DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2021–0006]

RIN 1205–AC05

Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H–2A nonimmigrant status (H–2A workers). Specifically, the Department is revising the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range occupations (*i.e.,* all occupations other than herding and production of livestock on the range) using a combination of wage data reported by the U.S. Department of Agriculture's (USDA) Farm Labor Reports (better known as the Farm Labor Survey, or FLS), and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey, formerly the Occupational Employment Statistics (OES) survey prior to March 31, 2021. For the vast majority of H–2A job opportunities represented by the six Standard Occupational Classification (SOC) codes comprising the field and livestock worker (combined) wages reported by USDA, the Department will continue to rely on the FLS to establish the AEWRs where a wage is reported by the FLS. For all other SOC codes, the Department will use the OEWS survey to establish the AEWRs for each SOC code. Additionally, in circumstances in which the FLS does not report a wage for the field and livestock workers (combined) occupational group in a particular State or region, the Department will use the OEWS survey to determine the AEWR for that occupational group. These regulatory changes are consistent with the Secretary of Labor's (Secretary) statutory responsibility to certify that the employment of H–2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. The Department believes this methodology strikes a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed.

DATES: This final rule is effective on March 30, 2023.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

Table of Acronyms and Abbreviations

AEWR Adverse Effect Wage Rate
ALS Agricultural Labor Survey
ARIMA Autoregressive integrated moving average
ASB Agricultural Statistics Board
BLS Bureau of Labor Statistics
CFR Code of Federal Regulations
CO Certifying Officer
CPS Current Population Survey
CY calendar year
DOL U.S. Department of Labor
DWL deadweight loss
E.O. Executive Order
ECI Employment Cost Index
ETA Employment and Training Administration
FLR Farm Labor Report
FLS Farm Labor Survey
FY Fiscal Year
GVW Gross Vehicle Weight
H–2ALC H–2A Labor Contractor
INA Immigration and Nationality Act
IRCA Immigration Reform and Control Act of 1986
NAICS North American Industry Classification System
NASS National Agricultural Statistics Service
NPC National Processing Center
NPRM Notice of Proposed Rulemaking
O*NET Occupational Information Network
OES Occupational Employment Statistics
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
Pub. L. Public Law
RFA Regulatory Flexibility Act of 1980
RIA Regulatory impact analysis
SBA Small Business Administration
SOC Standard Occupational Classification
Stat. U.S. Statutes at Large
SWA State Workforce Agency
U.S. United States
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Service
USDA U.S. Department of Agriculture
WHD Wage and Hour Division

I. Background

A. Legal Authority

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an ''H–2A'' nonimmigrant visa classification for a worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1), 1188.[1] Among other things, a prospective H–2A employer must first apply to the Secretary for a certification that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (2) the employment of the H–2A workers in such services or labor will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a ''temporary agricultural labor certification''—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers'

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who, in turn, has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC).[2] In addition, the Secretary has delegated to the Administrator, Wage and Hour Division (WHD), the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to ensure employer compliance with the terms and conditions of employment under the H–2A program.[3] Since 1987, the Department has operated the H–2A temporary agricultural labor certification program under regulations it promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501.

When creating the H–2A visa classification, Congress charged the Department with, among other things, regulating the employment of nonimmigrant foreign workers in agriculture to guard against adverse impact on the wages of agricultural workers in the United States similarly employed. *See* 8 U.S.C. 1188(a)(1)(B). Congress, however, did not ''define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements.'' [4] Thus, the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[5] The INA ''requires that the Department serve the interests of both farmworkers and growers—which are often in tension. That is why Congress left it to [the Department's] judgment and expertise to strike the balance.'' [6]

The AEWR is one of the primary ways the Department meets its statutory obligation to certify that the employment of H–2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed, while ensuring that employers can access legal agricultural labor. There is no statutory requirement that the Department determine the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose to guard against adverse impact on the wages of agricultural workers in the United States similarly employed.[7] The Department also considers factors relating to the sound administration of the H–2A program in deciding how to determine the AEWR.

B. Purpose for the Regulatory Action

The Department has determined this rulemaking is necessary to ensure that the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. As discussed in the notice of proposed rulemaking (NPRM) published on December 1, 2021, concerns about the employment of foreign workers adversely affecting the wages of agricultural workers in the United States similarly employed are heightened in the H–2A program because the program involves an especially vulnerable population.[8] Setting the AEWR and requiring employers who desire to employ H–2A foreign workers to offer, advertise, and pay at least the AEWR when it is the highest applicable wage is one of the primary regulatory controls the Department uses to meet its statutory obligation to certify that the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed.[9] The AEWR's role in the Department's administration of the H–2A program is distinct from and complementary to local prevailing wage findings, which are specific to a particular crop or agricultural activity. In the absence of a local prevailing wage finding, or where there is a local prevailing wage finding but that finding is lower than the prevailing wage of workers performing similar work within an occupational classification and broader geographic area (*e.g.,* statewide or regional), the AEWR establishes a wage floor that serves to prevent localized wage stagnation or depression relative to the wages of workers similarly employed in areas and occupations in which employers desire to employ H–2A workers.

The Department has expressed concerns with the current methodology used to determine the AEWR in the H–2A program, which was set forth in the 2010 Final Rule,[10] and has engaged in rulemaking activities to address its concerns.[11] As discussed below regarding recent rulemaking and related litigation, the Department determined that the 2010 Final Rule AEWR methodology does not adequately prevent adverse effect on the wages of agricultural workers in the United States similarly employed in two principal ways. First, the 2010 Final Rule AEWR methodology uses Farm Labor Survey (FLS) wage data for field and livestock workers (combined) to determine a single AEWR for all non-range H–2A job opportunities in each State or region, including job opportunities in Standard Occupational Classification (SOC) codes that the FLS does not include in the field and livestock worker (combined) data collection (*e.g.,* supervisors, construction, logging, tractor-trailer truck drivers). Not only is an AEWR determined under this methodology not reflective of the wages of workers performing similar work in those SOC codes, but the SOC codes not included in FLS field and livestock worker (combined) data collection generally account for more specialized or higher paid job opportunities. As a result, an AEWR determined using FLS field and livestock worker (combined) data does not adequately guard against adverse effect on the wages of agricultural workers similarly employed in the United States in these SOC codes. Second, the 2010 Final Rule AEWR methodology does not enable the Department to determine an AEWR for all geographic areas in which employers may seek to employ H–2A workers (*e.g.,* Alaska or Puerto Rico) due to FLS' data collection methodology and procedures.[12] Although the Department

[2] *See* Secretary's Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010); 20 CFR 655.101.

[3] *See* Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

[4] *AFL–CIO, et al.* v. *Dole,* 923 F.2d 182, 184 (D.C. Cir. 1991).

[5] *United Farmworkers* v. *Solis,* 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010).

[6] *Dole,* 923 F.2d ad 187.

[7] *See* 68 FR 11,460, 11,464 (Apr. 9, 1987) (''[T]he labor certification program is not the appropriate means to escalate agricultural earnings above the adverse effect level or to set an 'attractive wage.'").

[8] *See* Proposed Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States,* 86 FR 68174, 68176 (Dec. 1, 2021) (2021 AEWR NPRM).

[9] An employer seeking H–2A workers is required to offer, advertise in its recruitment, and agree to pay a wage that is at least equal to the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, and pay at least that rate to workers for every hour or portion thereof worked during a pay period. 20 CFR 655.120(a), 655.121(l).

[10] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule).

[11] *See, e.g.,* Proposed Rule, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 84 FR 36168, 36171 (July 26, 2019) (2019 NPRM); 2020 AEWR Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States,* 85 FR 70445, 70447–70465 (Nov. 5, 2020) (2020 AEWR Final Rule).

