

U.S. Department of Labor Report to Congress: Employment of “Piñeros” in Reforestation

May 2008

The House Report for Labor, Health and Human Services, Education, and Related Agencies Appropriations (House Report 110-231) for fiscal year 2008 directs the U.S. Department of Labor (DOL) to *“provide a report to the House and Senate Committees on Appropriations no later than March 1, 2008 on its enforcement activities regarding those contractors that employ piñeros and have violated Federal employment and/or safety standards.”*

In response, this report:

- Describes, in general terms, worker protections enforced by DOL’s Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) applicable to reforestation and the employment of *piñeros*;
- Describes cooperative efforts among the WHD, OSHA, and the U.S. Forest Service (USFS) to improve levels of compliance with labor laws on USFS reforestation contracts; and
- Describes WHD and OSHA enforcement experience in reforestation since the March 1, 2006, hearing before the U.S. Senate Committee on Energy and Natural Resources, Subcommittee on Public Lands and Forests (the Subcommittee).

The name *piñeros* translates literally to “men of the pines,” and refers generally to the immigrant workers employed in reforestation work, including reforestation work performed in national forests. In testimony before the Subcommittee on March 1, 2006, the Assistant Secretary for Employment Standards, Victoria A. Lipnic, provided summary descriptions of both the nature of reforestation work and the nature of the foreign workforce employed by many reforestation contractors to perform reforestation work. Although the hearing inquired about the enforcement work of the Employment Standards Administration’s WHD, there was also a focus on issues within the jurisdiction of DOL’s Employment and Training Administration Office of Foreign Labor Certification (OFLC), specifically the employer application certification process. In addition, testimony was provided by representatives of the Department of Agriculture’s USFS as they are the primary Federal agency contracting for reforestation work in the national forests.

Overview of Department of Labor Laws and Programs Applicable to Reforestation Workers

Wage And Hour Division Enforcement Responsibilities:

WHD administers and enforces the following laws that may pertain to reforestation workers:

Fair Labor Standards Act (FLSA)

The FLSA (29 U.S.C. §§ 201 et seq.) requires covered reforestation contractors to:

- Pay nonexempt workers no less than the Federal minimum wage (\$5.85 per hour, rising to \$6.55 on July 24, 2008, and to \$7.25 on July 24, 2009);
- Pay nonexempt workers time and one-half a worker's regular rate of pay for all hours actually worked over 40 in a seven-day work week;
- Limit the occupations and hours of employment for employees under 18 years of age in accordance with Federal youth employment regulations; and
- Maintain for each worker an accurate record of hours worked and wages paid.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

The MSPA (29 U.S.C. §§ 1801 et seq.) requires that covered contractors:

- Pay workers their wages when due and give workers itemized written statements of earnings for each pay period, including any amount deducted and the reason for the deduction;
- Comply with Federal and State safety and health housing standards, such as OSHA's Temporary Labor Camps standard, if the contractor owns or controls a facility or real property used for housing the reforestation workers. A written statement of the terms and conditions of occupancy must be posted at the housing site in a location where it can be seen or must otherwise be given to the workers;
- Ensure that vehicles used or caused to be used to transport the reforestation workers are properly insured, properly operated, driven by properly licensed drivers, and meet the applicable Federal and State safety standards;
- Inform the workers in writing about the terms and conditions of employment, including the work to be performed, wages to be paid, period of employment, and whether State workers' compensation or State unemployment insurance will be provided;
- Obtain a certificate of registration from DOL to operate as a farm labor contractor. In addition, specific authorization must be obtained for all housing

provided (if owned or controlled by the farm labor contractor), each vehicle used to transport the reforestation workers, and each driver of each vehicle used to transport the reforestation workers. The contractors must carry proof of this registration and show it to workers and any other person with whom they deal as contractors;

- Display a poster that sets forth the rights and protections of the workers in a location where it can be seen at the job site; and
- Keep complete and accurate payroll records for all workers.

The McNamara O'Hara Service Contract Act (SCA) and the Contract Work Hours and Safety Standards Act (CWHSSA)

The SCA (41 U.S.C. §§ 351-358) applies to Federal contracts for services (including reforestation) in excess of \$2,500, including contracts entered into by USFS. CWHSSA (40 U.S.C. §§ 327-333) applies to Federal service contracts in excess of \$100,000. SCA requires reforestation contractors to:

- Pay the reforestation workers the wages and fringe benefits determined by DOL to be prevailing in the locality for the class of service worker being employed; and
- Notify the reforestation workers of the SCA prevailing wage and fringe benefit requirements applicable to their work.

