Public Choices Affecting Human Resource Management

Howard R. Rosenberg, University of California at Berkeley

Introduction

The amount and types of labor needed in agriculture vary seasonally and across commodities, but human work is critical to the production of all food and fiber. While not historically part of the farm bill, labor issues are treated by many public policies in which the USDA has interest and could help develop, and the resulting legislation is important to agricultural interest groups.

Although technological advances have dramatically reduced the numbers, and more so the proportion, of the U.S. population needed to generate our agricultural products, an average of nearly three million people now work on farms (down from some fourteen million in 1900). A still growing share of farm jobs, roughly one-third overall — much more in high-value/acre crops — are filled by hired workers, as opposed to self-employed farmers or unpaid family. Costs for hired labor range up to one-quarter of total agricultural production expenses in states with relatively large fruit, vegetable, and horticultural specialty sectors, and harvest labor alone accounts for two-thirds of all operating cost in some crops.

American agriculture has long depended on workers born elsewhere. For more than a century, people from immigrant groups — Africans, Chinese, Japanese, Filipinos, and Mexicans — have performed most of the arduous work in labor-intensive specialty crops. Large portions of the people who now make these crop systems run are Mexican-born, males, recent arrivals, employed seasonally, and poor.

How can we sustain and minimize harmful externalities from an agricultural production system that gives us ample, high-quality food and fiber at reasonable cost and serves as an economic engine, but which currently depends to a large extent on a unauthorized workforce? One can hardly make it through a newscast, editorial page, congressional session, or friendly chat between heads of state in North America anymore without bumping into a facet of this complex agricultural labor issue that reaches into farm management, immigration policy, employment law, industrial (not only agricultural) economics, international relations, community development, family well-being, and electoral politics.

Both further raising its profile and complicating its resolution is that this issue has become joined at the hip to a second. How shall we deal with the large presence of people in the U.S. who have entered or stayed without authorization? Should accommodations be made for people who, despite their illegal status, have contributed to our economy and community social fabric?

Background

The situation and components of pending proposals to deal with the agricultural labor supply are not entirely novel. Our government has responded in the past to ebbs and flows of concern about this issue. One of the reasons that all farm jobs have not gone south lately, and made the loud sucking sound that Mr. Perot warned us about, is that people have been coming north in droves. The migration today continues a tradition that we have at times encouraged, and at others times tried to block — or even reverse. In May 1917, the U.S. Department of Labor issued an order allowing farmers to bring Mexicans here exempt from the usual head tax, literacy test, and other restrictions as long as they were to perform agricultural work. A dozen years later, the great depression put a big chill on immigration from Mexico. Prospective entrants were discouraged from coming, and immigrants already here were encouraged, socially as well as economically to go home, as U.S.-born refugees from dust bowl and industrial states displaced them in farm jobs.

The rug was again rolled out to Mexican workers during World War II when U.S. citizens were drawn away from agriculture, and it stayed there for more than two decades. The Bracero program ran from 1942 through 1964, and brought some five million workers here with temporary work visas under an evolving set of rules (initially established as the Bracero Agreement of 1942, continued after the war emergency through interim provisos of the Immigration Act, and was further codified as Public Law 78 in 1951, during the Korean conflict that was again absorbing U.S. manpower). The program was subsequently extended by each Congress, usually with refining amendments, till 1965.

Rules during the 1950s put pieces into the program structure that have persisted into the present H-2A agricultural work visa program. One such provision limited the use of farm work visas to times when 1) the Department of Labor certified that U.S. domestic workers were not sufficiently available, 2) employment of Mexican workers would not adversely affect the wages and working conditions of U.S. workers similarly employed, and 3) employers had made reasonable efforts to attract enough U.S. workers.

Congressional authorization for the program expired without further extension in December 1964, amid growing public outcry about the exploitation of many Braceros, insufficient enforcement of supposed protections, and undercutting of U.S. resident workers – there was a widespread belief that it was interfering with the market for people here. To many people, the Bracero program remains a symbol of all that was, and is, wrong on the farm labor scene. Whether right or not, it is important to recognize that strong feelings still exist about this program and others that resemble it.

The Immigration Reform and Control Act (IRCA) was enacted in 1986. The explicit purpose of the IRCA was to control illegal entry to the U.S. However, other dubiously compatible purposes became annexed to this main one, including averting economic disruptions in agriculture, to recognize the contributions and stakes of people already here, protecting terms of employment for legal residents, and reducing the relative isolation of the farm labor market. So, the Act emerged as a compromise mix of provisions that required a new type of worker screening by employers (prohibition against hiring people not authorized to work in the U.S.), offered legal resident status to many people who had lived or worked in the U.S., and anticipated potential needs to supplement the legal farm labor supply in the future.

