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NEW H-2A ADVERSE EFFECT WAGE RATES UP IN AIR AS COURT ORDERS DOL TO TRY AGAIN: WHAT AGRICULTURAL EMPLOYERS NEED TO KNOW

Insights
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New H-2A Adverse Effect Wage Rates Up in Air as Court Orders DOL to Try Again: What Agricultural Employers Need to Know

A federal court in California just ordered the US Department of Labor (DOL) to quickly come up with a new methodology for calculating the Adverse Effect Wage Rate (AEWR) for H-2A job orders, just weeks after the agency released long-awaited new H-2A farmworker rates. Those rates had been calculated under a framework established in an interim final rule, which the DOL issued in 2025 and the United Farm Workers challenged. The district court issued an order on August 26 largely siding with the UFW and finding the IFR to be unlawful, though it stopped short of vacating the rule entirely. Even still, the potential for a backpay order covering the difference in wages between the current AEWR methodology and DOL's future methodology creates tremendous uncertainty for farms, FLCs, workers, and consumers. What does this mean for agricultural employers and H-2A wage rates?

Quick Background

The DOL issued an interim final rule (IFR) in October 2025 that dramatically reshaped the H-2A program's minimum wage policy. Under this framework, the DOL calculates the AEWR for H-2A job orders using a new skill-based and occupation specific wage structure. The United Farm Workers filed suit to challenge the rule, and in May the court

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denied the UFW's request to temporarily block the rule while the litigation plays out.

In the meantime, the DOL published the new AEWRs on August 3, which took effect immediately for most states. (A slightly later effective date of August 17 applied to states covered by a 2024 court ruling related to the Farmworker Protection Rule, including Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.)

What's the Latest?

A district court in California handed the UFW a major win on August 26 by ruling that the DOL's October 2025 IFR is unlawful and ordering the agency to promptly produce and publish a new methodology for calculating AEWRs for H-2A workers. Specifically, the court held that:

- each of the challenged components of the IFR – including the tier system, the housing adjustment, the use of the Occupational Employment and Wage Statistics survey, and the "greater than 50%" rule – are arbitrary and capricious under the Administrative Procedure Act (APA); and
- the DOL did not have "good cause" to issue the IFR on an emergency basis and bypass the APA's usual procedural requirements for rulemaking.

The August 26 order applies nationwide – it is not limited to the UFW or a specific jurisdiction. The good news is that the court did not immediately vacate the rule but instead ordered the DOL to create a new one.

What Was the Court's Reasoning?

- The court found that the use of wage "tiers" based on experience "is not inherently unreasonable," but the use of the 17thpercentile and 50thpercentile was "arbitrary and capricious" where the DOL estimated that 92% of jobs would be assigned to the lower-tier wage rate. This leaves the door open to a different wage-tiering mechanism in DOL's next AEWR rule.
- The court also found the "housing adjustment" in the IFR to be unlawful, based on the separate requirement in the

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DOL's H-2A rules that employers provide housing to H-2A workers "at no cost" to them. The DOL proposed removing that regulatory requirement in the IFR, and when they created the H-2A program, Congress required only that employers "shall furnish housing in accordance with regulations," but not that it be "at no cost." Because it perceived a conflict within the existing DOL rules, the court found the housing adjustment to be unlawful.

- Third, the court faulted the DOL for using the OEWS without specifically considering alternatives, since the OEWS surveys farm labor contractors but specifically excludes farms from the survey. The DOL may reframe the OEWS to include farms in future surveys.

- Lastly, the court found unlawful the "greater than 50%" or "primary duties" rule for assigning a wage to a job with duties that span different occupations. The court suggested that the DOL should have considered other alternatives, like requiring employers to pay different wage rates for different hours of the day to reflect work with different wage rates (the example given was an H-2A worker spending 49% driving heavy trucks and 51% on ranch work – the court suggested that the DOL require the truck-driver wage for hours spent driving and the livestock wage for the rest of the week).

What's Next? Key Takeaways for Agricultural Employers

The DOL now has seven days to notify state workforce agencies, employers, and the public that employers may be required for make wage adjustment payments to qualifying H-2A workers and US farmworkers in corresponding employment who worked during the "backpay period" (the period between when the DOL sends the notice and when it issues a new AEWR methodology). **This signals that a court *might* order employers to pay the difference between the current AEWRs paid during the backpay period and the new AEWRs that the DOL ultimately issues. The court declined to rule on the issue of "back pay" yet but ordered DOL to put employers on notice of the *possibility* of such an order in the future.**

How soon the DOL issues the new AEWR methodology remains to be seen, but Wednesday's order requires the agency to submit an initial status report in two weeks to detail steps it has taken and its anticipated timeline. It's also unclear whether the DOL will have to issue notice of proposed rulemaking, a new interim final rule, or something else. After DOL issues the new AEWR methodology, the court will re-open briefing regarding backpay issue flagged in the notice.

In addition, the DOL could appeal the order issued on August 26 – especially in light of the Supreme Court's ruling in *Trump v. Casa* last year, which held that federal district court judges may not issue injunctions that are broader than necessary to provide complete relief to each plaintiff with standing to sue. However, it remains to be seen whether the agency will do so.

Ongoing litigation over this always-contentious issue means that the rule just declared unlawful was the third version of the wage rule in effect in the past 12 months, and the DOL is now required to create a fourth version of the rule "promptly." Employers need to stay informed on these changes as they play out and be prepared for the next twist in the AEWR story by working with their agricultural employer attorneys and staying tuned for updates.

Conclusion

We will continue to monitor developments and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Agriculture Industry Team.