

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2022 H-2A Final Rule FAQs

Prevailing Wage Surveys
November 21, 2022

On October 12, 2022, the Department of Labor (the Department) published a final rule promulgating regulations governing the certification of employment of nonimmigrant workers in temporary agricultural employment and the enforcement of obligations applicable to employers of H-2A workers and workers in the United States similarly employed. The Department is providing these FAQs to assist State Workforce Agencies and other interested parties in understanding the prevailing wage survey methodology of this final rule as it goes into effect.

1. Why did the Department adopt new prevailing wage survey requirements for the H-2A program?

The Department has engaged the State Workforce Agencies (SWAs) to conduct wage surveys to determine whether prevailing wage rates exist for distinct crop or agricultural activities for more than four decades. Prior to the Department’s final rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (“2022 H-2A final rule” or “final rule”), the SWAs used the Department’s ETA Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to conduct such surveys and submit prevailing wage findings, where available, to the Department for review and approval. The 2022 H-2A final rule establishes a new methodology for prevailing wage surveys that replaces the outdated prevailing wage survey guidelines from the Department’s ETA Handbook 385, which, for example, used in-person interviews to gather survey data that were unnecessarily burdensome and inconsistent with modern survey methods.

The 2022 H-2A final rule establishes a methodology that is intended to be more effective in producing prevailing wage rates for distinct crop or agricultural activities. In addition, the final rule expands the universe of State entities that may conduct prevailing wage surveys for the SWAs to submit for OFLC review and approval. This provides the SWAs with the flexibility to leverage other State agency, State college, or State university resources. Thus, the 2022 H-2A final rule supports expansion of the number and scope of surveys conducted based on information that is as reliable and representative as possible. While not requiring statistical validity, the updated minimum standards are designed to provide more options for the SWAs to make decisions about prioritizing precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages and produce prevailing wage findings with greater frequency.

Important Note: The minimum standards a prevailing wage survey must meet are set forth in 20 CFR 655.120(c). The standards governing the wage rate an H-2A employer must offer, advertise in its recruitment, and pay, which include consideration of a prevailing wage finding, if available, are set forth in 20 CFR 655.120(a) and 655.122(l).

2. What are the key elements of the 2022 H-2A final rule prevailing wage survey methodology?

The new prevailing wage survey methodology is intended to produce prevailing wage rates for employers and workers that are as reliable and representative as possible, while establishing updated standards that are more realistic for the SWA in a modern technology and budget environment. Key elements of the updated methodology include the following:

- Allows the SWAs to conduct prevailing wage surveys or to leverage surveys conducted by other State agencies, State colleges, or State universities, provided that the survey meets the standards listed in 20 CFR 655.120(c)(1);
- Permits the SWAs to determine the best data collection period for a particular prevailing wage survey;
- Enables the SWAs to make decisions about prioritizing precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wage findings, rather than requiring statistical validity;
- Establishes standards to produce prevailing wage findings for crop activities and agricultural activities with few employers and U.S. workers;
- Establishes a regulatory process for the SWAs to submit prevailing wage surveys to OFLC and for OFLC to review, approve, and post prevailing wages on OFLC's Agricultural Online Wage Library (AOWL); and
- Provides that a prevailing wage finding is valid for 1 year from the date of posting on OFLC's website (i.e., AOWL) or until replaced with an adjusted prevailing wage finding, whichever comes first.

Important Note: The Department provides additional information about prevailing wage survey methodological requirements in the preamble to the 2022 H-2A Final Rule. In particular, please see pages 61689 through 61701. [87 FR 61660 \(Oct. 12, 2022\)](#).

3. How will the 2022 H-2A final rule change the role of the State Workforce Agencies (SWAs) with regard to prevailing wage surveys used in the H-2A program?

Under the new prevailing wage survey methodology, the SWAs will continue to play an active role in determining prevailing wages. They retain the discretion to develop, administer, and report the results of prevailing wage surveys to the Department. This includes, subject to the methodological requirements of the 2022 H-2A final rule, the discretion to determine where to conduct surveys for distinct crop or agricultural activities and, if applicable, distinct work task(s) in those activities. For example, the SWAs may determine the geographic scope of a prevailing wage survey (e.g., State or sub-State), based on available resources to conduct the survey, the size of the agricultural population covered

by the survey, and any different wage structures in the crop activity or agricultural activity within the State. *See* 20 CFR 655.120(c)(1)(vi).

