



# APS

Agri-Placement Services, Inc.

## THE APS ADVISOR: RECENT NEWS

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**MARCH 2015**

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## Migrant and Seasonal Agricultural Worker Protection Act: United States Department of Labor goes after Dairy Farms in New York *By F. Brandon Mallory*

US Department of Labor (USDOL) continues to emphasize labor law regulatory enforcement focusing on dairy farms in NY, which have national implications. USDOL is attempting to change its interpretation of the statutory definition of a Migrant and Seasonal Agricultural Worker (MSFW).

August 2014, Occupational Safety and Health Administration (OSHA), an agency of USDOL began implementing a Local Emphasis Program that focused on random, unannounced compliance inspections at New York State dairy farms <http://www.dairyherd.com/dairy-news/NYS-OSHA-begins-LEP-dairy-farm-inspections-270518161.html>. These standards are national and will apply everywhere, indeed already have in Vermont and other states. So although you may not have

heard of this in your state, be assured that if it happens in NY, it will happen elsewhere <http://www.nycamh.com/osh-n-y-dairy-lep/>.

Now, a regional office of USDOL Wage and Hour Division (WHD) announced that the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) <http://www.dol.gov/whd/mspa/> applies to dairy farms and to the farms' year around permanent workforce and that WHD may begin inspection of any dairy farm in New York very soon.

The Migrant and Seasonal Agricultural Worker Protection Act was enacted in 1983 and replaced the Farm Labor Contractor Registration Act of 1963. It provides protection for MSFWs by establishing employment standards related to wages, housing, transportation, disclosures

and recordkeeping. MSPA also requires farm labor contractors, i.e. any entity that recruits, solicits, hires, employs, furnishes or transports MSFWs to register with DOL.

MSPA is one of the most litigious farm regulations in the US and violations cost US farms millions of dollars annually in civil money penalties. Violations of MSPA can cause fines up to \$1,000 for each individual violation, in addition to back wages and interest possibly resulting in criminal conviction and imprisonment. In addition, individuals whose MSPA rights have been violated may seek civil damages in federal court.

Dairy farmers have to be thinking by now, "we have never heard of this"—nor had we, until quite recently! **Con't p. 2**



## Emerging Puerto Ricans on Dairy Farms

*By Clay Martin*

When I ask a Puerto Rican why they are currently looking for a job in the U.S. dairy industry the resounding response is, "Things are bad here [*in Puerto Rico*], really bad." In Puerto Rico the unemployment rate is 13.5%, which is more than double that of the US. This is leading to more and more Puerto Ricans looking to settle in here, stateside. The key words here are "to settle." Thanks to the collaboration efforts of APS and several loyal clients, they are settling and thriving on dairy farms. Puerto Ricans are solid, capable dairy farm workers—so successful that they have brought their families to live on or close to the farm. As American citizens, they are entitled to these freedoms. In the communities where Puerto Ricans are thriving as farmworkers, it is becoming common for **Con't p. 3**

The confusion has arisen out of the WHD interpretation of the legal definition of a MSFW. **MSPA . . . (con't)**  
The law reads, "*Migrant agricultural worker means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence. Seasonal agricultural worker means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.*"

As is obvious from the language in the statute, producing milk in most instances cannot employ MSFWs because milk production is permanent and year around and not of a "seasonal" or "temporary" nature.

For some reason, the thinking seems to be that Mexican farmworkers and other farmworkers from Latin America are by nature MSFWs, because their permanent place of residency is somewhere other than the U.S.

Even if we accept this mishandling of the definition of a MSFW, it still does not overcome the requirement that the work has to be of a "seasonal" or "temporary" nature and of course, milk production is not.

Therefore, the dairy industry has a battle to fight. We do not believe there is legal precedent for WHD to enforce MSPA onto dairy farms. We believe we must follow the rule of law and cannot allow arbitrary decisions by individual government officials to rule the day.

If dairy farms have to comply with MSPA, housing inspections will become a regular part of farm labor compliance, vehicle inspection reports will be required, increased scrutiny of wage records will be commonplace and if it happens in New York, it will happen throughout the U.S.