The reforestation contractors may not require the workers to pay for the employers' business expenses, such as tools, equipment, or fuel, to the extent that such payments will reduce the employees' wages below the applicable SCA prevailing wage.

The CWHSSA requires an overtime payment of time and one-half the basic wage rate to workers on contracts subject to its provisions.

Occupational Safety and Health Act (OSH Act) – Field Sanitation Standard

OSHA administers the OSH Act (29 U.S.C. §§ 651 *et seq.*). Safety and health conditions in most private industries are regulated by OSHA or the States through an OSHA-approved State plan. By order of the Secretary of Labor, the authority for enforcing OSHA's Field Sanitation standard was re-delegated to WHD in all States in which Federal OSHA generally has authority, and in certain State-plan States.

With respect to reforestation, it is the policy of both OSHA and WHD that the field sanitation requirements apply to hand-labor operations in this industry without regard to whether the work is performed on private or public land. Therefore, covered reforestation contractors are required to provide:

- Sanitary and adequately-supplied toilets in proper ratio for crew size, and located within 1/4-mile walk of each employee's place of work in the field;

- An adequate and readily accessible supply of cool, potable drinking water; and
- Adequate and sanitary hand-washing facilities located in close proximity to toilet facilities.

Further, employers must notify each employee of the location of sanitation facilities and the importance of their use to minimize the hazards of heat-related illness and communicable disease. In addition, employers must provide sanitation facilities at no cost to employees and allow each employee reasonable use of the facilities during the workday.

Occupational Safety and Health Administration Enforcement Responsibilities (OSH Act):

As previously noted, the OSH Act is administered by the Occupational Safety and Health Administration (OSHA). OSHA has standards that apply broadly across all industries, but has also promulgated standards that are applicable to specific industries and activities, such as logging operations, which are applicable to certain reforestation operations.

Several OSHA standards apply to reforestation work. For example, OSHA standards require that:

- Employers assess the workplace and determine what hazards are present, and what personal protective equipment is required to protect against those hazards (*e.g.*, protective eyewear, protective footwear, head protection, cut-resistant leg protection when using chainsaws), and ensure the use of such equipment;
- Employers train employees in safe work practices when performing logging operations, such as felling trees (*e.g.*, use undercuts and back cuts, determine a clear retreat path), and ensure that such procedures are followed;
- Machines and vehicles are maintained in serviceable condition, inspected at the start of each work shift, and equipped with seat belts;
- First aid kits are present at each worksite where trees are cut, at each active landing, and on each employee transport vehicle, and each employee performing logging operations has received first aid/CPR training;
- Flammable liquids are handled and stored properly; and
- Employees are trained with regard to the hazards of the chemicals with which they work, and that Material Safety Data Sheets (MSDS) for those chemicals are available.

Whistleblower Statutes

In addition to administering workplace safety and health standards, OSHA is also responsible for the administration of a number of whistleblower statutes, including Section 11(c) of the OSH Act. Section 11(c) prohibits reprisals, in any form, against

employees who exercise their rights under the OSH Act. The administration of Section 11(c) is thus integral to OSHA's core mission. In addition, OSHA administers the whistleblower protection provisions of 15 other statutes, ranging from commercial motor vehicle safety and security (under the Surface Transportation Assistance Act of 1982) to corporate fraud (under the Sarbanes-Oxley Act of 2002).

Other Enforcement Issues:

Immigration and Nationality Act (INA) – Relevant Visa Category H-2B:

Department of Homeland Security (DHS) regulations implementing the Immigration and Nationality Act (8 U.S.C. §§ 101 *et seq.*) require employers filing petitions for H-2B non-immigrant workers with the U.S. Citizenship and Immigration Services (USCIS) to include a labor certification from the Secretary of Labor that qualified U.S. workers could not be found to fill the job. In the case of reforestation activities, employers must file an application for labor certification with the State Workforce Agency (SWA) serving the geographic area.

