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Memorandum of Support

Establish the Farmworker Fair Labor Practices Act

S2837(Ramos)/A2750(Nolan)

Empire Justice Center strongly supports Senate Bill 02837, which will establish long overdue and fair and equitable labor practices for agricultural workers in New York State. For the last 85 years, this class of low wage workers has been unfairly excluded from the most basic labor law protections enjoyed by all other workers. As set forth in this bill, the Farmworker Fair Labor Practices Act finally extends to agricultural workers the same rights to collective bargaining; overtime compensation for work beyond the eight hour workday; unemployment insurance; worker's and disability compensation; and minimum wage coverage. This legislation also provides farmworkers with a modicum of dignity by providing them with one day of rest each week, and it requires any employer provided housing to be safe and sanitary for all agricultural workers residing there.

Empire Justice Center has represented hundreds of low-income workers in Upstate New York facing barriers to meaningful and productive employment caused by wage theft, dangerous working conditions, and employment discrimination. This proposed legislation will finally cure the underlying statutory gaps and weaknesses in New York Labor Law and Worker's Compensation Law, and will help attain the promise of fairness and equal treatment in the workplace for these long neglected New Yorkers.

The decision to exclude farmworkers from basic labor protections was established during the New Deal Era. When the National Labor Relations Act was passed in 1935, it provided basic protections for workers and employers to engage in collective bargaining. The law is based on a policy of equalizing bargaining power between employees and their employers, with intent of helping "employees with the least ability to negotiate terms and conditions of employment on an even footing with their employers."¹

¹ Michael H. LeRoy; Wallace Hendricks, Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?, 48 Emory Law Journal 489, 490-91 (1999)

Farmworkers were “shamefully exploited during this time,” but they were excluded from NLRA protections. This exclusion was not the product of a deliberate policy, but congressional focus on industrial employment.² In 1940, New York enacted the State Employment Relations Act, Labor Law (SERA), §700 *et. seq.* SERA was modeled after the NLRA,³ and as a result, state law also excluded farmworkers from these labor protections. Section 2 of the Farmworker Fair Labor Practices Act finally repairs this oversight by permitting farmworkers in New York the ability to engage in the same collective bargaining rights that virtually all others have enjoyed for the last 85 years. As stated by President Roosevelt when he signing the NLRA, it is “an act of both common justice and economic advance.”⁴

Another New Deal reform, the Fair Labor Standards Act (FLSA) of 1938, abolished child labor, guaranteed most workers a minimum wage for each hour worked, and provided overtime pay for those who worked more than 40 hours in a workweek. FLSA was a product of legislative compromise and in exchange for their support, southern congressman obtained concessions “that preserved the social and racial plantation system in the South,” by excluding sharecroppers and farmworkers from all FLSA protections.⁵

Gradually and over time, some forms of this discrimination have been purged. Under federal law, farmworkers finally became eligible for minimum wages in 1966, and they are now covered by state law minimum wage requirements. But since 1938, farmworkers have been statutorily ineligible for overtime wages- regardless of the total number of hours they actually worked. Similarly, federal law still permits children under 17 to be paid sub-minimum wages when employed harvesting crops.⁶

Section 8 of the Farmworker Fair Labor Practices Act finally rectifies one of these pernicious vestiges of discrimination by requiring employers to pay overtime wages to farmworkers *on the same basis as earned by all other employees in New York*- one and one half times the regular rate of pay for all hours worked over 40 in the workweek. Section 17 effectively prohibits paying sub-minimum wages to underage farmworkers. This provision will help safeguard minimum wage standards by requiring non-hourly rates and piece rates to be equivalent to the New York minimum hourly pay rate.

² *Id.*

³ Association of Plumbing and Heating Contractors of Greater New York v. Merten, 173 Misc. 448 (Mun. Ct. 1940), *judgment aff'd*, 261 A.D. 543 (1st Dep't 1941), *judgment aff'd*, 288 N.Y. 555(1942).