Ann Margaret Pointer, a lawyer from Fisher and Phillips, has produced a position paper hoping to produce a response and engage the dairy industry. If the industry does not engage, this law could insidiously become an ordinary part of labor management on dairy farms.

## Obama's Immigration Action Halted, and Possible Ramifications

By Aaron TeCrony

The executive action pertaining to immigration that President Obama announced on November 20, 2014 was delayed by US District Judge Andrew Hanen on February 16. The Texas judge temporarily blocked the initiation of executive action with a preliminary injunction claiming a coalition of 26 states has the right to open a lawsuit saying the action must go through an administrative review process. They will argue the president violated the US Constitution "Take Care Clause" which places limits on presidential powers. It is likely that the government will ask for an emergency reversal at the Fifth Circuit Court of Appeals in New Orleans because the injunction is based on a "technicality" and not on the unconstitutional use of presidential power. This means the application opening date is no longer valid, nor does anyone know if the executive action will be implemented.

If the executive action is allowed to proceed, what does this mean for dairy? There is no good way to canvas the industry to see how many workers actually would qualify for this program. To apply for a deferred deportation status and a 3 year work authorization, the applicants must be parents of citizens and/or permanent residents, have been living here since January 1, 2010, and have no criminal record. Anecdotal evidence suggests less than that 25% of dairy employees would qualify for this program if the action is allowed to proceed. Agricultural groups have reminded policy makers that this presidential action is not immigration reform. The program is temporary and nothing like the bill that was in the US Senate allowing workers a path to citizenship if they remain in agriculture for 5 years, which included dairy in a guest worker program. The executive action gives the recipients the option to seek employment outside agriculture.

If the order is reinstated, there are many uncertainties and guidance must first be issued. Some employers may want to help their workers through this process. As of now, there is no language to protect the farmer from having "constructive knowledge" of an employee's undocumented status if they come forward and apply. Should the political climate change, nothing prevents farmers from legal entanglements due to "constructive knowledge" of their employee's prior status. Agricultural representatives are working to insert language allowing employers to assist undocumented workers without facing criminal charges. For the time being there will be no implementation of the executive action unless the court action is resolved.

Information in this article was taken from an interview with Tom Maloney, Senior Extension Associate, Cornell University and also from the US Citizenship and Immigration Services website, <http://www.uscis.gov/immigrationaction>.

## Human Trafficking— A Form of Modern-Day Slavery

By F. Brandon Mallory

Several months ago, dairy farmers, specialty crop producers and agribusiness professionals met in Batavia, New York with officials of two different divisions of the United States Department of Homeland Security—Immigration and Customs Enforcement and the U.S. Border Patrol. The purpose of the meeting was to take a step toward establishing a better working relationship and to understand the department's enforcement emphasis.

ICE officials indicated that the fight against human trafficking is near the top of the DHS enforcement objectives. As a result, ICE launched the Blue Campaign <http://www.dhs.gov/blue-campaign/about-blue-campaign> to more effectively combat human trafficking through enhanced public awareness, training, victim

assistance and law enforcement investigations. Consistent with DHS national emphasis, the cover of the February 13, 2015 edition of Newsweek reads, "Sex Slaves in America, Trafficking Down on the Farm" and inside appears a shocking article entitled "Sex Slaves on the Farm" <http://www.newsweek.com/2015/02/13/sex-slaves-farm-304354.html>. Shocking is not a strong enough term to describe the content of this article! Nauseating, disgusting and deplorable begin to define the scourge that is human trafficking. The sad reality is that here in the United States people are being bought, sold and smuggled like modern-day slaves. Many are trapped in lives of misery and forced to work as prostitutes or at jobs with little or no pay. Every human being has a responsibility to stand-up against this plague!

## Emerging PR's...

(con't from page 1)

them to buy cars, rent their own apartments, become more proficient in English, and enroll their kids in school.