[12] USDA's National Agricultural Statistics Service (NASS) publishes *Farm Labor Methodology and Quality Measures,* a document that describes the methodology and quality measures used for the

Continued

requires consideration of several wage sources other than the AEWR (*e.g.,* local prevailing wage finding, State or Federal minimum wages) to determine the minimum wage rate an employer must offer, advertise in its recruitment, and pay covered workers, not all of those wage sources are available or applicable to H–2A applications in all circumstances (*e.g.,* a CBA or a local prevailing wage finding). Regardless of the availability or applicability of other wage sources, the AEWR currently serves as a primary wage source to protect against adverse effect relative to the wages of workers similarly employed in occupations and geographic areas included in FLS data collection. However, workers in geographic areas not included in FLS data collection procedures do not have an AEWR's protection against adverse effect.

To address these concerns, this rule revises the methodology by which the Department determines the hourly AEWRs for non-range occupations (*i.e.,* all occupations other than herding and production of livestock on the range).[13] Using a combination of wage data reported by the USDA FLS and the Department's BLS OEWS survey, the methodology adopted in this final rule enables the Department to establish appropriate AEWRs in all geographic areas and for all SOC codes in which employers may seek to employ H–2A workers, which the Department considers a reasonable approach that strikes an appropriate balance under the INA, as discussed below.

C. Recent Rulemaking

As part of the comprehensive H–2A program notice of proposed rulemaking published on July 26, 2019 (2019 NPRM), the Department proposed to adjust the methodology used to establish the AEWRs in the H–2A program.[14] That approach would have provided occupation-specific statewide hourly AEWRs for non-range occupations using data reported by FLS for the SOC code in the State or region, [15] if available, or data reported by the OES (now OEWS) survey for the SOC code in the State, if FLS data in the State or region was not available. At the time, the Department explained that establishing AEWRs based on data more specific to the agricultural services or labor being performed under the SOC system would better protect against adverse effect on the wages of agricultural workers in the United States similarly employed. For example, the Department expressed concern that the AEWR methodology under the 2010 Final Rule could have had an adverse effect on the wages of workers in higher paid agricultural SOC codes, such as supervisors of farmworkers and construction laborers, whose wages may have been inappropriately lowered by use of a single hourly AEWR based on the wage data collected for the six SOC codes covering field and livestock workers (combined).[16]

The Department received thousands of comments on the proposed changes to the methodology for setting the AEWRs in the 2019 NPRM. The commenters represented a wide range of stakeholders interested in the H–2A program, and their comments were both in support of and in opposition to the proposed changes to establish occupation-specific hourly AEWRs for non-range occupations.[17]

As the Department worked on drafting a comprehensive H–2A program final rule, USDA publicly announced, on September 30, 2020, its intent to cancel the planned October 2020 data collection and November 2020 publication of the Agricultural Labor Survey (ALS) and Farm Labor Reports (better known as the FLS).[18] The USDA's announcement created uncertainty regarding the annual average hourly gross wage rates for the six SOC codes covering field and livestock workers (combined) within the FLS that were necessary for the Department to establish and publish the hourly AEWRs for the next calendar year (CY) period on or before December 31, 2020, under the existing 2010 Final Rule methodology. To ensure AEWRs for each State were published before the end of CY 2020, the Department published the 2020 AEWR Final Rule on November 5, 2020, with an effective date of December 21, 2020.[19] In revising the AEWR methodology in the 2020 AEWR Final Rule, the Department acknowledged that USDA had suspended FLS data collection on at least two prior occasions, and that the USDA decision to cancel both the October data collection and the related November 2020 report was the subject of ongoing litigation.[20] In addition, the Department took into account the public comments received in response to the proposal to revise the AEWR methodology in the 2019 NRPM.

The 2020 AEWR Final Rule set the 2021 AEWR for the six SOC codes covering field and livestock workers (combined) at the 2020 AEWR rates, which were based on results from FLS wage data published in November 2019, and provided for those AEWRs to adjust annually, starting at the beginning of CY 2023, using the BLS Employment Cost Index (ECI), Wages and Salaries. For all other SOC codes, and for geographic areas not included in the FLS, the 2020 AEWR Final Rule set the 2021 AEWR at the statewide annual average hourly gross wage for the SOC code reported by the OEWS survey or, where a statewide average hourly gross wage is not reported, the national average hourly gross wage for the SOC code reported by the OEWS survey, to be adjusted annually based on the OEWS survey.

Litigation challenging USDA's cancellation of the October data collection and November publication of the FLS followed USDA's September 30, 2020, announcement. On October 28, 2020, in *United Farm Workers, et al.* v. *Perdue, et al.,* No. 20–cv–01452 (E.D. Cal. filed Oct. 13, 2020), the court preliminarily enjoined USDA from giving effect to its decision to cancel the October 2020 FLS data collection and cancel its November 2020 publication of the FLS.[21] The USDA National

FLS. Most recently updated on May 25, 2022, this document may be accessed at *https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/05_2022/fmlaqm22.pdf.*

[13] Range occupations are subject to a minimum monthly AEWR, as set forth in 20 CFR 655.211(c).

[14] *See* 84 FR 36168, 36171.

[15] For more information about the states and regions in the FLS survey, you may visit the following web page: *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/#:~:text=The%20Farm%20Labor%20Survey%20provides%20the%20basis%20for,turn%2C%20provide%20the%20basis%20for%20annual%20average%20estimates.*

[16] *See* 84 FR 36168, 36180–36185.

[17] A detailed discussion of the public comments as well as further background on the 2019 NPRM, specifically related to the hourly AEWR determinations, was included in the Department's 2020 AEWR Final Rule and will not be restated here. *See* 85 FR 70445, 70447–70465 (Nov. 5, 2020). The public comments are accessible in the public docket in *regulations.gov*. See *https://www.regulations.gov/document/ETA-2019-0007-0002.*

[18] *Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports by Suspending Data Collection for October 2020,* 85 FR 61719 (Sept. 30, 2020); USDA NASS, *Guide to NASS Surveys: Farm Labor Survey, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor* (last modified Dec. 10, 2020); *see also* USDA NASS, *USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), *https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php.*

[19] The Department's 2020 H–2A AEWR Final Rule revised the methodology by which the Department determines the hourly AEWR for non-range agricultural occupations, including the corresponding definition of the AEWR. The 2020 H–2A AEWR Final Rule addressed only that aspect of the 2019 NPRM, while the Department's Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 87 FR 61660 (Oct. 12, 2022) (2022 Final Rule) addressed the remaining aspects of the 2019 NPRM.

[20] 85 FR 70445, 70446.

[21] *United Farm Workers,* 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020); *see also United Farm Workers*

Agricultural Statistics Service (NASS) therefore proceeded with its data collection, and the USDA published the FLS report on February 11, 2021.[22] Meanwhile, the Department's 2020 AEWR Final Rule was challenged in *United Farm Workers, et al.* v. *Dep't of Labor, et al.,* No. 20–cv–01690 (E.D. Cal. filed Nov. 30, 2020). On December 23, 2020—two days after that rule went into effect—the court issued an order preliminarily enjoining the Department from further implementing it.[23] Additionally, the court issued a supplemental order on January 12, 2021, requiring the Department to publish the AEWRs for 2021 in the **Federal Register** on or before February 25, 2021, using the methodology set forth in the 2010 Final Rule, and to make those AEWRs effective upon their publication.[24] Pursuant to the court's January 12, 2021, supplemental order, the Department published the 2021 AEWRs using the 2010 Final Rule methodology on February 23, 2021, with an immediate effective date.[25]

In its order preliminarily enjoining the Department from further implementing its 2020 AEWR Final Rule, the court recognized that the Department has broad discretion in determining the methodology for setting the AEWR so long as the Department's approach is sufficiently explained.[26] However, the court concluded that the plaintiffs were likely to succeed on their claims that the Department failed to justify freezing wages for two years, and failed to properly analyze the economic impact of the 2020 Final AEWR Rule on farmers.[27] [28] In addition, the court found that, although the Department recognized ''the importance of the AEWR reflecting the market rate'' throughout the 2020 AEWR Final Rule,[29] the plaintiffs were likely to succeed on their claim that the Department failed to adequately explain its departure from its longstanding use of the FLS—which plaintiffs had asserted better reflected such market rates—to determine AEWRs for the field and livestock workers (combined) category.[30]