Although not an agricultural law, the IRCA treated agriculture specially in ways designed to help the industry adjust to a changed labor market. It deferred for 18 months the application of sanctions for either hiring ineligible workers or not documenting eligibility of workers. It provided means for specifically expanding the farm labor supply with legal immigrants or guestworkers. The Special Agricultural Worker (SAW) program granted legal resident status to a large number of people who had worked on farms between May 1985 and May 1986. The Replenishment Agricultural Worker (RAW) program could have supplemented the agricultural workforce with more legal immigrants, if needed, in fiscal years 1990-93. A third labor supply provision

adapted H-2 visa rules to codify a new H-2A visa program specific to agriculture, enabling farm employers to legally recruit and hire temporary guestworkers from abroad if 1) they can show that insufficient labor is available for a specific type of job during a given period in a defined market, and 2) they offer terms of employment that meet given standards.

Things have not quite worked out as the designers of the IRCA had expected. Some 2.7 million people obtained legal resident status, about 1 million as SAWs, but by no means has illegal entry to the U.S. been controlled. Though immediately entitled to seek employment anywhere, most SAWs did remain in agricultural work for years, and the RAW program was never activated. However, gradual attrition has reduced SAWs' ranks in the workforce, and the new entrants replacing them have been overwhelmingly unauthorized. The chief provision of the law has proven ineffective in reducing the draw of jobs here to the newcomers. All employers are to examine documents to assure that all new hires are eligible for employment in the U.S., but, for many, that merely means the paper chase has come to the farm, and not all good-looking papers are genuine.

The Regulatory Environment

Agricultural employers and workers are continually challenged to keep up with an evolving array of mandates, restrictions, and rights. In 1994, the U.S. Commission on the Future of Worker-Management Relations noted the rapid expansion since 1960 of generally applicable employment laws that promise assorted benefits to workers throughout the American economy. Additional legislation has reduced differences that long prevailed between employee protections in the farm and nonfarm sectors. Moreover, the creation of new obligations specific to agriculture has placed this sector among the most heavily regulated of industries.

Farmers typically devote several personal or staff hours each month to completing employment-related reports, and spend untold time trying to fathom rules prescribing what they must, may, and may not do when managing people. Mostly designed to protect workers by controlling employers, labor laws have been enacted also to serve public interests in curbing unfair competition among producers, and to reduce demands on the public treasury that ripple out from the labor market. The rules embody various definitions and coverages, differ somewhat from state to state, and are administered by a plethora of federal and state agencies with various levels of enforcement capability and orientations to the industry.

Controversy over the administrative costs, operational burdens, and true benefits of laws has been as pronounced in the realm of farm employment as in any other area. There is much more consensus around the goals than the legal tools of public policy regarding agricultural labor management. Regardless of how undertaken or received, regulatory efforts signify that agricultural personnel are important to the nation's economy and society.

As in other regulated domains, realities in the workplace and marketplace often fall short of standards set by public policy. The employment in agriculture of many people not truly eligible to work in the United States is only one type of incongruity between public policy myth and field-level reality.

Employers, workers, and third parties alike have expressed frustration with both the dictates and the impacts of laws, contending that they are onerous, inequitable, and improperly administered. Economic incentives, principled objections, and irregular enforcement may all breed willful disregard of the law. However, if the actual effects of regulation do not measure up to the intents, it is also in part because the people who are supposed to abide by the rules do not understand their obligations. The very volume and complexity of laws augur for uneven compliance with them. In addition, partly responsible for some of the misunderstanding as well as the disregard are state-to-state regulatory differences (e.g., in minimum wages, union organizing protections, or workers' compensation and unemployment insurances) that confer competitive advantages and disadvantages.

Should Congress reduce differences between state environments by removing some agricultural exceptions that remain in federal labor law (e.g., the Fair Labor Standards Act, the National Labor Relations Act), or by new federal legislation? Conversely, should Congress leave more to state discretion? Even within a national patchwork of laws,

should enforcement resources be increased to better assist in compliance, protect workers, and remove competitive disadvantages for farm employers who play by the rules? More modestly, should the USDA endeavor to make regulatory guidance more easily accessible to agricultural employers and workers, possibly by channeling up-to-date information from a myriad of authorities through an integrated web portal?

