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Agricultural Labor Challenges & The H-2A Process

USA Rice Outlook Conference – December 2023

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Current Labor Situation in Production Ag

- 1.2 million on-farm FTE
 - 70% foreign born
 - 50 percent working in undocumented status
- 2021 Farm Journal Labor Survey found most farm employers (87%) are finding it harder to fill positions.
- Exponential growth in H-2A
 - DOL certified 371,619 positions in 2022 up from 317,600 in FY21
 - ~77,000 certified positions in 2011
 - 298,336 visas issued in 2022 (~55,000 admissions in 2011)

Policy History

- Immigration and Reform Control Act (IRCA) passed in 1986
- Immigration reform efforts in the 90s, 2006, 2013, and steady debate throughout
- Farm labor stand alone bills in both House and Senate for over 20 years
 - AgJobs, BARN Act, HARVEST Act, Ag Guestworker Act (Goodlatte Bill), Farm Workforce Modernization Act, Affordable and Secure Food Act
- H-2A regulatory reforms under Bush, Obama, Trump, and Biden Administrations

Current H-2A Program Terms



- Agricultural Visa program
- Seasonal or temporary – No year round
- 3 Federal & 1 state administering agencies
- Recruit US Workers
- Housing Provided
- Paid Transportation
- Pay highest of Adverse Effect Wage Rate, Prevailing, Federal/State Minimum Wage, CBA
- $\frac{3}{4}$ Guarantee

Biden Administration Regulatory Efforts

- *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* took effect on November 14, 2022
- *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants* took effect March 30, 2023
- *DOL Proposal: Improving Protections for Workers in Temporary Agricultural Employment in the United States* comment period closed November 14, 2023
- *DHS Proposal: Modernizing H-2 Program Requirements, Oversight, and Worker Protections* comment period closed November 20, 2023

AEWR: Before

- All workers – regardless of job duties – were required to be paid the highest of the adverse effect wage rate (AEWR), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage AEWR.
- USDA National Ag Statistics Service Farm Labor Survey
 - Combined weighted average of crop & livestock wage
 - Surveys farmers regionally
 - Asks for gross wages for 4 reference weeks (January, April, July, and October)
 - Partially funded by DOL/USDA
 - Published Annually in November, DOL publishes state AEWRs in January.

AEWR: Now

- The FLS methodology applies to the following SOC codes:
 - Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092);
 - Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093);
 - Agricultural Equipment Operators (45-2091);
 - Packers and Packagers, Hand (53-7064);
 - Graders and Sorters, Agricultural Products (45-2041); and
 - All Other Agricultural Workers (45-2099).

- For all other occupations, each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey
 - Most Common: Construction Labor, Logging Workers, Heavy Truck And Tractor-trailer Drivers, First-line Supervisors, Cooks, Drivers, & Mechanics.

- <https://www.bls.gov/oes/current/oessrcst.htm> (OEWS wages)
- <https://www.onetonline.org/search/> (SOC Codes/Job Descriptions)

Annual Average Gross Wage Rates by Type of Worker – Regions and United States: 2022 and 2023

[Excludes agricultural service workers and Alaska. Annual rates are averages of the published wage rates for each survey week weighted by the number of hours worked during the week]

Regions ¹ and United States	Type of worker						Gross wage rates for all hired workers	
	Field workers		Livestock workers		Field and livestock combined		2022	2023
	2022	2023	2022	2023	2022	2023	2022	2023
	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)	(dollars per hour)
Northeast I	17.34	18.36	16.25	16.86	16.95	17.80	17.91	18.73
Northeast II	16.85	17.49	15.63	16.46	16.55	17.20	17.68	18.21
Appalachian I	14.78	16.15	15.32	14.71	14.91	15.81	15.54	16.52
Appalachian II	14.20	14.95	14.34	15.42	14.26	15.14	15.03	15.98
Southeast	13.68	14.94	13.62	13.88	13.67	14.68	14.35	15.41
Florida	14.28	14.69	14.63	15.39	14.33	14.77	15.26	15.69
Lake	17.79	19.43	16.94	17.78	17.34	18.50	18.22	19.55
Cornbelt I	17.60	18.75	16.11	16.79	17.17	18.18	17.87	18.91
Cornbelt II	17.43	17.76	17.68	17.82	17.54	17.79	18.37	18.57
Delta	13.59	14.45	13.95	14.66	13.67	14.53	14.10	14.98
Northern Plains	17.89	19.52	16.71	17.15	17.33	18.32	17.90	18.90
Southern Plains	14.34	15.76	15.38	15.35	14.87	15.55	15.57	16.36
Mountain I	15.86	16.61	15.50	16.36	15.68	16.54	16.43	17.35
Mountain II	17.25	17.17	15.26	15.99	16.34	16.63	17.27	17.59
Mountain III	14.95	15.94	16.43	16.77	15.62	16.32	16.38	17.23
Pacific	17.95	19.33	18.16	18.56	17.97	19.25	18.66	19.89
California	18.62	19.75	18.80	19.73	18.65	19.75	20.09	21.25
Hawaii	17.10	18.65	18.11	19.37	17.25	18.74	19.15	20.60
United States	16.77	17.88	16.29	16.85	16.62	17.55	17.56	18.53