In its decision granting plaintiffs' motion for summary judgment, the court adopted its rationale from its decision granting the requested preliminary injunction in holding that the 2020 Final Rule (1) did not protect against adverse effect as required by the INA, (2) did not adequately explain the 2-year wage freeze, and (3) failed to properly analyze the economic impact of the rule.[31] Accordingly, the court vacated the 2020 Final AEWR Rule, and remanded to the Department for further rulemaking consistent with the court's opinion.[32]

D. Implementation of This Final Rule

Any job order submitted to the OFLC National Processing Center (NPC) in connection with an *Application for Temporary Employment Certification* for H–2A workers and before the effective date of this final rule will be processed using the 2010 Final Rule methodology, under which the AEWR for all non-range H–2A job opportunities is equal to the annual average hourly gross wage rate for field and livestock workers (combined) in the State or region as reported by FLS.[33] In addition, if an updated AEWR is published by the OFLC Administrator in the **Federal Register** during the work contract period for a temporary agricultural labor certification processed using the 2010 Final Rule methodology, and the updated AEWR is higher than the highest of the previous AEWR, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage in effect at the time the work is performed, the employer must pay at least the updated AEWR upon the effective date published in the **Federal Register**, as required by 20 CFR 655.120.[34]

The methodology established by this final rule will apply to any job orders for non-range job opportunities submitted to the NPC in connection with an *Application for Temporary Employment Certification* for H–2A, as set forth in 20 CFR 655.121, on or after the effective date of this final rule, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under 20 CFR 655.134. In order for employers to understand their wage obligations upon the effective date of this final rule, the Department is listing the statewide AEWRs applicable to the field and livestock workers (combined) category pursuant to 20 CFR 655.120(b)(1)(i) of this final rule below and providing the URL that provides a search tool enabling interested parties to search by State and SOC code for the AEWR applicable to all other non-range job opportunities pursuant to 20 CFR 655.120(b)(1)(ii) of this final rule. In addition, the Department will post the AEWR applicable to each SOC code and geographic area contemporaneously with the publication of this final rule in the **Federal Register** on the OFLC website at *https://www.dol.gov/agencies/eta/foreign-labor/*. Employers will therefore have 30 days from the date of the publication of this final rule to understand their new wage obligations before they go into effect.

TABLE—HOURLY AEWRS DETERMINED UNDER § 655.120(b)(1)(i) EFFECTIVE ON OR AFTER MARCH 30, 2023

Alabama	$13.67
Alaska	17.21
Arizona	15.62
Arkansas	13.67
California	18.65
Colorado	16.34
Connecticut	16.95
Delaware	16.55
District of Columbia	20.33
Florida	14.33
Georgia	13.67
Guam	10.40
Hawaii	17.25
Idaho	15.68
Illinois	17.17
Indiana	17.17
Iowa	17.54
Kansas	17.33
Kentucky	14.26
Louisiana	13.67
Maine	16.95
Maryland	16.55

v. *Perdue,* 2020 WL 6939021 (E.D. Cal. Nov. 25, 2020) (denying USDA's motion to modify or dissolve the injunction).

[22] *See* USDA, Farm Labor Report (Feb. 11, 2021), *https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/f7624565c/9k420769j/fmla0221.pdf; see also Notice of Reinstatement of the Agricultural Labor Survey Previously Scheduled for October 2020,* 85 FR 79463 (Dec. 10, 2020).

[23] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* 509 F. Supp. 3d 1225 (E.D. Cal. 2020).

[24] Supplemental Order Regarding Preliminary Injunctive Relief, *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–1690 (E.D. Cal. Jan. 12, 2021), ECF No. 39.

[25] *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations,* 86 FR 10996 (Feb. 23, 2021).

[26] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* 509 F. Supp. 3d 1225, 1241 n.5 (E.D. Cal. 2020).

[27] *Id.* at 1241–42.

[28] *Id.* at 1243–45.

[29] *Id.* at 1241 (internal quotation and citation omitted).

[30] *Id.* at 1247–48.

[31] *United Farm Workers, et al.* v. *U.S. Dep't of Labor, et al.,* No. 20–cv–01690–DAD–BAK, 2022 WL 1004855, at *6–7 (E.D. Cal. April 4, 2022).

[32] *Id.*

[33] Although a job order filed before the effective date of this rule is not subject to the AEWR methodology of this rule, it may be subject to the same AEWR as a job order for field and livestock workers filed on or after the effective date of this rule because an AEWR determined under the 2010 Final Rule's AEWR methodology is the same as an FLS-based AEWR determined under paragraph (b)(1)(i)(A) of this final rule.

[34] *See* 20 CFR 655.120(c) of the 2010 Final Rule (providing for AEWR adjustments ''at least once each calendar year'').

TABLE—HOURLY AEWRS DETERMINED UNDER § 655.120(b)(1)(i) EFFECTIVE ON OR AFTER MARCH 30, 2023—Continued

Massachusetts	16.95
Michigan	17.34
Minnesota	17.34
Mississippi	13.67
Missouri	17.54
Montana	15.68
Nebraska	17.33
Nevada	16.34
New Hampshire	16.95
New Jersey	16.55
New Mexico	15.62
New York	16.95
North Carolina	14.91
North Dakota	17.33
Ohio	17.17
Oklahoma	14.87
Oregon	17.97
Pennsylvania	16.55
Puerto Rico	9.17
Rhode Island	16.95
South Carolina	13.67
South Dakota	17.33
Tennessee	14.26
Texas	14.87
Utah	16.34
Vermont	16.95
Virgin Islands	13.24
Virginia	14.91
Washington	17.97
West Virginia	14.26
Wisconsin	17.34
Wyoming	15.68

Hourly AEWRs determined under § 655.120(b)(1)(ii) effective on or after March 30, 2023 are available for each SOC code and geographic area using the search tool or searchable spreadsheet that may be accessed here: *https://flag.dol.gov/.*

When the OFLC Administrator publishes subsequent updates to the AEWRs in the **Federal Register**, as required by 20 CFR 655.120(b)(2) of this final rule, the adjusted AEWRs will be effective on the date specified in the **Federal Register** notice.[35] As of the effective date of an AEWR adjustment, the updated AEWR applies to both H–2A applications in process (*e.g.,* filed, but no final determination made; or those with a final determination, but under appeal), and certified H–2A applications that remain in effect.[36] If the AEWR is adjusted during a work contract period, the employer must reassess its wage obligation(s) under 20 CFR 655.122(l). If the new AEWR applicable to the employer's certified job opportunity is higher than the highest of the previous AEWR, the current prevailing hourly wage rate, the current prevailing piece rate, the current agreed-upon collective bargaining wage, the current Federal minimum wage rate, or the current State minimum wage rate, the employer must pay that adjusted AEWR upon the effective date of the new rate. *See* 20 CFR 655.120(b)(3). For a job order subject to the 2022 Final Rule, if the adjusted AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order. *See* 20 CFR 655.120(b)(4).

II. Summary of Proposed Changes to the AEWR Methodology and the Changes Adopted in This Final Rule

On December 1, 2021, the Department issued the 2021 AEWR NPRM announcing its intent to amend the regulations governing the methodology by which it determines the hourly AEWRs for non-range H–2A occupations (*i.e.,* all H–2A occupations other than herding and production of livestock on the range). *See* 86 FR 68174 (Dec. 1, 2021). Specifically, the Department proposed to use a single FLS-based AEWR for most agricultural work performed in a given State (*i.e.,* work performed in the ''field and livestock workers (combined) occupational group'' reported by FLS). Only in the event FLS did not report a wage finding for the field and livestock workers (combined) occupational group (*e.g.,* in Alaska, where FLS does not survey) would the OEWS serve as a wage source for setting the single statewide AEWR applicable to H–2A job opportunities for field and livestock workers (combined) in that State or region, or equivalent district or territory. For each SOC code not included in the field and livestock workers (combined) occupational group reported by FLS, the Department proposed to use SOC-specific OEWS-based AEWRs in each State or equivalent district or territory. Additionally, for agricultural labor or services to be performed by H–2A workers that cannot be encompassed within a single SOC code, the Department proposed to determine the AEWR using the SOC code assigned to the employer's job opportunity with the highest applicable AEWR.