⁴ See: <https://www.presidency.ucsb.edu/documents/statement-signing-the-national-labor-relations-act>

⁵ Marc Linder, Farmworkers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Texas Law Review 1335, 1336 (1987)

⁶ 29 U.S.C. § 213(a)(6). New York Labor Law permits children as young as 12 to hand harvest fruits, berries, and vegetables up to 4 hours per day during non-school hours. See: <https://www.dol.gov/whd/state/agriemp2.htm#NewYork>

Equally important, this proposed statute closes discriminatory gaps in traditional safety net laws by permitting eligible farmworkers to receive unemployment insurance under the same terms as other unemployed workers. (Sections 8 & 9). This legislation will require all agricultural employers to provide worker's compensation and includes important protections against retaliation. The proposed law establishes the same eligibility conditions for farmworkers that all other injured workers must meet to receive benefits. (Sections 11-14).

New York State disability benefits insurance provides temporary cash benefits paid to an eligible wage earner to replace, in part, wages lost when he/she is disabled by an off-the-job illness or injury, and for disabilities arising from pregnancy. Under existing law, providing disability insurance to their agricultural employees is "optional" for employers. This proposed legislation would make agricultural workers equal to other New York State employees by requiring their employers to provide them with disability insurance. (Section 14).

Most significantly, this entire legislation will help promote and preserve the employment of critical domestic agricultural labor and lessen the agricultural industry's dependence on foreign labor. The H2A temporary agricultural worker program is a foreign labor certification program which permits agricultural employers to hire workers from other countries with temporary work permits to fill seasonal agricultural jobs.⁷ There is no cap on the number of visas, and the program has tripled in size in the last 10 years to 240,000 foreign worker positions in 2018.⁸ In New York, the number of H2A foreign workers has increased to almost 7,000 farmworkers, many employed in apple production.⁹ The agricultural industry maintains that these foreign guestworkers are necessary because, as noted by the Pennsylvania Farm Bureau,

To most U.S. residents seeking employment, working in agriculture is not attractive. Jobs in agriculture are physically demanding, conducted in all seasons and are often transitory.¹⁰

In New York State, the estimated value of dairy products and milk is \$2.5 billion per year, and dairy and milk production account for almost nearly 26,000 jobs in New York State.¹¹

⁷ H2A workers have extremely limited employment rights in the United States. They are restricted to working solely for their sponsoring agricultural employer; solely in a pre-specified geographic region; restricted to performing only agricultural labor; and must return to their country of origin upon expiration of their temporary visa.

⁸ Farmworker Justice Fund: https://www.farmworkerjustice.org/sites/default/files/resources/2019%20H-2A%20Factsheet_0.pdf material

⁹ Center for Immigration Studies: Unlimited Cheap Farm Labor : Evaluating H2A Disclosure Data <https://cis.org/Report/Unlimited-Cheap-Farm-Labor-Evaluating-H2A-Disclosure-Data>

¹⁰ Pennsylvania Farm Bureau: <https://www.pfb.com/policy-pfb/issues/1691-agricultural-labor-reform>

Under current law, H-2A workers are excluded from the dairy industry because the work is not considered “seasonal.” The New York Farm Bureau is now actively seeking to remove this barrier in order bring foreign workers to work year round on New York dairy farms.¹² Ironically in the face of this perceived labor shortage, the New York Farm Bureau opposes enactment of the employment provisions of the Farmworker Fair Labor Practices Act.¹³

We respectfully submit that the passage of the Farmworker Fair Practices Act will finally provide the same labor protections and rights to New York farmworkers- including dairy workers- that have been shared by all other wage earning New Yorkers for the last 85 years. Providing agricultural employees with the same rights as enjoyed by other workers may well make agricultural labor “more attractive” to job seeking residents of New York State, particularly those living in rural areas with few jobs and high unemployment rates. By providing a weekly day of rest, overtime wages, worker’s compensation, unemployment compensation, disability insurance, and collective bargaining rights, employers and consumers may well find a reduced need for reliance on imported labor in the fields, packing sheds, and milking barns.

Regardless, the farmworkers of New York deserve to be treated fairly, equally, and respectfully in the workplace. For these reasons, we strongly support the enactment of the Farmworker Fair Labor Practices Act.

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¹¹ New York Farm Bureau: <https://www.nyfb.org/about/about-ny-ag>

¹² New York Farm Bureau: <https://www.nyfb.org/application/files/4715/5595/6197/2019/National.pdf>

¹³ New York Farm Bureau <https://www.nyfb.org/application/files/3115/4843/5579/priorities.pdf>