

## Wage and Hour Division, Labor

## § 501.0

from the date of the issuance of the Secretary's final decision, as provided in § 500.268.

[54 FR 13330, Mar. 31, 1989]

### RECORD

#### § 500.270 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

#### § 500.271 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court pursuant to section 103(c) or 503(c) of the Act, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

## PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

SOURCE: 75 FR 6978, Feb. 12, 2010, unless otherwise noted.

### Subpart A—General Provisions

#### § 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B applicable to the employment of H-

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2A workers and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, subpart B.

### § 501.1 Purpose and scope.

(a) *Statutory standards.* 8 U.S.C. 1188 provides that:

(1) A petition to import an alien as an H-2A worker (as defined at 8 U.S.C. 1188) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary labor certification from the U.S. Secretary of Labor (Secretary). The temporary labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under 8 U.S.C. 1188 has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment and assuring program integ-

rity. The regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart B.

(c) *Role of the Wage and Hour Division (WHD).* Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part apply to the employment of any H-2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* filed with the Department on and after March 15, 2010.

### § 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded

to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H-2A program, other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and the WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to the DHS promptly.

#### § 501.3 Definitions.

(a) *Definitions of terms used in this part.*

*Administrative Law Judge (ALJ).* A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

*Adverse effect wage rate (AEWR).* The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

*Agent.* A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section with respect to a specific *Application for Temporary Employment Certification*; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

*Agricultural association.* Any non-profit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incor-

porated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

*Area of intended employment.* The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA.

*Corresponding employment.* The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

*Date of need.* The first date the employer requires the services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

*Employee.* A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the

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skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

*Employer.* A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

*Federal holiday.* Legal public holiday as defined at 5 U.S.C. 6103.

*Fixed-site employer.* Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part, as incident to or in conjunction with the owner's or operator's own agricultural operation.

*H-2A Labor Contractor (H-2ALC).* Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

*H-2A worker.* Any temporary foreign worker who is lawfully present in the

U.S. and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a).

*Job offer.* The offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

*Job opportunity.* Full-time employment at a place in the U.S. to which U.S. workers can be referred.

*Job order.* The document containing the material terms and conditions of employment that is posted by the SWA on its inter- and intra-state job clearance systems based on the employer's Form ETA-790, as submitted to the SWA.

*Joint employment.* Where two or more employers each have sufficient definitional indicia of an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

*Prevailing wage.* Wage established pursuant to 20 CFR 653.501(d)(4).

*State Workforce Agency (SWA).* State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

*Successor in interest.* Where an employer has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

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- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (7) Similarity in machinery, equipment, and production methods;
- (8) Similarity of products and services; and
- (9) The ability of the predecessor to provide relief.

For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations at issue.

*Temporary agricultural labor certification.* Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

*United States (U.S.).* The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

*United States worker (U.S. worker).* A worker who is:

- (1) A citizen or national of the U.S.; or
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the Immigration and Nationality Act (INA) or by DHS) to be employed in the U.S.; or
- (3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

*Wages.* All forms of cash remuneration to a worker by an employer in payment for personal services.

*WHD Administrator.* The Administrator of the Wage and Hour Division (WHD), and such authorized representatives as may be designated to perform any of the functions of the WHD Administrator under this part.

*Work contract.* All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

(b) *Definition of agricultural labor or services.* For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition shall be agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

(1)(i) *Agricultural labor for the purpose of paragraph (b) of this section means all service performed:*

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(iv) but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(iv) and (b)(1)(v) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the rais-

ing of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this

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part, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

### § 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or the regulations in this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188 or the regulations in this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or the regulations in this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, or to this subpart or any other Department regulation promulgated pursuant to 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of himself or others any right or protection afforded by 8 U.S.C. 1188 or the regulations in this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice,

Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

### § 501.5 Waiver of rights prohibited.

A person may not seek to have an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in these parts. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

### § 501.6 Investigation authority of Secretary.

(a) *General.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person and gather any information as may be appropriate.

(b) *Confidential investigation.* The WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which

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the reported violation is alleged to have occurred.

### § 501.7 Cooperation with Federal officials.

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and the regulations in this part during the performance of such duties. The WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefor. In addition, the WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

### § 501.8 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with 8 U.S.C. 1188 or the regulations in this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

### § 501.9 Surety bond.

(a) Every H-2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H-2A program. The original bond instrument issued by the surety must be submitted with the *Application for Temporary Employment Certification*. At a minimum, the bond instrument must identify the name, address, phone num-

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ber, and contact person for the surety, and specify the amount of the bond (as required in paragraph (c) of this section), the date of issuance and expiration and any identifying designation used by the surety for the bond.

(b) The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210. The bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits owed to an H-2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must be written to cover liability incurred during the term of the period listed in the *Application for Temporary Employment Certification* for labor certification made by an H-2ALC, and shall be amended to cover any extensions of the labor certification requested by an H-2ALC.

(c) The bond must be in the amount of \$5,000 for a labor certification for which an H-2ALC will employ fewer than 25 workers; \$10,000 for a labor certification for which an H-2ALC will employ 25 to 49 workers; \$20,000 for a labor certification for which an H-2ALC will employ 50 to 74 workers; \$50,000 for a labor certification for which an H-2ALC will employ 75 to 99 workers; and \$75,000 for a labor certification for which an H-2ALC will employ 100 or more workers. The WHD Administrator may require that an H-2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(d) The bond must remain in force for a period of no less than 2 years from the date on which the labor certification expires. If the WHD has commenced any enforcement action under the regulations in this part against an

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H-2ALC employer or any successor in interest by that date, the bond shall remain in force until the conclusion of such action and any related appeal or related litigation. Surety bonds may not be canceled or terminated unless 45 days' notice is provided by the surety in writing to the WHD Administrator at the address set forth in paragraph (b) of this section.