In addition, the Department proposed to continue to adjust the AEWRs for each State or region at least once in each calendar year. The Department explained that because the FLS is released in or around November and the OEWS is released in or around June, the Department intended to update the AEWRs through two separate annual announcements in the **Federal Register**. One **Federal Register** notice would announce annual adjustments to the AEWRs based on the FLS, effective on or about January 1, and a second **Federal Register** notice would announce annual adjustments to the AEWRs based on the OEWS survey, effective on or about July 1.

Finally, the Department proposed to revise the definition of AEWR. The proposed definition clarified that the Department uses a different methodology to establish AEWRs for range occupations (*i.e.,* job opportunities processed under the Department's herding and production of livestock regulations at 20 CFR 655.200 through 655.235) than it uses to establish AEWRs for non-range occupations. The Department explained that a different methodology is required to establish the national monthly AEWR for range occupations due to the nature of range occupations (*i.e.,* occupational requirements for workers to be on call 24 hours per day, 7 days a week, to perform herding and production of livestock duties on the range).

The Department invited interested parties to submit written comments on all aspects of this proposal. Because the 2020 AEWR Final Rule had been preliminarily enjoined before the NPRM for this Final Rule was published, there was uncertainty as to whether the 2020 AEWR Final Rule would be vacated prior to the issuance of this Final Rule. The Department therefore sought comment on all aspects of the NPRM for this Final Rule that mirrored provisions in the 2020 AEWR Final Rule. In addition, the Department requested comments on use of the FLS and OEWS surveys and the conditions under which each survey should be used to establish the AEWR. For example, the Department sought comments on the continued use of a single statewide hourly AEWR for the field and livestock worker (combined) category, rather than statewide AEWRs for each SOC code within the FLS field and livestock workers (combined) category. In addition, the Department requested comments on use of the OEWS survey to establish the AEWR for the field and livestock workers (combined) category in the absence of the FLS or where the FLS does not report a wage finding for these SOC codes in a particular State or region or equivalent district or territory, and also sought comments on use of the OEWS to establish AEWRs for all job opportunities that do not fall within the

[35] *See* 20 CFR 655.120(b)(3) of the 2022 Final Rule, 87 FR at 61796 (providing that ''the employer must pay at least the updated AEWR upon the effective date of the updated AEWR published in the **Federal Register**'').

[36] *See* 20 CFR 655.120(a) (requiring the employer to ''offer, advertise in its recruitment, and pay a wage that is at least the highest of'' the applicable wage sources) and 20 CFR 655.120(b)(3) and 655.122(l) (requiring the employer to increase a worker's pay due to an AEWR adjustment after certification, if applicable).

FLS field and livestock workers (combined) occupational group.

The Department specifically stated that it was not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H–2A program, for reasons explained at length in prior rulemakings, including in the 2020 AEWR Final Rule and 2010 Final Rule.

The comment period closed on January 31, 2022.

A. General Overview of Comments

The Department received a total of 92 public comments in docket number ETA–2021–0006 in response to the 2021 AEWR NPRM prior to the comment submission deadline. The commenters represented a range of stakeholders from the public, private, and not-for-profit sectors. The Department received comments from a geographically diverse cross-section of stakeholders. These commenters included workers' rights advocacy organizations, farm owners, trade associations for agricultural products and services, not-for-profit organizations interested in agricultural issues, and other organizations with an interest in farming, ranching, and other agricultural activities. Public sector commenters included State agencies, while private sector commenters included business owners, employer representatives, workers' rights advocacy groups, public policy organizations, and trade associations interested in agricultural and immigration-related issues. The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this final rule was developed after review and consideration of all public comments timely received in response to the 2021 AEWR NPRM.

Among the comments received, the Department received 16 requests for an extension of the comment period for the 2021 AEWR NPRM.[37] While the Department appreciates the issues raised concerning the public's opportunity to examine the rule and comment, the Department decided not to extend the comment period and posted its response in the rule's electronic docket (ETA–2021–0006–0046) for public viewing. In that response, the Department explained that the proposed changes would have an economic impact on the regulated community, and the 60-day comment period provided was consistent with the comment periods provided in rules on similar subject matter that were more comprehensive and complex. For example, the Department published the 2019 NPRM, which proposed comprehensive revisions to the entire H–2A regulatory framework, including revisions to the AEWR methodology that were more complex than those proposed in the 2021 AEWR NPRM. The 2019 NPRM received extensive public review and comments within the 60-day comment period even though the Department declined at that time to extend the comment period.

Most commenters specifically addressed one or more of the Department's proposed changes to the methodology used to determine the AEWR in the H–2A program, such as the Department's proposed use of FLS and OEWS as the wage sources for setting AEWRs and conditions under which each source would be used to determine the AEWR for a particular job opportunity. These comments are discussed in the subject-by-subject analysis below.

Some commenters expressed support or opposition, generally, regarding the Department's rulemaking efforts to modify the AEWR methodology, regarding the AEWR, itself, or regarding the Department's balancing of employer and worker interests. For example, a variety of commenters asserted that there is no reason to change the methodology, or objected to the proposed changes by themselves without balancing them with other program changes or addressing the undocumented workforce. Some commenters expressed a preference for the current methodology (*i.e.,* the 2010 Final Rule methodology) if the only alternative is the proposed 2020 AEWR Final Rule methodology. Comments from employers, trade associations, a law firm, and a government agency objected to both the 2010 AEWR methodology and the AEWR methodology proposed in the 2021 AEWR NPRM. In general, these commenters asserted that both the 2010 and 2021 (proposed) AEWR methodologies were disconnected from agricultural industry realities, such as labor shortages despite wage increases; the impact of labor and program costs on agricultural operations' viability and competitiveness in interstate and international markets; whether employers are able to absorb labor costs; and the impact of such costs on job availability, downstream industry, and food cost and supply.

Other commenters expressed general concern about increases in required wage rates or asserted that the AEWR is too high, comparing it to the minimum wage rate or to general wage trends in the U.S. economy, using the ECI for comparison. Some commenters objected to the Department setting a wage floor, rather than permitting the employer to offer a wage based on work performance or experience, knowledge, loyalty, and contribution to the employer's operation. In contrast, a nonprofit public policy advocacy organization observed that farmworkers are not receiving unusually high wages or wages that are increasing at an unreasonable rate; rather, its review of wage data indicated that farmworkers are among the lowest-paid workers in the United States—lower than other comparable low-paid workers—and the rate of farmworker wage changes over time has been reasonable and consistent with labor market trends, with the impact on farmers offset by rising productivity and/or output prices.

Although the Department is sensitive to the commenters' general concerns, the Department notes the purpose of this rulemaking effort is to establish an AEWR methodology that guards against potential wage depression among similarly employed workers in areas where employers hire H–2A workers in accordance with H–2A program requirements. As stated above, the AEWR is a longstanding regulatory mechanism the Department uses to certify that the employment of H–2A workers will not adversely affect the wages of agricultural workers in the United States similarly employed. In addition, the Department's effort to improve the AEWR methodology through rulemaking is one part of the Department's larger efforts to update and improve the H–2A program within the scope of the Department's authority. Throughout the course of several rulemakings, the Department has articulated reasons for changing the AEWR methodology, including geographic limitations of the FLS survey and the need to address potential adverse effect on the wages of similarly employed workers in occupations outside the field and livestock workers (combined) occupations. The Department responds to specific comments about the proposed changes adopted by this final rule in the subject-by-subject analysis in Section II.B. Before beginning the subject-by-subject analysis, however, the Department here clarifies three significant

[37] The Department also received an *ex parte* communication during the comment period seeking clarification on one of the regulatory alternatives mentioned in the NPRM. The Department responded to the communication and posted the correspondence (ETA–2021–0006–0013) on the public docket associated with this rulemaking.

misconceptions about the 2021 AEWR NPRM reflected in the comments.

