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# Adverse Effect Wage Rate (AEWR) Methodology for Temporary Employment of H-2A Nonimmigrants in the United States

## Introduction

The H-2A visa program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature. (See CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues* for a discussion of the H-2A visa program.)

Before filing a visa petition with the Department of Homeland Security (DHS), a prospective H-2A employer must apply to the Department of Labor (DOL) for labor certification. Per 8 U.S.C. §1188(a)(1), before approving a labor certification application, DOL must determine that

- 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 agricultural labor or services for which an employer desires to hire temporary foreign workers (H-2A workers); and
- the employment of the H-2A workers will not *adversely affect* the wages and working conditions of workers similarly employed in the United States (e.g., by lowering wages).

The Immigration and Nationality Act, which authorizes the H-2A program, does not specify a method by which the Secretary of Labor is to make these determinations. To ensure there are not sufficient U.S. workers who are qualified and available to perform the work, DOL requires employers to advertise and engage in positive recruitment of U.S. workers for the H-2A job opportunity, and to offer U.S. workers terms and working conditions that are not less favorable than those offered to H-2A workers. To guard against adverse effects on similarly employed U.S. workers, DOL requires employers to offer wages at or above the highest of five wages levels: (1) the adverse effect wage rate (AEWR), (2) the applicable prevailing wage rate, (3) an agreed-upon collective bargaining wage rate, (4) the federal minimum wage rate, or (5) the applicable state minimum wage rate. DOL regulations govern the offered wage rate and provide the methodologies for determining AEWRs and prevailing wage rates.

For many H-2A workers, the applicable AEWR is a state-level, *hourly rate* that is based on labor force survey data. However, a *monthly AEWR* is used for certain occupations—referred to as *range occupations*—that involve the herding or production of livestock on the range and under certain working conditions. For the purpose of H-2A labor certification, agricultural occupations that do not

meet these requirements are referred to as *non-range occupations*.

## DOL AEWR Methodology: Range Occupations

As noted, DOL calculates a *monthly AEWR* for range occupations. For H-2A program purposes, range occupations involve the herding or production of livestock, which is performed on the range for more than 50% of the workdays in the work contract period, and generally require the workers to be on-call 24 hours per day, 7 days per week. DOL provides for a monthly AEWR given the unique nature of such occupations, which makes the recording of work hours difficult.

The monthly rate for herding and range livestock occupations was initially calculated in 2016 as \$7.25 per hour (i.e., the federal minimum wage) multiplied by 48 hours per week, and then multiplied by 4.333 weeks per month. Since 2017, the monthly AEWR for range occupations is adjusted annually based on growth in the Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) for private sector wages and salaries over the preceding September-to-September (12-month) period. For example, the 2022 AEWR for range occupations was \$1,807.23. Between September 2021 and September 2022 the ECI increased by 5.2%. The monthly AEWR for range occupations was adjusted to  $\$1,807.23 \times (100\% + 5.2\%) = \$1,901.21$ , effective January 1, 2023.

## DOL AEWR Methodology: Non-range Occupations

AEWRs for non-range occupations are calculated using wage data collected through the Department of Agriculture's Farm Labor Survey (FLS) and the BLS Occupational Employment and Wage Statistics (OEWS) survey.

### Field and Livestock Workers (Combined)

DOL calculates a single AEWR per state for workers who perform tasks covered by occupations included in the FLS *field and livestock workers (combined)* category. The AEWR for such workers is the annual average hourly gross wage in the state or region.

The field and livestock workers (combined) category contains jobs with the following Standard Occupational Classification (SOC) codes and titles:

- 45-2041 Graders and Sorters, Agricultural Products;
- 45-2091 Agricultural Equipment Operators;

- 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse;
- 45-2093 Farmworkers, Farm, Ranch, and Aquacultural Animals;
- 53-7064 Packers and Packagers, Hand; and
- 45-2099 Agricultural Workers, All Other.

Descriptions of the SOC definitions, skill requirements, and tasks typically performed by workers in these occupations are available from the Occupational Information Network (O\*NET) website at <https://www.onetonline.org/>.