In each case, the SWA follows guidance from DOL to determine the prevailing wage rate for the occupation listed, to supervise and to guide the employer's recruitment of U.S. workers, and to ensure completion of other requirements of the H-2B program. The SWA forwards completed applications to DOL's Employment and Training Administration (ETA), which reviews the record in its entirety, including documentation from the State and the employer, to determine whether and when to issue a certification. The employer then uses ETA's certification in support of its petition with USCIS for guest workers.

Information on approved applications for H-2B job certification is available on ETA's website at <http://www.flcdatabcenter.com/CaseH2B.aspx>.

The INA does not provide DOL the authority to enforce the wage rate identified on the employer's attestation for the H-2B workers. DOL may only enforce the payment of a specified wage rate if it is required by application of one of the other laws for which DOL has enforcement authority, *e.g.*, FLSA, SCA, or MSPA. The INA was amended by the Save Our Small and Seasonal Businesses Act of 2005, which, among other things, provided the Secretary of the DHS with authority to impose certain sanctions when sponsoring employers have committed a substantial failure to meet any of the conditions of the H-2B petition or made a willful misrepresentation of a material fact in the petition. 8 U.S.C. § 1184(c)(14)(A).

Cooperative Efforts among Agencies

As outlined in the ESA Assistant Secretary's March 2006 testimony before the Subcommittee, a number of measures have been put into place, both before and subsequent to the hearing, to improve the flow of information between WHD, OSHA,

and USFS in an effort to improve working conditions on reforestation contracts on public lands. As was explained at the hearing, WHD enforces the law through two means—directed enforcement activity and complaint-based investigations. A substantial amount of analysis goes into planning WHD’s directed enforcement work. The preparation of the annual operational plan begins during the year before the start of the operational fiscal year, and the resource commitment is determined as far in advance as possible. Given the remote nature of the work in reforestation, the sooner WHD is aware of contracts that will be let by USFS, the better it can target its reforestation enforcement activities.

- WHD, OSHA, and USFS have designated regional points of contact for the three organizations to facilitate communication and for the USFS to use in a rapid response referral system in case of potential violations.
- USFS has included stronger contract provisions that provide for a minimum level of contractor safety awareness and that enhance the agency’s ability to shut down a project or fire a contractor.
- WHD and OSHA created a one-page “Red Flag” checklist for USFS personnel to use as a guide to identify potential violations of fundamental wage, safety, and health requirements that USFS can address under its contract authority or by making a referral to WHD and/or OSHA, as appropriate.
- USFS provided the means for OSHA and WHD to access USFS contract information in order to facilitate strategic planning for investigations.
- USFS has agreed to check the MSPA registration status and investigation history of any contractor who wins a reforestation contract by contacting the WHD Regional Office with jurisdiction over the place of performance of the contract. WHD created a form to facilitate responses to these requests.
- In FY 2007, the WHD received and responded to 66 requests from USFS for information on the registration status and investigation history of contractors being awarded contracts. Currently there is one SCA investigation pending that was referred to WHD from USFS.
- WHD developed Fact Sheet #63, which summarizes the basic provisions of the Federal laws administered and enforced by the WHD that apply to reforestation workers. This Fact Sheet is available in English and Spanish on WHD’s website at <http://www.dol.gov/esa/regs/compliance/whd/whdfs63.htm>.
- WHD prepared English and Spanish *Reforestation Workers’ Rights* cards that explain the fundamental provisions of the applicable laws to reforestation workers. These wallet-sized cards can be accessed from WHD’s website and/or ordered by other agencies or outside organizations using the Quick Finder for Employees’ Rights Cards on the WHD homepage at www.wagehour.dol.gov.

Also, ten education and outreach events were held during FY 2007, many of them put on cooperatively by the WHD, OSHA, and USFS. At four of these events, WHD provided training on investigations to USFS staff. WHD created a training package for use in training USFS personnel, reforestation contractors, and others. Dialogues were also held with organizations such as the Forest Resource Association and the Alliance of Forest Workers and Harvesters to allow them to share their concerns regarding enforcement and the conditions affecting reforestation workers.

Enforcement Experience

WHD Enforcement:

Since the March 2006 hearing, WHD has completed 44 investigations involving 40 reforestation contractors, and there are four investigations underway as of February 2008. Collectively, the 40 contractors investigated employed over 3,240 workers. The discussion below details the findings to date.