These gentlemen have diverse backgrounds ranging from hard-working professionals to the most common "Jack-of-all-Trades" who boasts a wide array of job experiences. Some more common experiences and skills include construction, roofing, masonry, welding, maintenance, and agricultural jobs. Some even come with dairy experience acquired from the Puerto Rican dairy farming region of Hatillo.

What amazes my clients and I is how serious these men take their jobs. Puerto Ricans see a career in the dairy industry and their pride shines through in their job performance, willingness to accept responsibilities, positive attitudes and phenomenal communication skills (English is required coursework in Puerto Rican public schools). They are engaged during farm visits, making recommendations and bringing up any job-related hurdles they may be facing. The last three years have been a pleasure working with these diligent men.



## 2015 Minimum Wage Increases

By Aaron TeCrony

As we welcomed 2015, several states raised their minimum wage. It is important for employers in these states to be aware of and comply with the new wage rates. There are several states where APS has clientele that have increased their minimum wage: Maryland \$7.25-\$8.00, Massachusetts \$8.00-\$9.00, New York \$8.00-\$8.75, Ohio \$7.95-\$8.10, and Vermont \$8.73-\$9.15. Please note that the highest minimum wage is in Vermont at \$9.15/hour. There are some states with an "agricultural/farm" minimum wage farmers may pay which may be considerably lower than the state minimum wage. People in the world are more connected today than ever before, and the word is out in the Hispanic worker community that there are new minimum wages. It is common for Hispanic workers to travel hours to relocate for a higher paying job, sometimes only for 20 cents more per hour.

Even though your state may have a lower minimum wage than Vermont, please know and understand that *your farm is in direct competition for workers with Vermont*. No place in the Northeast is too far for a worker to relocate to Vermont. APS encourages farms to pay 50 cents above minimum wage. This attracts high-quality employees, keeps them engaged in your farm, and keeps them from looking for "greener pastures." If you are not paying a starting wage in the neighborhood of \$9.50 per hour we highly recommend adjusting appropriately. Keep in mind that long tenured employees should likewise receive appropriate wage increases. If you have any questions or concerns about this please discuss them with your APS Representative.

## We Are Pleased to Introduce our Two Newest APS Team Members: Peter Wawro and John Caraway III

Peter is responsible for overseeing client operations in Central New York and North/Central Pennsylvania and is enjoying getting to know the Northeast and its farming culture. He is pleased to have the opportunity to increase his knowledge of the dairy industry and to improve employer/employee relations as well as production on client farms. Peter studied Spanish and International Relations at Colorado State University. He recently returned from 3 years of service in Peace Corps Panama where he worked with those in extreme poverty, focusing on the implementation of improved rice and tilapia fish tanks designed to improve production and caloric intake. Being a Colorado native please excuse his tendency to refer to farms as ranches, which is what they are called out west. Some old habits die hard.

John is a graduate of the University of South Carolina who has just returned from spending three years abroad serving in the United States Peace Corps in Panama. In his first two years as a Peace Corps Volunteer, John helped provide an indigenous community with potable drinking water. He then accepted a position to stay on for a third year as a Regional Coordinator of 30+ Peace Corps Volunteers. John enjoyed his time abroad but is happy to be back stateside and even though he is new to the Northeast, he already feels right at home. He is currently finding the people to be much warmer than the temperature but he is slowly acclimating. John looks forward to all that the new job will bring and is very excited to be a part of the APS team.

- **F. Brandon Mallory**, Company President/Director
- **Dawna Mallory**, Office Assistant
- **Julia DeVries**, Finance Manager/Assistant Director
- **Andre Skandar**, BHRS Manager (New England)
- **Peter Wawro**, BHRS Manager (Central NY/North & Central PA)
- **Ivan Jaramillo**, Field Development & Support Manager/BHRS Manager (Central NY/PA/OH/MI/MN)
- **Aaron TeCrony**, BHRS Manager (NY/PA/OH/DE/VA) & BHRS Administrator
- **John Caraway III**, BHRS Manager (New England)
- **Clay Martin**, BHRS Manager (Northern NY/MI)
- **Eduardo Rodriguez**, BHRS Manager (Western NY/PA/MD)



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