



Agricultural Legislative & Public Policy ADVISORY ■

DECEMBER 1, 2021

Opportunity for Comment: H-2A Wage Methodology Notice of Proposed Rulemaking

by [Kristi Boswell](#) and [Courtney Walter](#)

This week the U.S. Department of Labor (DOL) [published](#) a Notice of Proposed Rulemaking (NPRM) on the “Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States.” Comments are due on or before January 31, 2022.

The H-2A visa program is the mechanism used by agricultural employers to hire seasonal foreign workers when domestic labor is unavailable. A key element of the program is the adverse effect wage rate (AEWR). The AEWR is the primary tool used by the DOL to ensure that there is no adverse effect on the wages and working conditions of the U.S. workforce by the admission of temporary foreign workers as is required by statute.

For years, agricultural employers have raised the high cost of using the program, including the wage rate, as the top concern for participants in the program. Additionally, the use of the U.S. Department of Agriculture’s Farm Labor Survey (FLS) in setting the AEWR has resulted in large fluctuations in the wage rate that have made it difficult for farm employers to budget labor costs each year. These issues have been the subject of previous rulemakings in the past three Administrations and of numerous pieces of legislation. These efforts are as recent as H.R. 1603, the Farm Workforce Modernization Act of 2021, that passed the House of Representatives in March 2021, along with regulatory efforts in 2019 resulting in the 2020 AEWR Final Rule published in November 2020. This NPRM is in direct response to ongoing litigation that enjoined the 2020 AEWR Final Rule.

While this NPRM is largely based on the methodology finalized in the previous Administration’s NPRM, it has two key differences: (1) the NPRM does not stabilize wages by freezing the AEWR for two years; and (2) the NPRM reverts to the use of the USDA FLS every year rather than use the Economic Cost Index for future adjustments. As drafted, the proposal does not provide immediate wage relief, nor year-to-year stability—both key issues for employers as noted by numerous commenters in the 2019 rulemaking process.

This alert is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

The proposed rule continues to apply the current methodology, “gross average hourly wage rate for field and livestock workers (combined)” as reported by the FLS for the following categories:

- 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
- 45-2099—Agricultural Workers, All Other

The DOL explains that most H-2A job classifications fall under these categories and, as a result, many employers will continue to operate under the existing methodology. However, given the feedback that the DOL and USDA have received for years, it is evident that employers were hoping to see change resulting in wage relief and stability.

The DOL does propose changes to the methodology for H-2A job classifications outside those six categories. For all other occupations, notably truck drivers, farm supervisors and managers, construction workers, and many occupations primarily in contract employment, wages would be set using the Occupational Employment and Wage Statistics (OEWS) survey. In support of this proposal, the DOL provides an example of an Ohio construction worker brought in under the terms of the H-2A program who would have their wage rate increased from \$15.31/hour to \$22.73/hour under this proposal, and similarly a first-line supervisor in Ohio would increase to \$27.83/hour.

Another notable proposed change requires that when a H-2A job opportunity can be classified into more than one occupation, the highest wage rate applies. As farm jobs often include broad descriptions and duties, if finalized, this would require employers to specifically tailor duties or increase record-keeping obligations to ensure compliance with the regulations. Additionally, this requires a review of which rate of pay would apply by either the state workforce agency or DOL during the application process, leaving additional uncertainty for employers.

The department is seeking comment on all aspects of the proposed AEW methodological. Specifically, the DOL highlights the following areas for comments:

- All proposals to mirror provisions found in the 2020 rule.
- The use of the FLS and OEWS survey and the conditions under which each survey should be used to establish the AEW.
- The continued use of a single, statewide hourly AEW for field and livestock worker occupations (combined), rather than occupation-specific statewide AEWs for each occupation comprising the field and livestock workers (combined) category covered by the FLS.

- The use of the OEWS survey to establish the AEW for field and livestock worker occupations (combined) in the absence of the FLS or where the FLS does not report a wage finding for these occupations in a particular geographic area, as well as the use of the OEWS to establish AEWs for all job opportunities that do not fall within the FLS field and livestock workers (combined) category.

Notably, the DOL hopes to focus comments on the methodology used to determine the AEW rather than comments about the existence or role of the wage rate as the proper method in preventing adverse effect. This is concerning for employers, who have articulated in the past that the DOL should, first, demonstrate that the admission of temporary foreign workers adversely impacts the wages and working conditions of U.S. workers before requiring the payment of a heightened wage rate. Considering the shrinking percentage of domestic workers in the workforce and the exponential increase in wage rates due to labor shortages and labor instability, we recommend employers can and should continue to seek this analysis and determination from the agency.

In addition, the USDA recently published 2021 [FLS](#) results that are used to set the 2022 AEW. On page 25 of the survey, annual average gross wage rates by region and type of worker are listed. Every region sees an increase for 2022 and new farmworker wages will range from \$12.45/hour to \$17.51/hour. The U.S. average AEW rose from \$14.62/hour to \$15.56/hour. With the impacts of COVID-19 tightening supply chains, the news of the wage increase could potentially be devastating to employers going into the next season. Before the new AEW takes effect, the DOL must publish the rates in the *Federal Register*. We expect that to occur in the coming weeks.

Recognizing the transition in Administration and history surrounding the AEW discussion, this proposal is not unexpected. But for employers, that have been raising costs concerns for years, this proposal does not seem to provide the wage relief and stability they were hoping for in a wage rulemaking. It is critical that the DOL hear from valuable stakeholders and agricultural employers as they consider finalizing this proposal.

Our team at Alston & Bird is available to strategize and draft comments to ensure your feedback is considered during the rulemaking process.

Authors Kristi Boswell and Courtney Walter have been at the forefront of H-2A reform efforts while serving in critical roles at the White House, USDA, and DOL during the previous administration's H-2A rulemaking.

You can subscribe to future *Agricultural Legislative & Public Policy* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our [Agricultural Legislative & Public Policy Team](#).

Kristi Boswell
202.239.3236
kristi.boswell@alston.com

Theodore B. Schroeder
202.239.3447
ted.schroeder@alston.com

Evan Collier
202.239.3133
evan.collier@alston.com

Eileen Scofield
404.881.7375
eileen.scofield@alston.com

Kerri-Ann Griggs
404.881.7186
kerri.griggs@alston.com

Courtney E. Walter
202.239.3165
courtney.walter@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2021

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
 BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
 CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 FORT WORTH: 3700 Hulen Street ■ Building 3 ■ Suite 150 ■ Fort Worth, Texas, USA, 76107 ■ 214.922.3400 ■ Fax: 214.922.3899
 LONDON: 5th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333