¹ Region map on page 26.

2024 AEWR
USDA Farm Labor
Survey Results

DOL Proposal: Worker Protections

■ **Discontinuation to Employment Service:**

- Empowers SWAs and expands definitions to include agent(s), FLC, joint employers, and successors in interest for purposes of clearance order activities, meaning that agents and attorneys are among entities subject to discontinuation of employment services.

■ **Single Employer Test/Temporary or Seasonal:**

- Proposes to codify existing use of the “single employer” test to determine if nominally separate employers, filing individual job orders, should be considered as a single entity for purposes of assessing temporary or seasonal need.

■ **Wage:**

- Must list all potential wage rates must be listed on the job order (including piece rates if paid).
- Removes the 14-day payroll implementation window for wage changes.

■ **Application Filing Requirements/Disclosures of Owners & Supervisors**

- Proposes to require disclosure of all persons or entities who are owners and operators (if different than employer) any person who will manage or supervise H-2A workers and corresponding workers

■ **Protected Activity:**

- Provide list of H-2A and corresponding workers to any requesting labor organization
- Allows workers to designate a 3rd party representative to attend any disciplinary meeting (reasonable belief)
- Requires bargaining in good faith over the terms of a labor neutrality agreement or explain why you do not agree to (for DOL disclosure)
- Labor organization access to common areas and housing up to 10 hours per month

■ **Other Key Provisions:**

- Defines “for cause” termination
- Foreign recruiter disclosure, Seatbelts, Passports

DHS Proposal: H-2 Requirements, Oversight, and Worker Protections

■ Prohibited Fees:

● DENIAL or REVOCATION:

- A petitioner (employees) that collects prohibited fees would be subject to denial or revocation unless shows through **clear and convincing evidence (case by case basis)**, **both** that **extraordinary circumstances beyond its control** resulted in its failure to prevent collection **and** that it has **fully reimbursed** all affected beneficiaries and designees.
- 3rd Party: A prohibited fee **to the petitioner's third-party agent, attorney, facilitator, recruiter, or similar employment service** would result in denial of the petition or revocation on "unless the petitioner demonstrates to USCIS through **clear and convincing evidence** that it did not know and could not, **through due diligence**, have learned of such payment or agreement **and** that all affected beneficiaries have been **fully reimbursed**."
- Consequence is 1-to-4-year bar to approval of subsequent petitions.

■ Employer Violations of Labor Law/H-2 Program Requirements:

- Mandatory Denial (DOL debarment, fraud or willful misrepresentation, unlawful hiring of aliens)
- Discretionary Denial (e.g. Administrative action by DOL, violation of other employer laws, failure to comply with inspection)

■ Worker Flexibilities/Grace Periods:

- Admission 10 days prior to the petition's validity period and up to 30 days following the expiration of the petition.
- 60-day grace period or end of date of authorized period, whichever is shorter, following a cessation of H-2 employment if the H-2 worker was terminated, has resigned, or otherwise ceased employment or if the petition was revoked

■ Portability:

- Allows an H-2 worker to begin new employment, within the same classification, upon the proper filing of an extension of stay petition rather than only upon its approval (does not require E-verify by subsequent employer)

■ Limit of Stay:

- 60-day uninterrupted absence restarts the 3 year term

USDA Farm Labor Stabilization and Protection Pilot Grant Program

- \$65 million
- Applications due: January 3, 2024
- Baseline, Silver & Platinum Award Levels with varying requirements
- <https://www.ams.usda.gov/services/grants/flsp>

Legislative Efforts

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Questions?

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