First, one commenter objected to the Department's inclusion of any aspect of the 2020 AEWR Final Rule, noting that the rule was enjoined in Federal court. As discussed above, although the Federal court's decision determined that specific aspects of the methodology adopted in the 2020 AEWR Final Rule were inconsistent with the Department's mandate to ensure employment of foreign workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, the Department reevaluated the 2020 AEWR Final Rule's provisions, in conjunction with the Federal court's findings, and proposed only aspects of the 2020 AEWR Final Rule that are consistent with the Department's objectives and the court's opinion. The Department solicited public comment on the specific aspects of the 2020 AEWR Final Rule the Department proposed to retain, and these comments are addressed in subject-by-subject analysis in Section II.B.

Second, some commenters misunderstood, or requested clarification regarding, the Department's statement in the 2021 AEWR NPRM that the proposed AEWR methodology would not change labor costs or wage requirements for the ''vast majority'' of H–2A job opportunities. The Department appreciates the opportunity to clarify. The Department proposed to retain the 2010 Final Rule AEWR methodology for field and livestock workers (combined) job opportunities, whenever the FLS reports the average hourly gross wage rate for field and livestock workers (combined) in a State or region. Apart from three instances in the past three decades in which USDA suspended the survey, which are discussed above, the FLS has consistently collected and reported wage data for field and livestock workers (combined) in 49 States. Thus, the Department's proposal would not change the methodology by which the AEWRs are established for field and livestock workers (combined) job opportunities in most of the United States. In addition, the FLS field and livestock workers (combined) category reports aggregate wage data covering six SOC titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45–2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); Agricultural Equipment Operators (45–2091); Packers and Packagers, Hand (53–7064); Graders and Sorters, Agricultural Products (45–2041); and All Other Agricultural Workers (45–2099). Based on the Department's program estimates, 98 percent of H–2A job opportunities are classified within these six SOC titles and codes.[38] The Department acknowledges that some of the job opportunities within that 98 percent may involve some work that cannot be classified solely within the field and livestock workers (combined) occupational group and, instead, constitutes a combination of job duties covering multiple SOC codes subject to different AEWRs under the proposed methodology. However, as clarified in the subject-by-subject analysis in Section II.B, the Department anticipates the AEWRs established for the vast majority of H–2A job opportunities will not change under this final rule, and will impact H–2A wage requirements only for: (1) the small percentage of job opportunities that cannot be encompassed within the six SOC codes and titles in the FLS field and livestock workers (combined) reporting category, and (2) the small number of field and livestock workers (combined) job opportunities in States or regions, or equivalent districts or territories, for which the FLS does not report a wage (*e.g.,* Alaska and Puerto Rico).

Third, comments reflecting employers' interests asserted a variety of objections to the Department continuing to require employers to adjust wage offers and rates of pay due to annual AEWR adjustments. An employer and a trade association expressed concern with wage increases after growers calculate payroll and receive loans for their production year or crop loan cycle, while a law firm expressed concern with wage increases after agricultural construction companies negotiate multiyear contracts with growers. An agent stated that AEWR adjustments appeared to require wage increases after the State Workforce Agency (SWA) has accepted a job order. Trade associations and employers objected to wage increases due to AEWR adjustments as infringing on negotiated employment contract terms. The Department appreciates the opportunity to clarify that wage requirement adjustments based on annual AEWR adjustments are not new for employers who choose to use the H–2A program. The 2010 H–2A Final Rule specified the employer's obligation to pay the wage rate ''in effect at the time work is performed,'' which required wage offer and payroll adjustments if the Department provided notice of an updated AEWR or prevailing wage determination higher than an employer's current wage offer or pay rate.[39] In the 2022 Final Rule, the Department clarified and codified in 20 CFR 655.120(b)(3) and 655.120(c)(3) an employer's wage adjustment obligation in the event of an AEWR or prevailing wage determination update.

The Department appreciates all of the comments received, which reflect the importance and complexity of the Department's objective—to strike a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed—and its responsibility to certify H–2A employment only where the Department determines such employment will not adversely affect the wages of workers in the United States similarly employed. The Department proposed changes to the AEWR methodology in the 2021 AEWR NPRM after reflection on recent rulemaking, related litigation, and the need to strengthen wage protections. Having now considered the public comments received on the proposed methodology, the Department continues to believe that the changes proposed in the 2021 NPRM best strike the balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages of workers in the United States similarly employed. Accordingly, the Department is adopting the methodology proposed in the 2021 AEWR NPRM without change.

B. Definition of AEWR

The Department proposed to define AEWR as ''[t]he wage rate published by the OFLC Administrator in the **Federal Register** for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c),'' mirroring the definition in the 2020 AEWR Final Rule.

One commenter opposed the use of any part of the 2020 AEWR Final Rule,

[38] Based on a review of H–2A applications certified during the 5-year period of October 1, 2017, through September 1, 2022, OFLC certified 76,547 H–2A applications covering 1,484,699 worker positions across all SOCs. Of the total worker positions certified, 1,459,792 (98.3%) worker positions were certified in the following six SOCs comprising the field and livestock workers (combined) category that the FLS reports: 3,056 worker positions as Graders and Sorters, Agricultural Products (45–2041); 86,157 worker positions as Agricultural Equipment Operators (45–2091); 1,302,604 worker positions as Farmworkers and Laborers, Crop, Nursery and Greenhouse (45–2092); 58,741 worker positions as Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); 437 worker positions as Packers and Packagers, Hand (53–7064); and 8,797 worker positions as Agricultural Workers, All Other (45–2099). See *https://www.dol.gov/agencies/eta/foreign-labor/performance* (accessed September 12, 2022).

[39] *See* 75 FR at 6901.

including the definition of AEWR, because of the litigation history in Federal court. The commentor misinterpreted the impact of the litigation, as the court's decision vacating the 2020 rule was unrelated to the definition of AEWR, and the court's vacatur of the 2020 rule does not prevent the Department from proposing and subsequently adopting the same definition of AEWR in this rulemaking. The Department has reevaluated the definition of AEWR and determined that the definition adopted in the 2020 AEWR Final Rule and proposed in the 2021 AEWR NPRM remains consistent with the Department's objectives.

The same commenter suggested that the Department, instead, continue to use the AEWR definition provided in the 2010 Final Rule, and wait for the FLS to adjust its methodology, an endeavor the commentor asserted is underway. The Department declines to adopt this suggestion, as the 2010 Final Rule definition [40] is inconsistent with the methodology adopted in this final rule. In addition, the 2010 Final Rule definition failed to account for the distinct AEWR methodology applicable to H–2A range occupations, implemented in 2015.

C. AEWR Methodology

1. Wage Sources Used To Determine the AEWR

The Department proposed a contingency approach to calculate the AEWR in which the FLS is the primary data source for the overwhelming majority of workers with backup wage sources for each occupational classification grouping based on availability of wage source data. The Department recognizes that having contingencies in place when data are not available is a practical necessity in certain circumstances to determine an AEWR. Thus, the Department proposed to implement secondary and, in some instances, tertiary safeguards to determine the AEWR when data is not available using the primary wage source in a particular State or region.

For the field and livestock workers (combined) occupational group within a given State or region, or equivalent district or territory, the Department proposed to determine the AEWR using, as its primary wage source, the annual average combined hourly gross wage from the USDA's NASS quarterly FLS for the State or region. Hourly wage rates are calculated based on employers' reports of total wages paid and total hours worked for all hired workers during the survey reference week each quarter. In the event FLS data is not available to calculate the AEWR for field and livestock workers in a particular State or region, or equivalent district or territory, the Department proposed to determine the AEWR using, as its secondary wage source, the OEWS statewide annual average hourly gross wage for the field and livestock workers (combined) category. In the event that neither the FLS nor the OEWS report a wage for the field and livestock workers (combined) category for a State, or equivalent district or territory, the Department proposed to determine the AEWR for the field and livestock workers (combined) category using, as its tertiary wage source, the OEWS national annual average hourly gross wage for the field and livestock workers (combined) category.