Locating the Onus of Employer Responsibilities

Given all the regulatory and technical challenges of managing labor, many growers contract with an external entity for services on their land. Engagement of workers through farm labor contractors (FLCs, also referred to as crew leaders in some places) has increased as farm operators have sought more organizational flexibility, time for other management functions, and relief from legal obligations and exposures to liability. Growers often find that FLCs relieve them of various difficulties, uncertainties, and costs associated with direct employment. Though dealing with contractors may involve other complications that farmers weigh against the burdens of hiring and managing their own employees, about three of five growers in California, for example, purchase services from at least one contractor.

Common functions of FLCs include negotiating terms of service with growers; recruiting, hiring and directing workers to the work site; supervising their work and inspecting results; paying wages and benefits; providing field sanitation facilities and drinking water; furnishing work tools; and filing reports and maintaining records.

Society has responded to reports of some FLCs' abusing employees and neglecting their public obligations by establishing laws to govern relationships between contractors, their employees, and growers. Farm labor contractors are now more intensely regulated than are other agricultural employers. They must register with the U.S. Department of Labor and, in many states, they must obtain licenses. Over the past several years, contractors have been specially targeted by worker advocates, enforcement agencies, and lawmakers, and new legislation in some states has raised license standards (e.g., a continuing education requirement, higher surety bond, etc.) as well as administrative scrutiny.

FLCs who meet all their legal obligations and operate truly as independent businesses serve to lessen the risks for both growers and workers. Yet, not all do. Growers are required to confirm that any contractor they do business with is duly certified at the federal and (usually) state levels. Among the penalties for failing to do so is the imposition on the grower of joint liability for any violations of other labor laws committed by the contractor while working for the grower.

Even in cases where FLCs are licensed, however, growers may find themselves held liable for contractor misdeeds by way of the joint employment doctrine under the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA) — the prime federal law designed to protect migrant and seasonal farm workers. Congress included the concept of joint employer in the original MSAWPA of 1982, and in a 1997 regulation, the Department of Labor (DOL) more fully discussed circumstances under which a contractor's customer (i.e., typically a grower, association, or packing house) is to be considered a joint employer of the FLC's employees. Attached to joint employer status is liability for compliance with wage and hour laws and all requirements of MSAWPA, such as to provide accurate and timely disclosure of the terms and conditions of employment, to maintain written payroll records, and to pay wages when due. Joint employment also affects responsibility for work-incurred injuries, discriminatory acts, and company benefits.

Although the regulation says that joint employment is not presumed to exist in agriculture and that no one fact or set of facts will necessarily result in a joint employment determination, DOL's own fact sheet about applicability of the Fair Labor Standards Act states, "Agricultural employers who utilize the services of a farm labor contractor are almost always in a situation of joint employment with the contractor in regard to the employees." The 1997 rule does appear to expand the range of circumstances in which joint employment is to be found, and the very increased chance of litigation to clarify status, even if not resulting in a finding of joint

employment, raises costs and liabilities for grower-customers of labor contractors.

Much uncertainty prevails about the meaning and implications of joint employment. Congress adopted the concept as a device to connect responsible parties to the breach of duties to protect migrant and seasonal workers. Could lawmakers save years of controversy, litigation, and untold expense by writing legislation to define the concept within MSAWPA?

How critical is an expansive joint employer doctrine to the effective protection of farm workers? Can the establishment of higher federal standards for FLC professionalism serve its purpose at least as well at lower cost to all? Would separating grower-customers from the employment responsibilities of the labor contractors who serve them as fully competent operators be a recipe for the vile, blatant exploitation of workers? To what reasonable limits should growers be held accountable for the farm labor contractors from whom they purchase service?

Is It Time to Enlarge the Supply of Legal Workers?

From a producer's perspective, employing personnel carries various risks that translate into higher costs, lower revenues, or both. The most classic, perpetually lurking risk to growers of labor intensive crops is not having sufficient help from people capable and willing to perform production tasks when needed.

Since the mid-1990s, growers have reported greater difficulty recruiting and retaining employees, exacerbated by the economic boom, keen competition in product and labor markets, more vigorous enforcement of the ban on hiring people not eligible for employment in the U.S., and recognition that a majority of hired farm workers now are unauthorized. Observing that few legal U.S. residents with other options can, or will, perform seasonal field jobs, they acknowledge heavy reliance on ineligible employees and look upon the situation as disconcerting — at best — to all parties. Their concerns have found expression in a series of bills in Congress to reform the existing H-2A work visa (guestworker) program, or create a new one that would more easily allow workers from abroad to legally come and go, on a non-immigrant basis, for specific temporary employment.