### Subpart B—Enforcement

#### § 501.15 Enforcement.

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, as provided in the regulations in this part for enforcement by the WHD, pertain to the employment of any H-2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

#### § 501.16 Sanctions and remedies—general.

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a)(1) Institute appropriate administrative proceedings, including: the recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (see 20 CFR 655.135(k)); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the em-

ployer, or from its successor in interest, as appropriate. In the case of an H-2ALC, the remedies will be sought from the H-2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to the H-2ALC, as required by 20 CFR part 655, subpart B and § 501.9 of this part.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, by any person.

(c) Petition any appropriate District Court of the U.S. for an order directing specific performance of covered contractual obligations.

#### § 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 501.1(b) of this part and in 20 CFR part 655, subpart B. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c) of this part. The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.182 or under § 501.20 of the regulations in this part.

#### § 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and the regulations in this part.

#### § 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the

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regulations in this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;

(2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part will not exceed \$1,500 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract, or of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, or for each act of discrimination prohibited by § 501.4 shall not exceed \$5,000;

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, that proximately causes the death or serious injury of any worker shall not exceed \$50,000 per worker;

(3) For purposes of this section, the term serious injury includes, but is not limited to:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(4) A civil money penalty for a repeat or willful violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, that proximately causes the death or serious injury of any worker, shall not exceed \$100,000 per worker.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed \$5,000 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker employed in work or activities that are encompassed by the approved *Application for Temporary Employment Certification* for H-2A workers in the area of intended employment either within 60 days preceding the date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed \$15,000 per violation per worker.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, shall not exceed \$15,000 per violation per worker.

### § 501.20 Debarment and revocation.

(a) *Debarment of an employer.* The WHD Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under 20 CFR part 655, subpart B, subject to the time limits set forth in paragraph (c) of this

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section, if: the WHD Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Debarment of an agent or an attorney.* The WHD Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B or 29 CFR part 501, if the WHD Administrator finds that the agent or attorney participated in an employer's substantial violation, by issuing a Notice of Debarment. The OFLC Administrator may not issue future labor certifications to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.* (1) The WHD Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s)

of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;

(vii) Employing an H-2A worker outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);

(ix) A violation of any of the provisions listed in §501.4(a) of this subpart; or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in §501.19(b) shall be considered.

(e) *Procedural Requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under §501.33 and a timeframe under which such rights must be exercised and must comply with §501.32. The debarment will take effect 30 days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in §501.33(d).

(f) *Debarment involving members of associations.* If, after investigation, the WHD Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the WHD Administrator determines that the association or another association member participated in the violation, in which

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case the debarment will be invoked against the association or other complicit association member(s) as well.

(g) *Debarment involving associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

(h) *Debarment involving associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the WHD Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(i) *Revocation.* The WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary labor certification.

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by the WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

**§ 501.21 Failure to cooperate with investigations.**

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H-2A worker, a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H-2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

**§ 501.22 Civil money penalties—payment and collection.**

Where a civil money penalty is assessed in a final order by the WHD Administrator, by an ALJ, or by the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 days of the date of the final order. The person assessed such penalty shall remit the amount ordered to the WHD Administrator by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

**Subpart C—Administrative Proceedings**

**§ 501.30 Applicability of procedures and rules.**

The procedures and rules contained herein prescribe the administrative

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process that will be applied with respect to a determination to assess civil money penalties, to debar, or to increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, or to the collection of monetary relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

### PROCEDURES RELATING TO HEARING

#### § 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, to debar, to increase a surety bond, or to proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

#### § 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, the amount of any civil money penalty assessment, whether debarment is sought and the term, and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the proce-

dures relating thereto, as set forth in § 501.33.

#### § 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

### RULES OF PRACTICE

#### § 501.34 General.

(a) Except as specifically provided in the regulations in this part, the Rules of Practice and Procedure for Administrative Hearings Before the Office of

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Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 501.35 Commencement of proceeding.**

Each administrative proceeding permitted under 8 U.S.C. 1188 and the regulations in this part shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

**§ 501.36 Caption of proceeding.**

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and the regulations in this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of \_\_\_\_\_, Respondent.

(b) For the purposes of such administrative proceedings the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

**REFERRAL FOR HEARING**

**§ 501.37 Referral to Administrative Law Judge.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the

person requesting such hearing or by the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under the regulations in this part or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of the regulations in this part, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

**§ 501.38 Notice of docketing.**

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

**§ 501.39 Service upon attorneys for the Department of Labor—number of copies.**

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

**PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE**

**§ 501.40 Consent findings and order.**

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of

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any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

### POST-HEARING PROCEDURES

#### § 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and

conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

### REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

#### § 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.

#### § 501.43 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's Notice pursuant to § 501.42, the OALJ shall promptly forward a copy of the complete hearing record to the ARB.

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**§ 501.44 Additional information, if required.**

Where the ARB has determined to review such decision and order, the ARB shall notify the parties of:

- (a) The issue or issues raised;
- (b) The form in which submissions shall be made (*i.e.*, briefs, oral argument, etc.); and
- (c) The time within which such presentation shall be submitted.

**§ 501.45 Final decision of the Administrative Review Board.**

The ARB's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

**RECORD**

**§ 501.46 Retention of official record.**

The official record of every completed administrative hearing provided by the regulations in this part shall be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

**§ 501.47 Certification.**

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

**PART 502—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT (SUSPENDED 6-29-2009)**

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**Subpart B—Enforcement of Work Contracts**

- 502.15 Enforcement.
- 502.16 Sanctions and Remedies—General.
- 502.17 Concurrent actions.
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