For all SOC codes other than the six covering field and livestock workers (combined), the Department proposed to determine the AEWR using, as its primary wage source, the statewide annual average hourly gross wage for the SOC code for the State, or equivalent district or territory, as reported by the OEWS survey. In the event the OEWS survey does not report a statewide annual average hourly gross wage for the SOC code, the Department proposed to determine the AEWR for that State, or equivalent district or territory, using as its secondary wage source, the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey. After considering public comments discussed in detail below, the Department has adopted these proposals without change.

a. The Department Will Use the FLS To Establish the AEWR for Field and Livestock Worker Job Opportunities in the Vast Majority of Cases

The Department received some comments in support of its proposal to continue using the FLS to determine the AEWR for H–2A job opportunities for field and livestock workers. Several comments noted that the FLS provides the most accurate and reliable source of wage data to represent the field and livestock workers (combined) category. A trade association stated that the FLS is the only wage survey that collects data directly from farm and ranch employers. Additional comments in support of using the FLS over other data sources noted that the FLS most accurately captures seasonal peaks in farmworker wages by measuring wages quarterly (January, April, July, and October), and provides the most up-to-date data on worker wages by using only single-year data. One of these commenters asserted that the Department's current proposal is not too burdensome or expensive to use and it provides consistency for employers and workers because—in most cases—the AEWR methodology proposed is the same methodology the Department has used for more than three decades.

The Department also received numerous comments opposing its proposal to continue using the FLS to determine the AEWR for H–2A applications for job opportunities in the field and livestock workers (combined) occupational group for various reasons. Several commenters asserted that the Department's use of the FLS to determine the AEWR is arbitrary and capricious and does not meet the Department's statutory obligations. A trade association stated that the proposal is ''likely to cost exponentially more than what the Department estimates to the users of the H–2A program and will most certainly drive some to shutter operations.'' Other commenters also expressed concern that using the FLS to determine the AEWR in the H–2A program would lead to curtailed operations, more automated processes, or closing farms. These commenters suggested that using the FLS would result in diminished job opportunities and an inadequate labor supply. Many of these commenters provided alternative suggestions, such as setting a static wage rate of 115 percent of the Federal or State minimum wage, or adopting the Canadian model of farmworker wage setting (without providing any information regarding that model), which are addressed in the discussion of alternative methodology suggestions in this preamble, below.

In response to commenters' concerns that the use of the FLS to determine the AEWR for H–2A job opportunities in the field and livestock workers (combined) occupational group will result in operational and labor supply issues for employers who choose to participate in the H–2A program, the Department reiterates that, with the exception of brief periods, it has used FLS data to establish the AEWR for such field and livestock job opportunities since 1987. While the Department is sensitive to the concerns raised, continuing to use FLS data will not introduce new operational or labor supply issues. In carrying out its statutory responsibility under the INA, the Department seeks to balance employers' and workers' interests by, among other things, using the best available actual wage data for workers in the United States similarly employed

[40] *See* 75 FR 6883, 6960 (defining AEWR as ''[t]he annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the USDA based on its quarterly wage survey'').

(when available) to determine the AEWR.

As discussed in the legal authority section above (Section I.A), the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[41] The Department continues to believe the FLS is the best available wage source for establishing AEWRs covering the vast majority of H–2A job opportunities (*i.e.,* the field and livestock workers (combined) category), whenever such data is available. The FLS is the most comprehensive survey of wages paid by farmers and ranchers.[42] The data collected in the FLS allows the Department to establish AEWRs using the most current wage rates, which protects workers in the United States similarly employed against adverse effects on their wages resulting from the employment of foreign workers willing to work for less.

In addition, the Department considers the broad geographic scope of the survey an advantage of the FLS. The FLS consistently collects sufficient data to generate a wage finding for the field and livestock workers (combined) category in each State or region surveyed, making it a reliable source of wage data year-to-year. As explained in the 2021 AEWR NPRM, the geographic scope of the FLS, covering California, Florida, and Hawaii, and 15 multi-State groupings for other States, and the statewide and regional wages issued ''provide[s] protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers.'' [43] The broad geographic scope of the FLS is also ''consistent with both the nature of agricultural employment and the statutory intent of the H–2A program,'' reflecting the migratory pattern of many workers providing agricultural labor or services across wide areas, and Congress's recognition of ''this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multi-State regions as part of their labor market before receiving a labor certification . . . .'' [44] The Department continues to believe that use of FLS data serves to prevent adverse effect on the wages of farmworkers in the United States by establishing a prevailing wage defined over a broader geographic area and over a broader occupational span (*i.e.,* the six SOC codes covering all field and livestock workers (combined), rather than a narrow crop or job description).[45] For similar reasons, the Department explained that the FLS-based AEWR may serve ''to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on . . . foreign labor on an ongoing basis.'' [46]

Several commenters expressed concerns related to the accuracy, reliability, and future availability of FLS data. One of these commenters suggested that the Department's use of the FLS is ''inconsistent, difficult to measure, and should be discontinued'' as a wage source to calculate the AEWR, without clearly explaining its characterization of the FLS as ''inconsistent'' and ''difficult to measure.'' In addition, this commenter asserted the FLS ''artificially inflates the reported wage'' both by not differentiating between the U.S. workforce and H–2A workforce—thereby creating an echo chamber of rising wages—and by including incentive pay such as piece rate, bonuses, and overtime. Noting that the FLS is used for various purposes other than determining AEWRs, two commenters suggested the Department should ''ensure it only uses the data that applies to its use . . .''. Another commenter suggested the Department should coordinate with the USDA to ensure that FLS data is accurate and does not result in creation of an artificial wage rate. To the extent the commenters suggested the Department change the FLS' methodology, those comments are beyond the scope of the present rule, as well as beyond the Department's authority. Regarding the comments directed toward the Department's continued reliance on the FLS to determine the AEWR and the value of the FLS for that purpose, the Department responds in this section.

The USDA has conducted the FLS since 1910, and has developed extensive expertise analyzing, measuring, and assessing the accuracy and reliability of its annual wage estimates.[47] USDA NASS publishes FLS data semiannually in May and November in the Farm Labor Report (FLR).[48] The May report includes employment and wage estimates based on January and April reference weeks, and the November report includes estimates based on July and October reference weeks. In each case, the reference week is the Sunday to Saturday period that includes the 12th day of the month. The November report also provides annual data based on quarterly estimates. The Department uses the annual data from the November report to determine AEWRs.

The scope, purpose, and statistical methodology for each FLR is extensively outlined in NASS's ''Methodologies and Quality Measures Report,'' which is published concurrently with each FLR publication. In the ''Methodologies and Quality Measures Report,'' the NASS states that ''the employment and wage estimates published support USDA and DOL programs'' and inform other ''government agencies, educational institutions, farm organizations, and private sector employers of farm labor.'' [49] Each FLR contains specific information about the types and purposes of the statistical methods used for analysis of the data collected in that round of the FLS. Additionally, each FLR outlines the quality metrics for that round of the FLS, including the sample size, response rate and outliers, calibration for survey nonresponses, and coefficient of variation for each survey. For the final step in the survey process, NASS convenes farm labor experts from its Agricultural Statistics Board (ASB), a panel of senior statisticians and program specialists, to perform a national review, reconcile the State-level evaluations to regional and national estimates, and prepare the official findings for release.