In addition, the 2022 H-2A final rule permits the SWAs to determine whether to conduct a wage survey itself or leverage a survey conducted by another State entity. Whether the SWA conducts a wage survey itself or uses another State entity's survey, the survey must satisfy all of the methodological requirements of the 2022 H-2A final rule to produce prevailing wage rate findings. The SWA has the discretion to determine which survey to submit to OFLC using the updated Form ETA-232, *Domestic Agricultural In-Season Wage Report* for prevailing wage rate approval, if all regulatory criteria are met.

Important Note: OFLC encourages the SWAs to conduct wage surveys, with the understanding that wage survey efforts will not always produce results that meet all regulatory requirements to produce prevailing wage findings. For example, due to low response rates, a survey may not satisfy the methodological requirements for the number of employers or number of workers represented in the survey data. The SWAs, however, should continue to submit prevailing wage surveys to the OFLC Administrator even if the surveys do not satisfy regulatory criteria for prevailing wage findings (i.e., survey submissions that present “no finding”). Although these submissions will not be used to determine prevailing wage rates, they will inform OFLC of the SWA's workload as related to grant plan assessment and challenges the SWA encountered in producing prevailing wage surveys that satisfy methodological requirements.

4. What standards must a prevailing wage survey meet to be approved under the 2022 H-2A final rule and posted on OFLC's Agricultural Online Wage Library (AOWL)?

Under the 2022 H-2A final rule methodology, the OFLC Administrator will issue a prevailing wage for a distinct crop activity or agricultural activity and, if applicable, distinct task(s) performed in that activity if a prevailing wage survey, submitted by the SWA to OFLC, meets all of the requirements in § 655.120(c)(1):

- The survey was independently conducted by the SWA or another State agency, State college, or State university, as required under § 655.120(c)(1)(ii);
- The survey covers work performed in a single crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, as required under § 655.120(c)(1)(iii);
- The survey covers an appropriate geographic area, based on consideration of three factors (i.e., available resources to conduct the survey; the size of the agricultural population covered by the survey; and any different wage structures in the crop activity or agricultural activity within the State), as required under § 655.120(c)(1)(vi);
- The surveyor contacted employers to collect wage data as required by § 655.120(c)(1)(iv) (i.e., all employers or a randomized sample) based on the estimated universe of employers, as addressed in a separate Frequently Asked Question below;

- The survey data is not unduly impacted by the wages of a dominant employer (i.e., a single employer whose wage data represents 25 percent or more of the sampled wages), as required under § 655.120(c)(1)(ix) and addressed in a separate Frequently Asked Question below;
- The survey reports the average wage of U.S. workers in the crop activity or agricultural activity (and distinct task(s), if applicable) and geographic area, as required under § 655.120(c)(1)(v); and
- The average wage reported in the survey is based on:
 - the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey, as required under § 655.120(c)(1)(v);
 - the wages of 30 or more U.S. workers receiving that unit of pay, if the estimated universe is at least 30 U.S. workers. Alternatively, if the estimated universe of U.S. workers is less than 30, the average wage reported is based on the wages of all such workers, as required under § 655.120(c)(1)(vii); and
 - the wages of 5 or more employers in that unit of pay, if the estimated universe is at least 5 employers. Alternatively, if the estimated universe of employers is less than 5, the average wage reported is based on the wages of U.S. workers employed by all such employers, as required under § 655.120(c)(1)(viii).

5. What are the requirements for contacting employers to collect wage data for a prevailing wage survey?

If the estimated universe of employers employing workers in the crop activity or agricultural activity (and distinct work task(s), if applicable) in the geographic area to be surveyed is five or more, the surveyor must either:

- Make a reasonable, good faith attempt to contact all employers in the estimated universe; or
- Conduct a randomized sample of all the employers in the estimated universe and contact all of the employers in the randomized sample.

If the estimated universe of employers is four or fewer, the surveyor must contact all employers in the estimated universe.

