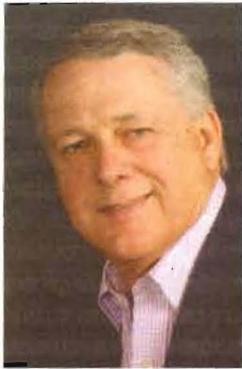


# 2016, the Year of the Regulator

By Frank Gasperini  
*National Council of Ag Employers*

Agricultural employers are among the most highly regulated groups in America. We are regulated by government at all levels and some are forced to accept non-government rules as if they had force of law for the right to sell your products.



**Gasperini**

Some regulation is usually good for all involved.

The idea of unregulated markets may sound attractive but honest and ethical businesses may face short-term disadvantage from businesses willing to operate absent ethical standards. In completely unregulated markets is that there are no regulations to protect us either.

Long-term the market does self-regulate but it can become impossible to start new businesses, and many smaller businesses are destroyed if there is no regulation to level the playing field.

That said, our current regulatory situation is difficult and confusing at best and will probably get worse before things improve.

Nearly every administration, from local to federal adds stricter or more difficult regulations and stricter enforcement interpretations of existing regulations on their way out. All previous federal administrations

have done this but the current Administration is on pace to be the most active regulator since FDR.

The U.S. Departments of Justice and Labor released a news release on Dec. 18, 2015, that puts all employers on notice of a joint initiative to expand worker-endangerment initiatives that will include investigations, audits, and penalties; including more criminal prosecutions for negligence. Agricultural employers should expect to hear more from OSHA, Wage and Hour, and the Department of Justice in the new-year, and you can count on them being there if there is a serious accident or death occurring on your farm or related to your business. We expect to see announcements like this, increasingly joint releases by two or more agencies or departments regularly in 2016.

<http://www.justice.gov/opa/pr/departments-justice-and-labor-announce-expansion-worker-endangerment-initiative-address>

Most of you have been audited by Wage and Hour, ICE, OSHA, IRS, and others. These will continue in 2016, so you must be prepared to cooperate and get through these audits as quickly, professionally, and positively as possible. Your best and only defense is to be in compliance with all the governing regulations and up to date on the paperwork; and to have that paperwork ready to use defending yourself.

Every few years IRS writes about who is an employee and who is a contractor. In July 2015, the Administrator of USDOL Wage and Hour published an "Administrator's Interpretation" announcing that Wage and Hour will be including this issue in upcoming investigations. Here

is the disturbing conclusion of the Administrator's Interpretation: "In sum, most workers are employees under the FLSA's broad definitions." [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.htm](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm)

2016 will see full implementation and enforcement of the Affordable Care Act. All employers and individual tax filers will have reporting requirements on their 2015 federal income tax filings due in 2016. Although it may take time for widespread enforcement, potential violations, penalties, and interest will begin to accrue at the end of the 2015 tax year. Smaller employers, who not under the employer mandate are not required to train employees on how to comply, but all employers are required to give every new-hire a letter explaining whether they offer insurance or how to go to the federal exchange for coverage if not. <http://www.dol.gov/ebsa/faqs/faq-noticeofcoverageoptions.html>

Those of you hiring through the H-2A temporary visa program should not expect any abatement of auditing and enforcement. In fact, you already know that you will be audited by Wage and Hour Division of USDOL virtually every year.

The USEPA has issued their final Pesticide Worker Protection Standard. WPS will be implemented over the next 14 months and will be in effect for the 2017 season.

All the impacts are not yet clear, there is annual training, notification, and record-keeping for all employees who will enter treated fields and, or work on equipment that may have residues. There will be buffers to applications near workers and an as-yet unclear designation of "worker representative" who may be able to access your records. USEPA is also in the public comment

period for a new Pesticide Applicator Certification Standard which includes changes to applicator minimum age, testing, and supervision requirements that may impact you.

The current administration is the most labor and union friendly administration since FDR. In 2016 expect to see no drop-off in auditing by Wage and Hour, OSHA, DOT, and other agencies. As states continue to look for funding, they will continue with increased levels of inspections and "document stops," thus turning enforcement into profit centers. Assume that you will be audited for documents, log-books, tax, labor, and other records at any given time, be ready with all the necessary and up-to-date documentation.

Lastly, make absolutely sure that you are completing and retaining all your payroll records, timekeeping, and pay stubs properly. There are differences for H-2 and non-H-2 employees, but if you have H-2 employees and domestics doing any of the same work the H-2 pay-rates and time offered will apply.

In 2015 a lot of employers got caught-up in innocent mistakes and oversights, or just got behind on documentation. To most regulatory agencies the cause does not matter, violations are violations and will cost you time and money.

*The author is Executive Vice President of the National Council of Agricultural Employers. NCAE is the national trade association representing Agricultural Employers in Washington, D.C. NCAE will offer updates on Congressional and federal regulatory issues important to Agricultural Employers. E-mail him at [frank@ncaeonline.org](mailto:frank@ncaeonline.org), or visit our website at [www.ncaeonline.org](http://www.ncaeonline.org).*