For the upcoming fiscal year, WHD plans to continue to conduct targeted investigations in this industry, particularly in the regions and districts where violations are most likely to occur. WHD will also continue to fully utilize information from the USFS contractor database to identify contractors for investigation. WHD has designated enforcement officials in each of its regions to ensure effective enforcement and continued cooperation with other agencies. WHD will also continue to provide FLC registration and investigation history to USFS when requested. The agencies will continue share information at all levels, but particularly at the levels where exchanging information provides the most meaning in assuring that workers are protected.

MSPA Investigations

Thirty-two of the completed reforestation contractor investigations disclosed violations of the MSPA. The most frequently encountered violation was failure to disclose the terms and conditions of employment, followed by failure to provide a proper wage statement, failure to make and keep records, and failure to pay the wages owed when due. Housing safety and health violations were found in 10 investigations, and transportation safety violations were uncovered in eight cases. As a consequence of the violations, over \$85,400 in civil money penalties were assessed. In addition, WHD initiated action to revoke the farm labor contractor certificate of registration of one reforestation contractor for violating requirements of the MSPA. The matter is currently pending before an Administrative Law Judge (ALJ).

FLSA Investigations

Sixteen of the employers investigated were found to have violated requirements of the FLSA. Two were found to have violated the Act's minimum wage requirements, 12

violated the overtime requirements, and 10 violated the Act's record-keeping requirements. A total of over \$173,250 in back-wages was found due to 475 workers.

SCA Investigations

Fifteen of the investigated employers were performing work on public land under contracts with the Federal government. Of the 15 employers investigated, ten were found to have violated requirements of the SCA. Six employers were in violation of the SCA prevailing wage requirements and seven were in violation of the fringe benefit requirements. In addition, four were found to have violated the overtime requirements of CWHSSA. A total of over \$222,810 was found due to 151 workers as a consequence of these violations.

Litigation

In December 2006, DOL's Regional Office of the Solicitor in Seattle resolved outstanding issues stemming from a 2004 investigation of Gonzalez Forestry of Centralia, Washington, by obtaining a default judgment against the firm. The 2004 investigation disclosed SCA, CWHSSA, and MSPA violations on pre-commercial thinning contracts that the firm had with the USFS in the Tongass National Forest in Alaska. The firm paid \$15,336 in CWHSSA overtime back wages and an additional \$7,756 in SCA minimum wages. The judgment orders a three-year debarment under the SCA for both Arturo Gonzalez and his wife, Angelia.

Also, on March 23, 2007, an ALJ issued a favorable decision and order in an SCA debarment matter stemming from a 2004 investigation of reforestation contractor Progressive Environmental, LLC, and two of its principals, Bruce Campbell and Randy Humbert. The ALJ ruled that as a consequence of the violations of the required wage and fringe benefit requirements and the failure to keep adequate records, the firm, Mr. Campbell, and Mr. Humbert should be barred from receiving Federal contracts for a period of three years.

OSHA Enforcement:

OSH Safety and Health Investigations:

Since the March 2006 hearing, both Federal OSHA and the State plan agencies have conducted 168 inspections (including 60 Federal inspections and 108 State plan inspections) in the forestry services industry (Standard Industrial Classification (SIC) 0851). It is not possible to determine precisely how many of these inspections were of reforestation contractors, as that is only one of several activities that fall within SIC 0851. However, with the exception of forest firefighting, the rest of the activities within that industry sector are relatively low-hazard; therefore, a majority of these 168 inspections likely can be attributed to reforestation activities. Of these 168 inspections, 102 were programmed inspections, that is, inspections that were initiated by a strategic program

rather than in response to a fatality, accident, complaint, or referral, while the remaining 66 inspections were conducted pursuant to such responses.

These inspections resulted in the issuance of 518 violations of OSHA standards. These violations identified serious hazards related to personal protective equipment, tree felling procedures, chemical hazard communication, fire extinguishers, powered industrial trucks, machine guarding, and electrical hazards, just to name a few.

- OSHA's Boise Area Office developed a Local Emphasis Program focusing on silviculture contractors. This program used information obtained from ETA's OFLC to develop contractor lists.
- In March 2008, OSHA's Directorate of Enforcement Programs is providing instructions for OSHA's regional and area offices to search USFS's online contracting database to obtain current and future contract information, which can assist in creating inspection lists for programmed inspections.

Litigation

There have been no ALJ or Occupational Safety and Health Review Commission decisions related to reforestation contractors since March 1, 2006. However, there are currently 12 pending cases for OSHA violations.