for agricultural workers while lowering the minimum insurance levels (and presumably premium costs) for most transportation providers. The Final Rule

sets the minimum amount of insurance not by arbitrary vehicle capacity divisions but by the actual capacity (thus, actual risk of loss) of each insured vehicle. A transporter using a six passenger vehicle would not be required to purchase insurance in excess of its seating capacity. Instead of the current regulation's \$1.5 million (for vehicles with capacities up to 15), only \$600,000 in insurance would be required. The operator of a 15 passenger vehicle has a risk exposure over twice that of the 6 passenger vehicle, and would be required to have proportionately higher insurance (\$1,500,000). The insurance requirements (and presumably the premium costs) reflect the difference in risk exposure.

In light of available data as well as program experience regarding the types of vehicles commonly used to transport agricultural workers, the Department believes that the Final Rule will likely result in a lower level of required insurance for the majority of transportation providers. By way of illustration, under the current regulation, a seven passenger vehicle would require \$1.5 million in insurance; under the Final Rule that same vehicle would require only \$700,000 in insurance. A 16 passenger bus currently must be insured at \$5 million; under the Proposed Rule, insurance would be lowered to \$1.6 million. By any reckoning, these examples show a significant reduction in required insurance. It is beyond the scope of these regulations to mandate that premiums for such insurance be reduced, but it would be logical to expect that there would be a reduction in premiums as the amount of insurance purchased is reduced.

Several commenters noted that the Proposed Rule would yield higher insurance requirements for one class of vehicle, those with more than 50 seats. While vehicles with seating capacity in excess of 50 are not common, it is not the Department's intention to increase the insurance requirement in this rulemaking but rather to find reasonable, prudent, and protective ways to reduce minimum requirements where possible. Therefore, the Final Rule provides a cap of \$5 million for required insurance for any one vehicle. Thus, no vehicle will be required to have increased levels of insurance and most vehicles could be insured for less than under the current regulations.

In summary, therefore, the Department has concluded that the available information—taken in its entirety and on balance—confirms the proposal that \$100,000 per seat is a reasonable measure of adequate

insurance in MSPA transportation cases. For the reasons stated above and for the reasons previously discussed in the NPRM, the Department is promulgating a Final Rule which is the same as the Proposed Rule except for the addition of the \$5 million cap on insurance.

E. Administrative Hearings on Denials, Suspensions, and Revocations of Farm Labor Contractor Certificates

The NPRM proposed to establish expedited hearing and review procedures for denial, suspension or revocation of farm labor contractor certificates. All those who commented on this proposal, including agricultural and farmworker advocacy organizations, favored the proposal. The proposal will be adopted as a Final Rule without change.

Executive Order 12866/Section 202 of the Unfunded Mandates Reform Act of 1995

This Final Rule is not "economically significant" within the meaning of Executive Order 12866, nor does it require a § 202 statement under the Unfunded Mandates Reform Act of 1995. However, because the rule provides initial regulations required to implement provisions of Public Law 104-49 and may raise novel legal or policy issues arising out of legal mandates, it was determined to be a "significant regulatory action" within the meaning of § 3(f)(4) of Executive Order 12866. The Final Rule addresses insurance and disclosure obligations required under MSPA, as amended by Public Law 104-49. In addition, the rule revises the administrative proceedings involving decisions to revoke, suspend, or refuse to issue or renew Certificates of Registration under MSPA. No economic analysis is required because the rule will not have a significant economic impact. For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in increased expenditures of \$100 million in any one year by State, local, and tribal governments, or by the private sector.

Regulatory Flexibility Analysis

This Final Rule will not have a significant economic impact on a substantial number of small entities. The rule amends current regulations at 29 CFR Part 500 to bring the regulations into conformity with the statutory changes made to MSPA by the enactment of Pub. L. 104-49. Additionally, the Final Rule amends §§ 500.224, 500.262, and 500.268 of the

current rule to provide for expedited administrative proceedings in matters where the Administrator has initiated action to revoke, suspend, or refuse to issue or renew a farm labor contractor's Certificate of Registration (including Farm Labor Contractor Employee Certificates).

The proposed rule is likely to result in reduced insurance premiums for some and will not result in increases for any transporter covered by MSPA. Further, the Department anticipates that the portion of the regulated community which provides transportation, and thus would be affected by the minimum insurance requirements, is not substantial in number in any event. According to the Department's farm labor contractor registration data, only 975 of all registered contractors (less than 9% of the total), provide transportation to agricultural workers. It is believed that a similarly small percentage of agricultural employers and agricultural associations provide MSPA-covered transportation. Furthermore, the MSPA exempts from its coverage small agricultural employers and associations which do not use more than 500 man-days of agricultural labor in a calendar quarter during the preceding year. Therefore, many small agricultural employers are exempt from MSPA coverage and will be unaffected by these regulations.

Therefore, this Final Rule is not expected to have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act, and the Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Accordingly, a regulatory flexibility analysis is not required.

Dates of Applicability

The Secretary has determined that the public interest requires an immediate effective date for the regulations on liability insurance, in order to comply with the requirement of Public Law 104-49 directing that regulations establishing insurance levels under § 401(b)(3) of the MSPA (29 U.S.C. 1841(b)(3)) be promulgated within 180 days of the date of enactment of Public Law 104-49. Accordingly, the Secretary for good cause finds pursuant 5 U.S.C. § 553(d)(3), that this rule amending §§ 500.48, 500.121 and 500.122 of the regulation must be effective upon publication rather than thirty days thereafter.

Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 500

Administrative practice and procedure, Agricultural associations, Agricultural worker, Aliens, Carpooling, Day-Haul, Farmer, Farm labor contractor, Health, Housing, Housing standards, Immigration, Insurance, Investigation, Migrant agricultural workers, Migrant labor, Motor carriers, Motor vehicle safety, Occupational safety and health, Penalties, Reporting requirements, Seasonal agricultural workers, Transportation, Wages, Manpower training programs, Labor, Safety.

