

WHD Response to comment submitted in response to 30 day notice

Public Comments

The Department received two comments in response to the 30-day notice. One comment submitted to the Department was a general statement of opposition, but the other comment suggested specific, technical changes to the forms. The Department has carefully considered the timely submitted comments addressing the proposed changes. Significant issues raised in the comments are discussed below, along with the Department's responses to those comments.

Item 6

The commenter suggests that the Department edit Item 6 of form WH-530 to ask applicants to identify specific items that would preclude them from being issued a certificate of registration. Specifically, the commenter states that the Department should provide fields to allow applicants to disclose all MSPA monetary judgments against them, whether the judgment has been satisfied, and the date on which the judgment was paid in full. The commenter also suggests that the applicant identify if a family member has been refused issuance or renewal of a certificate, or has had a certificate suspended or revoked, and then attest that the ineligible family member is not the real party in interest for the present application (colloquially known as "fronting"). The commenter states that these fields will help the Department recognize when an applicant should not be issued a certificate because they have not paid a court judgment or are not the real party in interest.

The Department declines to adopt these suggested fields. The Department's experience with applicants self-reporting criminal convictions in item 6 indicates that truthful self-reporting cannot reliably be expected. The Department encourages farmworkers and legal aid organizations to notify the agency if a MSPA civil judgment remains unpaid so that appropriate action may be taken. The Department may refuse to issue or revoke a certificate of registration when there is an unpaid court judgment under MSPA obtained by the Secretary of Labor or any other person or when there is a failure to comply with any final order issued by the Secretary of Labor.

In the case of "fronting," whether the applicant is the real party in interest is a fact-dependent determination and frequently requires an investigation; it is unlikely to be determined based on a disclosure on an application. When the Department encounters "fronting" in its MSPA investigations, it undertakes appropriate revocation or denial actions. The Department encourages the public to report allegations of "fronting" to the Wage and Hour Division (WHD) to be investigated.

Item 10

The commenter suggests that the WH-530 ask how liability insurance will be provided. The Department agrees with this comment and has added fields for the applicant to identify how it will comply with the insurance or liability bond requirements when transporting workers.

The commenter also suggests that, if the applicant is using workers' compensation insurance to obtain authorization, the Department should require the disclosure of the insured entity and, if the insured entity is not the applicant, the contract between the insured company and the applicant to determine if any gaps in insurance coverage exist. The commenter states that workers' compensation insurance frequently does not cover all circumstances of transportation, particularly if the workers' compensation is furnished by professional employment organizations (PEOs). The Department agrees that workers' compensation insurance that insufficiently covers all transportation is a common problem in the industry. However, the issue is not limited to PEOs; rather, the question as to whether workers' compensation insurance covers

all transportation depends on a multitude of factors, including state laws, the purpose and/or destination of the transportation, and the employer of the employees being transported (in addition to those issues the commenter identified with respect to PEOs). As a result, the Department doubts that its examination of a contract between the applicant and a PEO would assure that no gaps in workers' compensation insurance coverage exists.

The Department declines to adopt the commenter's specific suggestions with respect to workers' compensation and PEOs, but has included other revisions to address the commenter's concerns. Specifically, the Department has edited the WH-530 to require the applicant, if using workers' compensation in lieu of vehicle insurance, to disclose on the form the circumstances in which the applicant will transport workers. Additionally, the Department has edited the form to require that the applicant using workers' compensation instead of vehicle insurance attest that it has truthfully listed all circumstances of transportation and that these circumstances are covered under applicable State law. These fields replace and attempt to standardize the written statement requested by the WH-530 submitted as part of the 30-day notice (85 Fed. Reg. 17099 (March 26, 2020)).

In addition, the commenter suggests that form WH-530 include a statement of the applicant's intention to comply with the MSPA transportation provisions. The Department agrees with the suggestion and has added a statement of intent to comply, as well as corresponding language in the instructions.

Instructions Item 7

The commenter suggests that the word "so" is superfluous and should be deleted. The Department agrees with the suggestion and has edited the form accordingly.

Instructions Item 8

The commenter suggests that the instructions reference 29 CFR 500.20(h)(5) to more fully discuss the term "employ." The Department agrees with the suggestion and has edited the instructions to reference 29 CFR 500.20(h) in its entirety rather than only one component of the regulatory definition.

Instructions Item 11

The commenter suggests that the instructions in item 11 be modified to reflect that a Federal agency may complete a housing inspection. The commenter further writes that many State and local governments do not complete housing inspections, and that the WHD should be identified as the Federal agency to receive housing inspection requests.

The Department declines to adopt the proposed language. The instructions track the statutory and regulatory language by indicating that "another appropriate agency" may complete a housing inspection (in addition to State and local authorities). Many State and/or local governments have well-developed, established procedures for performing housing pre-occupancy inspections to ensure compliance with State and local laws as well as with the Federal standards. Indeed, many of the housing permits that the Department receives in connection with requests for housing authorization reflect inspections performed by State and/or local governments.