Some commenters stated that FLS data should not be used to determine AEWRs because average gross wage data is a byproduct of the survey instrument, and ''the survey is intended to identify the number of workers employed in the U.S.'' One commenter stated, ''the U.S. Department of Agriculture has indicated that using the FLS as a means to manufacture a wage rate is a misuse of its survey,'' based on a footnote citation to a ''Letter from Secretary Perdue.'' This commenter's assertion and the reference to a letter from former Secretary of Agriculture Sonny Perdue were echoed by several other commenters. The Department notes that; however, no commenter included a letter or statement from former Secretary Perdue and the Department has not identified such a statement in its research. In any event, even if such a

[41] *See AFL–CIO* v. *Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991); *AFL–CIO* v. *Brock,* 835 F.2d 912, 915 (D.C. Cir. 1987).

[42] 85 FR 70445, 70458 (Nov. 5, 2020) (AEWR 2020 Final Rule); 75 FR 6883, 6898–6899 (Mar. 15, 2010) (AEWR 2010 Final Rule).

[43] 86 FR 68174, 68180 (Dec. 1, 2021).

[44] 75 FR 6883, 6899 (Mar. 15, 2010).

[45] *Id.*

[46] *Id.*

[47] 86 FR 40802 (July 29, 2021).

[48] *See* USDA NASS, *Surveys: Farm Labor, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[49] *Farm Labor Methodology and Quality Measures (May 2022),* USDA, National Agricultural Statistics Service (May 25, 2022) *https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/05_2022/fmlaqm22.pdf* at 1.

statement had been made, it would not affect the Department's decision to utilize the FLS, particularly in light of other statements that contradict any such statement. For example, a 2019 Memorandum of Understanding (MOU) between USDA and the Department explicitly acknowledged the Department's ''continued and recurring bona fide need for the information provided by the [FLS], which will allow [DOL] to produce the official AEWRs.'' [50] In enjoining the Department of Agriculture from suspending the 2020 FLS, a Federal district court cited this MOU, observing that ''USDA has recognized that FLS data is used . . . 'by farm worker organizations to help set wage rates and negotiate labor contracts as well as determine the need for additional workers.' '' [51] Subsequently, the Department of Agriculture issued a court-ordered notice of reinstatement of the Agricultural Labor Survey.[52]

Additionally, NASS itself recognizes on its website that ''the employment and wage estimates published in the Farm Labor report are used by Federal, State, and local government agencies; educational institutions; farm organizations; and private sector employers of farm labor.'' [53] One of the listed current uses of FLS data includes the Department's use of the ''annual weighted average hourly wage rate for field and livestock workers combined'' to set the AEWR in the administration of the H–2A program.[54] As the Department explains at length below and in prior rulemakings, ''only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.'' [55] As the Department has noted, BLS refers the public to USDA and NASS for statistics on U.S. agriculture employment and wages.[56] Therefore, the Department disagrees with the assertions made by these commenters.

Other commenters noted that the Department decided against using the FLS to determine the AEWR for range occupations, noting that ''the Department determined utilization of the FLS would harm herding operations by causing them to downsize or close altogether.'' The Department, however, issued separate regulations governing the employment and wages of foreign workers in jobs related to the herding or production of livestock on the range (*i.e.,* range occupations) in 2015,[57] in recognition of the unique nature of such occupations, which made it necessary to use a different AEWR methodology.[58] Such occupations are located in remote areas, and have nontraditional work schedules that generally require workers to be on call 24 hours per day, 7 days per week. Additionally, even prior to the 2015 Herder Final Rule, the Department generally relied on wage surveys, historically conducted by the SWAs, for range occupations. The nature of these occupations and scarcity of U.S. workers employed in such occupations made it difficult to conduct statistically valid wage surveys for these occupations, and the lack of adequate survey data ultimately resulted in 20 years of wage stagnation for workers in these range occupations. Due to the unique nature of the occupations, challenges in producing valid wage surveys, and the inadequacy of wages produced by these circumstances, the Department established a new methodology to determine a monthly AEWR for all range occupations.[59] In contrast, non-range occupations do not present these unique circumstances that rendered use of the FLS for range occupations inadequate. Additionally, as discussed below, the Department declines to adopt an AEWR methodology that incorporates a broad index like the ECI as it did in the 2015 Herder Final Rule.

b. The Department Will Use OEWS Data for Field and Livestock Workers (Combined) Only if FLS Data Is Not Available

As set forth above, the Department's preference is to use the FLS, whenever possible, to determine the AEWR for all job opportunities that fall within the FLS field and livestock workers (combined) category. The Department recognizes, however, that there may be instances in which the FLS is unavailable to determine the AEWR for some or all such workers. In such circumstances, the Department believes that it is appropriate to determine the AEWR using the next best alternative data source (*i.e.,* the OEWS), as discussed below.

In the event the FLS cannot report the annual average hourly gross wage for the field and livestock workers (combined) category in a particular geographic area (*e.g.,* in Alaska, which is not covered in FLS data) or in the unanticipated circumstance that the FLS survey becomes unavailable (*e.g.,* suspension of the survey), the Department proposed to use the OEWS to determine a statewide AEWR for the field and livestock workers (combined) category. The Department also proposed a tertiary safeguard if neither the FLS nor the OEWS survey reports a statewide annual average hourly gross wage for the field and livestock workers (combined) category in a particular State, or equivalent district or territory. In these instances, the Department proposed to use the OEWS survey's national annual average hourly gross wage for the field and livestock workers (combined) category to determine the AEWR in that State. After consideration of comments, discussed below, the Department adopts this proposal without change.

The Department received several comments opposed to use of the OEWS as a wage source to establish the AEWR for the field and livestock workers (combined) category, when the FLS is not available to do so. Some of these commenters generally opposed use of the OEWS to establish the AEWR or set a wage floor for primarily agricultural operations, while others expressed concern that use of the OEWS in these cases may disconnect the AEWR from actual market wages paid to workers employed on farms because the OEWS does not survey farms and ranches.

The Department appreciates the concerns of the commenters, but maintains that the OEWS is the best available alternative source of wage data to use to determine the AEWR for the field and livestock worker (combined)

[50] *United Farm Workers* v. *Perdue,* No. 1:20–cv–01452–DAD–JLT, 17–18 (E.D. Cal. Oct. 28, 2020) (citing USDA–DOL MOU at 2–6).

[51] *United Farm Workers* v. *Perdue,* No. 1:20–cv–01452–DAD–JLT, 17–18 (E.D. Cal. Oct. 28, 2020) (citing USDA–DOL MOU at 2–6 and 83 FR at 50632).

[52] 85 FR 79463 (December 10, 2020).

[53] *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[54] *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.*

[55] 84 FR 36168, 36243 (Jul. 26, 2019); *See also* 85 FR 70445, 70473 (Nov. 5, 2020).

[56] 84 FR at 36182 (citing OEWS Frequently Asked Questions, *https://www.bls.gov/oes/oes_ques.htm,* which states, ''[f]or statistics on the U.S. agricultural sector, please visit the United States Department of Agriculture's National Agricultural Statistics Service program website.'').

[57] 2015 H–2A Herder Final Rule, 80 FR 62958. The Department recently rescinded § 655.215(b)(2) in a separate rulemaking. Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H–2A Program,* 86 FR 71373 (Dec. 16, 2021) (2021 H–2A Herder Final Rule).

[58] *See* 20 CFR 655.210(g) and 655.211(a).

[59] The Federal minimum wage serves as the basis for an initial national monthly wage rate (calculated based on a 48-hour workweek), and beginning in 2017, the Department adjusts the AEWR annually based on the ECI for wages and salaries. *See* 20 CFR 655.211(c).

category if the FLS is not available. Aside from the FLS, the OEWS survey is the only comprehensive and statistically valid source of wage data for agricultural occupations and geographic areas common in the H–2A program. The OEWS is also the wage source most consistent with the SOC-based wage collection of the FLS. Within the agricultural sector of the U.S. economy, the OEWS survey collects employment and hourly gross wage data from farm labor contractors that support fixed-site agricultural employers. Although the OEWS survey does not collect data from such fixed-site agricultural employers, the farm labor contractors surveyed by OEWS employ workers to provide agricultural labor or services similar to that of workers employed by fixed-site agricultural employers. In addition, farm labor contractors participate in the H–2A program and represent an increasing share of the H–2A worker positions certified by the Department.[60] Data reported by these types of employers, therefore, represent the best information available for purposes of establishing the AEWRs when FLS data is unavailable. BLS has the capability of providing a single annual average hourly gross wage for the six SOC codes that comprise the field and livestock workers (combined) category that mirrors the FLS, at both the statewide and national levels, based on the OEWS survey data.[61] The Department will make these OEWS-based AEWRs, both at the statewide and national levels, accessible to the public online.