6. When is a survey unacceptable for determining a prevailing wage due to “dominant employer” wage data?

The Department aims to establish prevailing wage rates that sufficiently reflect the average wage paid to U.S. workers engaged in a distinct crop or agricultural activity and any applicable distinct work task(s) in a particular geographic area, rather than have the wages of a single employer drive the wage result. In revising the prevailing wage methodology, the Department was concerned with prevailing wage determinations that were unduly impacted by the wages of a dominant employer. To address this concern, the 2022 H-2A final rule requires that a single employer’s wage data not represent more than 25 percent of the sampled wages that would be used to determine the prevailing wage rate (i.e., sampled wages

in the unit of pay used to compensate the largest number of U.S. workers reported in the survey).

Where the estimated universe of employers is three or fewer, however, the prevailing wage methodology provides an exception to the 25 percent ceiling on sampled wages from a single employer. This exception encourages additional prevailing wage findings and is consistent with the Department's goal of producing prevailing wage survey results that are as representative as possible by requiring the prevailing wage determination to be based on data from all workers or employers where the universe of workers or employers is limited.

7. How does a SWA submit a prevailing wage survey to OFLC under the 2022 H-2A final rule?

To submit a prevailing wage survey to OFLC for review the SWA must prepare Form ETA-232, *Domestic Agricultural In-Season Wage Report*. The Form ETA-232 requires the SWA to indicate whether the prevailing wage survey satisfies each of the regulatory criteria for approving a prevailing wage finding. In addition, the SWA must submit copies of the survey documentation demonstrating compliance with the methodological requirements when submitting the Form ETA-232 to OFLC. *See* 20 CFR 655.120(c)(1)(i).

SWAs may submit the Form ETA-232s through email or mail. Electronic filing is strongly recommended. Electronically filed Form ETA 232s may be submitted using the Agricultural Wage Surveys email box at agwage.surveys@dol.gov. If electronic filing is not feasible, please mail non-electronic applications to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center, 200 Constitution Ave., NW, Box N-5311, Washington, DC, 20210.

8. Are prevailing wage surveys that the OFLC Administrator approved before the effective date of the 2022 H-2A final rule still valid?

Yes. All prevailing wage rates posted on OFLC's Agricultural Online Wage Library, whether approved under the Department's ETA Handbook 385 guidelines or the 2022 H-2A final rule methodology, remain valid for one year from the posting date or until replaced with an adjusted prevailing wage rate, whichever comes first. *See* 20 CFR 655.120(c)(2).

Transition Period

9. How will a State Workforce Agency (SWA) know whether the 2022 H-2A final rule methodology or the Department's ETA Handbook 385 guidance governs a prevailing wage survey?

The effective date of the 2022 H-2A final rule is November 14, 2022. The Form ETA-232, *Domestic Agricultural In-Season Wage Report*, will continue to be processed under the Department's ETA Handbook 385 guidelines if the Form ETA 232 was submitted to OFLC before this effective date.

The Form ETA-232 will be processed under the 2022 H-2A procedures, using the new OMB approved Form ETA 232, if the Form ETA-232 was submitted (e.g., mailed date) to OFLC on or after the effective date of November 14, 2022.

10. If a SWA already submitted a Form ETA-232, *Domestic Agricultural In-Season Wage Report*, and it is pending with OFLC, which prevailing wage methodology will OFLC apply?

OFLC will process all Forms ETA-232 received before the effective date of the 2022 H-2A final rule, November 14, 2022, using the prevailing wage survey methodology under Department's ETA Handbook 385 and associated guidance.

11. If a SWA conducted a prevailing wage survey based on the ETA Handbook 385 guidance before November 14, 2022, can the SWA submit the survey for evaluation on or after November 14, 2022?

Yes. The SWA may submit the prevailing wage survey if the survey satisfies the prevailing wage methodology criteria of the 2022 H-2A final rule. The SWA may re-evaluate the data and findings of a survey conducted before November 14, 2022 (i.e., the effective date of the 2022 H-2A final rule) using the prevailing wage methodology requirements of the 2022 H-2A final rule and then, submit the survey and Form ETA-232, *Domestic Agricultural In-Season Wage Report* to OFLC for review. If OFLC determines that the survey satisfies the requirements of the 2022 H-2A final rule prevailing wage methodology, the prevailing wage rate(s) will be approved and posted on OFLC's Agricultural Online Wage Library website.