



Agricultural Employers Learn New Methodology to Calculate Wage Rates: 4 Things You Need to Know

Insights

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On the heels of the new rule for the H-2A program impacting nonimmigrant agricultural workers that took effect late last year, the Department of Labor recently published a follow-up rule introducing the methodology that employers need to follow when calculating H-2A wage rates. The bad news is that it could lead you to need to pay significant higher rates that you have been paying. It will take effect in just a few weeks – on March 30 – so what are the four most important things agricultural employers need to know?

1. What's New with The Wage Rule – and All the Acronyms?

As we explained in detail in our summary when the change in methodology was proposed, the Final Rule changes the way the Adverse Effect Wage Rate (AEWR) for temporary nonimmigrant agricultural workers in the H-2A visa program is calculated. As many agricultural employers know, employers employing H-2A workers or American workers in corresponding positions must compensate workers at the highest of:

- the AEWR;
- the prevailing hourly or piece rate;
- the agreed-upon collective bargaining wage; or
- the applicable Federal, State or local minimum wage.

In many geographic areas, the AEWR serves as the primary wage indicator.

Historically, the Department of Labor relied on the Farm Labor Survey (FLS) conducted by the United States Department of Agriculture to determine the AEWR. However, the Department was concerned the FLS data lumped all data for field and livestock workers (combined) to determine a single AEWR for all non-range H-2A jobs. The Department determined this did not account for more specialized or higher paid job opportunities like H-2A supervisors or tractor trailer drivers.

Instead of relying on the FLS data for these higher paid job opportunities, the Department's new method will instead look to the statewide or national average hourly wages for the occupation classification reported by the Bureau of Labor Statistics Occupational Employment and Wage Statistics Survey Program (BLS OEWS).

2. What Happened to Field and Livestock Workers?

The Department will still rely on the FLS to establish an average annual hourly wage for field and livestock workers. This will include specific job codes according to these Standard Occupational Classifications (SOC) (don't worry—more acronyms ahead):

- SOC 45-2041 – Graders and Sorters, Agricultural Products
- SOC 45-2091 – Agricultural Equipment Operators
- SOC 45-2092 – Farmworkers and Laborers, Crop, Nursery, and Greenhouse
- SOC 45-2093 – Farmworkers, Farm, Ranch, and Aquacultural Animals
- SOC 53-7064 – Packers and Packagers, Hand
- SOC 45-2099 – Agricultural Workers, All Other

3. What About Specialized Positions Not Included in the SOC Codes Above?

Instead of looking to agricultural-specific data, the AEWR will be set by the job-specific SOC code as reported by the OEWS survey. If a statewide annual average hourly wage for the SOC code is published, that will be the AEWR. If a statewide annual hourly wage is not reported, the AEWR will be the national average hourly wage reported by the survey.

These rates can be significantly higher than the H-2A AEWR rate an employee would have historically received for doing the same work. Perhaps most concerning for employers, the BLS OEWS rates do not take into account agricultural-specific factors – for example, rural geographic areas where many H-2A employers operate.

In accordance with the new Rule effective March 30, employers must look to the specific SOC code to determine the applicable AEWR for specialized positions like logging, construction, heavy trucking, and supervision of farmworkers.

For example:

- In California, the January 2023 AEWR is \$18.65 based on the FLS data.
- The California May 2021 mean hourly wage for a “Construction Laborer” (SOC 47-2061) is \$25.38, a \$6.73 increase from the farmworker AEWR.
- The California May 2021 mean hourly wage for a “Heavy and Tractor-Trailer Truck Driver” (SOC 53-3032) is \$25.06, a \$6.41 increase from the farmworker AEWR.

4. What Happens if My H-2A Employees are Performing Work That Could Fall Under Multiple Job Codes?

The new Wage Rule requires employers to pay the **highest** wage applicable if the job opportunity can be classified within more than one occupation.

Recently, the Department issued FAQ guidance on the Wage Rule. In it, the agency clarified that if an H-2A job order required workers to care for livestock, and also operate semi-trucks with at least 26,001 pounds Gross Vehicle Weight on public roads, that job would include two job codes: both SOC 45-2093 (Farmworker) and SOC code 53-3032 (Heavy and Tractor-Trailer Drivers). Even if this employee was primarily working under the Farmworker SOC code, they would be entitled to the Heavy and Tractor-Trailer Driver pay rate.

Turning back to our California example:

- This means an employee whose job primary entitles them to the AEW of \$18.65 per hour would be instead bumped to the “Heavy and Tractor-Trailer Truck Driver” SOC Code (53-3032), earning \$25.06/hour. This rate would apply whether the employee was driving a truck or not.

Conclusion

There are many outstanding questions regarding the impact of the new Wage Rule. Industry organizations have expressed concern about the new Wage Rule and are pursuing legal challenges in court.

We will monitor developments related to the Final Rule and provide updates as warranted, so make sure you are subscribed to Fisher Phillips’ Insights to get the most up-to-date information directly to your inbox. If you have further questions on this or on the H-2A process in general, contact your Fisher Phillips attorney or the authors of this Insight.

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