The FLS excludes Alaska, the District of Columbia (DC), and all of the U.S. territories. The AEWR for field and livestock workers (combined) in Alaska, DC, Guam, Puerto Rico, and the U.S. Virgin Islands is the statewide or territory-wide annual average hourly gross wage in the state or territory (for occupations with these SOC codes) as reported by the OEWS survey; or, if such a wage rate is not reported by the OEWS survey, the AEWR is the national annual average hourly gross wage as reported by the OEWS survey. Neither the FLS nor the OEWS survey collect data from—and consequently AEWRs are not calculated for—other U.S. territories (i.e., American Samoa and the Commonwealth of the Northern Mariana Islands).

In April 2023, the AEWR for non-range occupations in the field and livestock workers (combined) category ranged from \$9.17 per hour (Puerto Rico) to \$20.33 (DC). Among states included in the FLS, the rates ranged from \$13.67 (Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina) to \$18.65 (California).

### Other Non-range Occupations

For all non-range occupations other than those included in the field and livestock workers (combined) category, the hourly AEWR is the statewide annual average hourly wage for the specific SOC code, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the AEWR is the national annual average hourly wage reported by the OEWS survey.

Farm supervisors or managers, heavy truck drivers, farm construction workers, and logging workers are examples of agricultural occupations that are not included in the field and livestock workers (combined) category; AEWRs for such workers are based on OEWS survey data. For example, as of April 2023 the AEWR for First-Line Supervisors of Farming, Fishing, and Forestry Workers (SOC 45-1011) ranged from \$21.64 (Puerto Rico) to \$47.15 (Tennessee); and the AEWR for Heavy and Tractor-Trailer Truck Drivers (SOC 53-3032) ranged from \$10.96 (Puerto Rico) to \$30.56 (Nebraska).

### SOC Classification of H-2A Job Opportunities

As part of labor certification, employers identify the tasks, duties, and requirements associated with work to be performed by H-2A workers. DOL compares these with such information listed in O\*NET and considers other relevant factual information included in the employer's application (e.g., special skill or license requirements) to determine the SOC code or codes for the H-2A job.

Some H-2A jobs may require a combination of tasks that cannot be classified within a single SOC code. In such cases, an H-2A job opportunity may be assigned two or more distinct SOC codes. If all assigned codes are included among the six SOC codes included in the field and livestock workers (combined) category, then the AEWR is the single AEWR calculated for field and livestock workers (combined) in the state. If a job is assigned codes with *different* AEWRs, then the highest wage rate applies. For example, if an H-2A job opportunity in California is classified as both a first-line supervisor of farming workers (SOC 45-1011), with an OEWS-based AEWR of \$25.29, and an agricultural equipment operator (SOC 45-2091), with an FLS-based AEWR of \$18.65, the prevailing AEWR is \$25.29 (i.e., the highest applicable rate).

### Publication Schedule

As of March 30, 2023, DOL plans to publish separate notices of AEWR adjustments in the *Federal Register* for rate adjustments based on FLS data and rate adjustments based on OEWS data. DOL intends to publish FLS-based AEWRs on or about January 1 and OEWS-based AEWRs on or about July 1. If the adjusted AEWR remains the highest of the five wage rates considered by DOL (i.e., AEWR, applicable prevailing wage rate, an agreed-upon collective bargaining wage rate, the federal minimum wage rate, or the applicable state minimum wage rate) and the adjusted AEWR is higher than the previous AEWR, then the employer must pay at least the updated AEWR upon the effective date of the rate as published by DOL in the *Federal Register*. If the updated AEWR is lower than the wage rate guaranteed on the H-2A job order, the employer must continue to pay at least the guaranteed rate.

### Recent Regulatory History

On February 28, 2023, DOL published a final rule that revised the methodology by which it determines the hourly AEWRs for non-range agricultural occupations; the rule took effect on March 30, 2023. Prior to March 30, 2023, DOL determined the AEWRs for non-range agricultural occupations using methods established by a 2010 rule. This methodology used only FLS data for the field and livestock workers (combined) category to calculate a single state-level AEWR in each year for states included in the FLS.

The DOL 2023 rule responded to two primary concerns about the effectiveness of the previous methodology to prevent adverse effects on the wages of agricultural workers in the United States. DOL observed that the methodology did not take into account the wages paid to workers in jobs outside the field and livestock workers (combined) categories. For example, wages paid to relatively high-paid agricultural workers such as farm supervisors are excluded from the calculation. In addition, the methodology did not produce AEWRs for every state or territory where employers may seek to employ H-2A workers (e.g., Alaska, Puerto Rico). DOL engaged in rulemaking to establish a revised AEWR methodology to address these concerns.

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