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DOL ISSUES GAME-CHANGER RULE FOR H-2A FARMWORKER WAGES: 8 KEY TAKEAWAYS FOR AGRICULTURAL EMPLOYERS

Insights

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The DOL just dramatically reshaped the H-2A program's minimum wage policy, and the new framework could significantly lower wage costs for H-2A agricultural employers and help prevent severe labor shortages across the farm industry. Starting today, the DOL will calculate the Adverse Effect Wage Rate (AEWR) for new H-2A job orders using a new skill-based and occupation-specific wage structure that results in "more precise market-based price floors," according to the agency. We'll explain it all through some quick background and eight key takeaways for ag businesses.

Quick Background

The H-2A visa program allows US agricultural employers who anticipate a shortage of farmworkers to bring foreign nationals to the country to fill temporary agricultural jobs. To participate in the H-2A program, employers must comply with the AEWRs set out in DOL regulations to ensure that employing an H-2A worker does not adversely affect the wages and working conditions of domestic workers in similar positions.

For nearly 40 years, the DOL calculated the AEWRs based on data from the USDA's Farm Labor Survey (FLS) regarding average wages for farmworkers in a state or region. However, the DOL **issued a new rule** in 2023 that significantly increased the H-2A wages for certain occupations (including truck-drivers, bus-drivers, mechanics, and first-line supervisors) by basing their rates on the statewide average hourly wages reported by the

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Bureau of Labor Statistics Occupational Employment Wage Statistics (OEWS) survey.

Local and national associations of agricultural employers immediately sued the DOL to block the 2023 wage rule, and a federal court [officially set aside the rule](#) earlier this year. Shortly after the August 25 decision, the USDA announced that it would no longer publish the FLS – leaving a regulatory gap regarding the H-2A AEWR methodology.

The DOL's New AEWR Rule: 8 Key Takeaways for Employers

The DOL issued an [interim final rule](#) today that significantly changes how it determines the hourly AEWRs for H-2A workers in non-range occupations (meaning all occupations other than herding and production of livestock on the range). Here are your eight key takeaways:

Note on the Ongoing Government Shutdown. The federal government officially shut down on October 1 after Congress failed to reach a spending agreement by the deadline, and no new H-2A applications can be filed with DOL until Congress restores federal funding. For more information, see [how the government shutdown impacts employers](#).

1. Effective Immediately (New Job Orders Only). The DOL will apply the new AEWR methodology to H-2A job orders submitted after October 1.

2. One AEWR Covering Ag's "Big 5" Occupations. Most AEWRs will be based on an average of OEWS data for the five most common Standard Occupational Classification (SOC) codes: farmworkers, agricultural equipment operators, livestock workers, graders/sorters, and packers.

3. SOC-Specific AEWR for All Other Occupations. The DOL will use the OEWS survey to determine SOC-specific AEWRs for H-2A job opportunities that do not fall within the "Big 5" SOC codes.

4. AEWRs Determined at Two Skill Levels.

- **Skill Level I** is an "entry-level" wage rate based on the average hourly gross wage paid to the lower third of all workers in the combined category for the "Big 5" SOC codes or, if applicable, in the specific SOC code assigned to the job opportunity.

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- **Skill Level II** is an “experienced” level set at the OEWS mean.

While the new rule gives some suggestions about what might merit the higher or lower of the two wage rates, it seems that the DOL Certifying Officers will have significant discretion in how they are assigned.

5. Adjustments for Non-Wage Compensation Benefits. In recognition of the DOL requirement that H-2A employers provide housing to their workers “at no cost” and incur other fixed-costs to participate in the program, an “H-2A Adverse Compensation Adjustment” will be applied to reflect those employer expenses. These adjustments lower the OEWS rates by approximately \$1/hour to \$3/hour, depending on the state and will be updated annually. US workers in “corresponding employment” will be paid the full OEWS rate without that adjustment.

6. DOL’s Reasoning. The DOL estimates that agricultural employers will save over \$24 billion over the next 10 years as a result of these changes. And, as part of the justification for filing this rule outside the normal notice-and-comment process, the agency said that there is “ample data showing immediate dangers to the American food supply” because the prior AEW rule set “unreasonably high price floors on labor.”

7. AEW Examples. For some states, these AEW changes will mean that the state minimum wage will become the highest applicable wage rate for H-2A workers. For other states, the new AEWs will be lower than the state’s minimum wage. For example, **California’s statewide hourly minimum wage** for most employers for 2025 is **\$16.50**. However, the **new hourly AEW in California after applying the state’s \$3.00 downward adjustment for nonmonetary compensation** is **\$13.45** for entry-level H-2A workers in the Skill I category and **\$15.71** for experienced H-2A workers in the Skill Level II category.

8. What’s Next? There will be a 60-day comment period on the new rule, and we expect worker advocates and industry groups to submit hundreds of comments on the DOL’s new methodology. One area of concern is with how the DOL will assign occupational codes to positions that involve driving duties, maintaining farm equipment, construction of farm buildings, or supervision. The new interim final rule suggests looking at which duties are done on “the majority of

workdays” during the contract period, but specifically leaves open the prospect of assigning the OEWS “mean” wages as required by the 2023 AEW rule, which the DOL claims to have “vacated.” **How those occupations and wages are assigned, as well as the specific requirements that make a job “entry-level” vs. “experienced,” will require employers to be extremely careful about how they construct their job orders for H-2A positions.**

Conclusion

Please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Agriculture Industry Team](#) with questions or to develop a plan to address your farm labor needs. To ensure you stay current on the administration’s actions that affect ag labor, sign up to receive updates from the [Fisher Phillips Insight System](#).