Signed at Washington, D.C., on this 13th day of May, 1996.

John R. Fraser

Deputy Administrator, Wage and Hour Division.

For the reasons set forth above, 29 CFR part 500 is amended as set forth below:

PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

1. The authority citation for Part 500 is revised to read as follows:

Authority: Pub. L. 97-470, 96 Stat. 2583 (29 U.S.C. 1801-1872); Secretary's Order No. 6-84, 49 FR 32473; Sec. 210A(f), Pub. L. 99-603, 100 Stat. 3359 (8 U.S.C. 1161(f)); and Pub. L. No. 104-49, 109 Stat. 432 (29 U.S.C. 1821, 1831 and 1841).

2. Section 500.48 is amended by revising paragraph (d) to read as follows:

§ 500.48 Issuance of certificate.

* * * * *

(d) Authorize the activity of transporting a migrant or seasonal agricultural worker, subject to the maximum number of workers authorized to be transported under the vehicle liability policy and as indicated on the face of the Certificate of Registration, only upon receipt of:

(1) A statement in the manner prescribed by the Secretary identifying each vehicle to be used, or caused to be used, by the applicant for the transportation of any migrant or seasonal agricultural worker during the period for which registration is sought;

(2) written proof that every such vehicle which is under the applicant's ownership or control, is in compliance

with the vehicle safety requirements of the Act and these regulations; and

(3) written proof that every such vehicle is in compliance with the insurance requirements of the Act and these regulations;

* * * * *

3. In § 500.75, paragraph (b)(6) is revised to read as follows:

§ 500.75 Disclosure of information.

(b) * * *

(6) Whether state workers' compensation or state unemployment insurance is provided:

(i) If workers' compensation is provided, the required disclosure must include the name of the workers' compensation insurance carrier, the name(s) of the policyholder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which such notice must be given.

(ii) The information requirement in paragraph (b)(6)(i) of this section may be satisfied by giving the worker a photocopy of any workers' compensation notice required by State law;

* * * * *

4. In § 500.76, paragraph (b)(6) is revised to read as follows:

§ 500.76 Disclosure of information.

* * * * *

(b) * * *

(6) Whether state workers' compensation or state unemployment insurance is provided:

(i) If workers' compensation is provided, the required disclosure must include the name of the workers' compensation insurance carrier, the name(s) of the policyholder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which such notice must be given.

(ii) The information requirement in paragraph (b)(6)(i) of this section may be satisfied giving the worker a photocopy of any workers' compensation notice required by State law;

* * * * *

5. Section 500.121 is amended by revising paragraphs (a) and (b) to read as follows:

§ 500.121 Coverage and level of insurance required.

(a) Except where a liability bond pursuant to § 500.124 of this part has been approved by the Secretary, a farm labor contractor, agricultural employer or agricultural association shall, in order to meet the insurance requirements in § 500.120, obtain a policy of vehicle liability insurance.

(b) The amount of vehicle liability insurance shall not be less than \$100,000 for each seat in the vehicle, but in no event is the total insurance required to be more than \$5,000,000 for any one vehicle. The number of seats in the vehicle shall be determined by reference to § 500.105(b)(3)(vi). See § 500.122 regarding insurance requirements where State workers' compensation coverage is provided.

* * * * *

§ 500.122 [Amended]

6. Section 500.122 is amended by removing and reserving paragraph (b), and revising paragraph (c) to read as follows:

* * * * *

(b) [Removed and Reserved]

(c) A farm labor contractor, agricultural employer or agricultural association who is the employer of a migrant or seasonal agricultural worker may evidence the issuance of workers' compensation insurance and passenger insurance under paragraph (a) of this section by obtaining and making available upon request to the Department of Labor:

(1) A workers' compensation coverage policy of insurance; and

(2) A certificate of liability insurance covering transportation of all passengers who are not employees and of workers whose transportation by the employer is not covered by workers' compensation insurance. See § 500.121.

* * * * *

7. Section 500.224 is amended by redesignating paragraph (b) as paragraph (c), revising paragraph (c), and adding a new paragraph (b) to read as follows:

§ 500.224 Referral to Administrative Law Judge.

* * * * *

(b) In cases involving a denial, suspension, or revocation of a Certificate of Registration (Farm Labor Contractor Certificate; Farm Labor Contractor Employee Certificate) or "certificate action," including those cases where the farm labor contractor has requested a hearing on civil money penalty(ies) as well as on the certificate action, the date of the hearing shall be not more than sixty (60) days from the date on which the Order of Reference is filed. No request for postponement shall be granted except for compelling reasons.

(c) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

8. Section 500.262 is amended by redesignating paragraphs (b), (c), (d), (e), (f), and (g) as (c), (d), (e), (f), (g), and (h) respectively, and adding a new paragraph (b) to read as follows:

§ 500.262 Decision and order of Administrative Law Judge.

* * * * *

(b) In cases involving certificate actions as described in § 500.224(b), the Administrative Law Judge shall issue a decision within ninety (90) calendar days after the close of the hearing.

* * * * *

9. Section 500.268 is amended by revising paragraph (a) to read as follows:

§ 500.268 Final decision of the Secretary.

(a) The Secretary's final Decision and Order shall be issued within 120 days from the notice of intent granting the petition, except that in cases involving the review of an Administrative Law Judge decision in a certificate action as described in § 500.224(b), the Secretary's final decision shall be issued within ninety (90) days from the date such notice. The Secretary's Decision and Order shall be served upon all parties and the Chief Administrative Law Judge, in person or by certified mail.

* * * * *

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