Farm worker advocates, in contrast, maintain that many people already here are available for agricultural jobs, and that more would be if market forces were allowed to operate and induce employers to offer better job terms. Labor and immigrant rights groups have joined in vigorous opposition to the guestwork expansion plans. They have mounted support for proposals along a different line — to grant legal resident status to currently unauthorized immigrants. The AFL-CIO Executive Council planted a milestone on this path and added significant momentum for the concept in February 2000, when it reversed a longstanding policy and called for extending a blanket amnesty to people in the U.S. illegally, plus ending sanctions against employers who hire unauthorized workers. Organized labor had strongly opposed any bow to illegal immigration on grounds that undocumented workers take jobs from legal workers, depress wages, weaken the union movement, and create a black market work force. A bill proposing a broad legalization program was brought to the House of Representatives in February 2001.

An employer-supported bill in 1998, the Agricultural Job Opportunity and Benefits Security Act (AgJOBS), was adopted by the Senate but was dropped in late budget conference negotiations. Key elements of this bill were 1) a national system of voluntary registries of legally authorized workers, 2) streamlined procedures for granting H-2A visas for nonimmigrant workers to fill temporary agricultural jobs left open after use of the registries; 3) easing of existing visa requirements for employer-paid housing and for determination of permissible wages, 4) coverage of visa holders under protections of all U.S. labor laws, and 5) selective qualification of unauthorized workers for adjustment to a new legal status. Similar bills were in play during the 1999-2000 session, tempered with provisions that earned worker advocacy support, and a major compromise fell just short of adoption in December 2000. Another version of AgJOBS, S.1611 was introduced to the Senate in July 2001 and, in August, companion bills favored by worker advocates went to both houses of Congress.

Meanwhile, new presidents in Washington and Mexico City have clearly signalled their intent to address interrelated immigration and labor force issues. Especially in light of the near miss last year, the current Congress appears likely to enact some kind of law that significantly affects agricultural labor supply. Despite a few differences between the bills they have respectively sponsored, many employer and worker group leaders have come to agree that an acceptable package will include elements of H-2A reform, legalization, and worker protections.

Concluding Comments

There is something to dislike about virtually every idea that has been proposed to address the large scale employment of ineligible workers — including leaving the status quo as is. Perhaps the central objection to work visa programs from labor organizations is that they allow bad actors to bully vulnerable workers from abroad while also undermining standards for, and the bargaining power of, U.S. resident workers. From another perspective, some people intent on cutting illegal immigration oppose guestwork programs on the grounds that many workers overstay their visa terms and, thus, swell the numbers of unauthorized residents. However, studies have concluded that legalization under the IRCA has also spawned a surge of illegal immigration in its wake. Critics of amnesty note that each special legalization sends powerful messages of disrespect for the rule of law and of incentives to those contemplating illegal entry.

So, what shall we do this time around? With more industries now recognizing dependence on ineligible workers and as many as ten million people living and working here without authorization, should new legislation give any special consideration to agriculture? What is a fair balance of stakeholder group interests, and how can it be achieved?

Ultimately, is it in the long-term national interest to fashion policy measures that would replace the illegal immigrant work force that now sustains the industry with a supply of legal agricultural labor? Would a program granting legal status to currently ineligible workers, providing for the temporary admission and employment of foreign workers — or both — be worth more than their trouble to design, establish, and administer? Or, should we try to end large-scale employment of immigrant and guest labor in American agriculture in deference to other social goals and values?

References and Suggested Readings

Runyan, Jack, USDA Economic Research Service. "Summary of Federal Laws and Regulations Affecting Agricultural Employers, 2000." *Agricultural Handbook* No. 719. http://www.ers.usda.gov/epubs/pdf/ah719/

U.S.Department of Agriculture Economic Research Service. "Briefing Room on Farm Labor." http://www.ers.usda.gov/briefing/FarmLabor/

U.S. Department of Agriculture, Office of the Chief Economist, Agricultural Labor Affairs Coordinator. "Highlights of Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States - H-2A Program." http://www.usda.gov/agency/oce/oce/labor-affairs/h2asumm.htm

U.S. Department of Labor, "National Agricultural Workers Survey" (demographic profiles of hired farmworkers employed in crop production). http://www.dol.gov/dol/asp/public/programs/agworker/naws.htm

U.S. Department of Labor. "Comparative Summary of State Labor Laws." http://www.dol.gov/dol/esa/public/programs/whd/state/state.htm

United States General Accounting Office. "H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers," December 1997. http://are.berkeley.edu/APMP/pubs/gao-h2a.pdf