Take Note H-2A Employers: Labor Department Proposes New Methodology to Calculate Wage Rates

Insights
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The Department of Labor recently announced a proposal to change the methodology of the hourly Adverse Effect Wage Rate (AEWR) for temporary nonimmigrant agricultural workers in the H-2A Program for all occupations other than herding and production of livestock on the range. The proposed changes, announced on December 1 and set to take effect the second half of 2022, will result in steep increases to the wage rate for employers operating in most states, and additional wage increases for certain specialized jobs. Here is a review of the proposed changes, what led to them, and how you can best prepare.

The ABC's of the AEWR: Brief Background and Events Leading Up to Proposed Changes

In 2020, the DOL issued more than 210,000 visas for temporary nonimmigrant workers to perform agricultural labor in the United States as part of its H-2A program. This program allows agricultural employers who have a shortage of domestic workers to bring temporary nonimmigrant foreign workers to the United States to perform agricultural labor.

The DOL's regulations provide that employers must pay H-2A workers the highest of:

- the AEWR;
- the prevailing hourly wage;
- the agreed-upon collective bargaining rate; or
- the Federal or State statutory minimum wage.

Currently, the DOL publishes the AEWR annually for each state using wage data reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS). The FLS collects data on the number of hired workers, hours worked, and total wages by type of worker for each quarterly reference weeks, which in turn, provide the basis for annual average estimates for AEWR.

Towards the end of 2020, the USDA announced its intent to cancel the FLS and instead published the 2020 AEWR Final Rule. That publication set the 2021 AEWR occupations at the 2020 AEWR rates, which were based on results from the 2019 FLS. Such a move would have effectively imposed a two-year wage freeze.

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However, in two separate cases filed by the United Farm Workers (UFW), the U.S. District Court for the Eastern District of California prevented the USDA from suspending the FLS data collection. The decision effectively stopped the USDA from implementing of the 2020 AEWR Final Rule.

The court ultimately decided that a two-year wage freeze would not serve the purpose of the AEWR – to protect against potential wage depression from employment of foreign workers adversely affecting the wages and working conditions of domestic agricultural workers similarly employed. As a result of this litigation, the DOL responded by proposing a different methodology.

Summary of the DOL's Current Proposal

The DOL proposes to use a combination of wage data from the FLS and the DOL's Bureau of Labor Statistics Occupational Employment Statistics (OEWS). Similar to data collection in the FLS, the OEWS collects employment and gross hourly wage data from employer establishments that support farm production activities. Specifically, the DOL's proposal:

- Continues the use of a single, gross average hourly wage in each state by the FLS wage data for field and livestock workers as it has in the last 30 years. The "field and livestock" category represents a majority of agricultural workers – those who plant, tend, pack, and harvest field crops, fruits, vegetables, nursery and greenhouse crops, or other crops" or "tend livestock, milk cows, or care for poultry," including those who "operate farm machinery while engaged in these activities."
- Uses wage data from the OEWS for field and livestock workers in the event such data is not covered by the FLS, such as in Alaska and Puerto Rico, where FLS's data and methodology is limited.
- Adopts the OEWS-based, occupation-specific methodology for job positions other than field and livestock workers. This will likely apply to higher paid agricultural positions such as farm supervisors/managers, truck drivers, and those employed for contracted services such as construction or equipment operators supporting farm production, which the FLS does not adequately or consistently survey.
- Requires employers to pay the highest wage applicable if the job opportunity can be classified within more than one occupation. For example, if a job opportunity requires the same duties as that of a field and livestock worker and duties as that of a construction worker hired for contracted services, the employer must pay the highest rate among those classifications.
- Requires the Office of Foreign Labor Certification Administrator to publish an update to each AEWR as a notice in the Federal Register at least once a year.

What the Proposal Means for Employers – and How You Should Prepare

Employers currently working with or anticipating hiring H-2A workers should consider the following:

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- Spend time considering how this proposed rulemaking will impact your employees, customers, and overall business decisions. The DOL is inviting any member of the public to comment on the proposed AEWR methodology until January 31, 2022. If you're interested in commenting on any of the proposed changes, visit the following website for more details.
- Know and understand all the applicable rates. As mentioned above, employers are required to pay H-2A employees the highest of (i) the AEWR; (ii) the prevailing hourly wage; (iii) the agreed-upon collective bargaining rate; (iv) or the Federal or State statutory minimum wage. The 2022 AEWR rates can be found here.
- For information on state minimum wages, Fisher Phillips has an interactive map which can be found here.
- Perform an audit of current job positions and their duties. Do the job duties fall into specific categories or perform a mix of other duties, such as truck driving?

Conclusion

We will monitor developments related to this proposed rule and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions on this or on the H-2A process in general, contact your Fisher Phillips attorney, the author of this Insight, or any of the attorneys in our Wage and Hour Practice Group.

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