One commenter suggested alternative AEWR determination methods would be unnecessary because, the commenter predicted, the FLS will always be available. On the contrary, there have been, currently are, and likely will be future instances where FLS data is unavailable to establish an AEWR for at least some workers. For example, FLS data has not been and currently is not available for AEWR determinations in certain locations such as Alaska and Puerto Rico. Additionally, the FLS may become unavailable in the future for reasons that cannot be anticipated. As previously noted, the Department does not have control over the FLS; the USDA does, and it could elect to suspend or even terminate the survey at some point in the future—as it has three times previously. In 2007 [62] and 2011,[63] the USDA did not conduct the survey due to budget constraints. In 2020, the USDA announced its intention to suspend data collection for the October 2020 survey,[64] but was ultimately forced to conduct the survey by a federal court. Thus, in order to ensure the Department's ability to determine AEWRs in any circumstances in which the FLS is, or becomes, unavailable, the Department has identified the OEWS as its alternative source of wage data for the reasons discussed in the proposed rule and here.

c. The Department Will Use the OEWS Survey To Establish SOC-Specific AEWRs for All Other Job Opportunities

For H–2A job opportunities that do not fall within the FLS field and livestock workers (combined) category, the Department proposed to use the OEWS survey to determine SOC-specific AEWRs. Under this methodology, the AEWR for all non-range SOC codes outside the field and livestock workers (combined) category would be the statewide annual average hourly gross wage for the SOC code, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly gross wage for the SOC code, the AEWR for that State would be the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey. In this final rule, the Department is adopting the OEWS-based, SOC-specific AEWR methodology for these job opportunities for the reasons explained below and in the 2020 AEWR Final Rule (which was vacated on other grounds).[65]

The Department received several comments in support of using an OEWS-based AEWR determination for SOC codes outside of field and livestock workers (combined) category, as well as several comments in support of not using the FLS for SOC codes other than field and livestock workers. For example, two workers' rights advocacy organizations noted the FLS does not ''adequately or consistently survey'' farm employers about positions beyond the six field and livestock SOC codes, and many of the SOC codes outside the six field and livestock SOC codes are more often filled as contract positions than hired positions; thus, for positions outside the six field and livestock SOC codes, the advantages of FLS wage findings no longer apply. One of these two workers' rights organizations emphasized that the multisector reach of the OEWS survey does a better job of accurately reflecting market wage rates for positions such as truck drivers and construction workers whose work inherently includes work both in and outside the agricultural sector. The Department agrees with these commenters for the reasons outlined below.

As the Department stated in the NPRM, the OEWS survey is a reliable and comprehensive wage survey that consistently produces annual average hourly gross wages for nearly all SOC codes other than the six codes covering the field and livestock workers (combined) occupational category and is, therefore, a better wage source for those other SOC codes. The OEWS survey, which began collecting occupational employment and wage data from employer establishments in 1996, is among the largest ongoing statistical survey programs of the Federal government, producing wage estimates for more than 800 SOC codes, and is used as the primary wage source for prevailing wage determinations in the H–2B temporary non-agricultural labor certification program, and other nonimmigrant and immigrant programs.[66] The OEWS program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employers in the United States.[67] Every 6 months, the oldest data from the previous 3-year cycle is removed and new data is added. The wages previously reported are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OEWS survey is conducted primarily by mail, with telephone follow-ups to nonrespondents, or, if needed, to clarify written responses.[68] The OEWS

[60] For example, the proportion of all H–2A worker positions certified by DOL for employment in non-range occupations with employers qualifying as H–2A Labor Contractors (*i.e.,* farm labor contractors) has increased significantly from 33.1 percent in FY 2016 (54,787 positions out of 165,741 positions) to 42.6 percent in FY 2021 (135,314 positions out of 317,619 total positions) and 43.1 percent through August FY 2022 (151,439 positions out of 351,268 total positions).

[61] An overview of the OEWS survey methodology is available at *https://www.bls.gov/oes/current/oes_tec.htm.* An explanation of the survey standards and estimation procedures is available at *https://www.bls.gov/opub/hom/oews/pdf/oews.pdf.*

[62] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 72 FR 5675 (Feb. 7, 2007).

[63] *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports,* 76 FR 28730 (May 18, 2011).

[64] 85 FR 61719.

[65] 85 FR 70445, 70453, 70458–70459.

[66] *See, e.g.,* 20 CFR 655.731(a)(2)(ii)(A) (H–1B program, for specialty (professional) workers) and 20 CFR 656.40(b)(2) (Permanent Labor Certification program, for permanent employment of foreign workers).

[67] *See* BLS, *Occupational Employment and Wage Statistics Frequently Asked Questions, https://www.bls.gov/oes/oes_ques.htm* (last modified Aug. 13, 2021).

[68] *Id.*

average [69] hourly gross wage reported includes all gross pay, exclusive of premium pay, but including piece rate pay.

While the FLS is the most accurate and comprehensive wage source to determine the AEWRs for the field and livestock workers (combined) occupational group, the OEWS survey is a more accurate data source for other SOC codes common in agricultural operations, such as supervisors, that the FLS does not adequately or consistently survey, as noted above and in response to comments discussed below. In addition, the OEWS survey includes SOC codes that are more often contracted-for services (*e.g.,* construction supporting farm production) than farmer-employed positions, which makes the OEWS data collection from farm labor contractors a more direct, relevant data source for determining AEWRs for these SOC codes than the FLS.

The Department received several comments opposing the proposed use of the OEWS as a wage source because the OEWS does not survey fixed-site agricultural employers directly. For that reason, some commenters asserted that using the OEWS survey as a wage source would not reflect the intricacies of the agricultural industry and would further remove the wages paid using this wage source from actual market wages in agriculture. For example, a trade association and an employer alleged that the use of OEWS-based AEWRs for SOC codes outside the six field and livestock workers (combined) category would force employers to pay workers what the commenters considered to be ''private sector rates'' for certain positions, such as truck drivers, farm managers, and farm mechanics. These commenters also shared the perspective that the skill sets needed for each of these positions is ''materially different'' in the agricultural versus non-agricultural sectors, primarily based on factors such as the location, scale, or commodity involved, rather than the qualifications or requirements of the work to be performed, a perspective the Department disagrees with and addresses further in Section II.C.4, below. Another employer stated that ''wages based on surveys outside of agriculture will skew labor costs out of our ability to pay.'' Similarly, an agent asserted that if the Department classifies a job opportunity using an inappropriate SOC code, the Department's OEWS-based methodology would ''widen the gap . . . in the direction of higher AEWRs than market conditions dictate.'' [70] The Department is not persuaded for the reasons discussed below.

As noted in the 2020 AEWR Final Rule (vacated on other grounds) and the NPRM, the OEWS is more accurate than the FLS for SOC codes, such as supervisors, that the FLS does not adequately or consistently survey, and positions that are more often employed by farm labor contractors (*e.g.,* construction supporting farm production) than by fixed-site agricultural employers; therefore, use of the OEWS will better protect against adverse effects for those SOC codes. In contrast, an AEWR based solely on the field and livestock worker (combined) category wage may have the effect of depressing wages in these other, typically higher-paid SOC codes because the FLS field and livestock worker (combined) category does not reflect the wages in these SOC codes as accurately as the OEWS survey does. This aspect of the methodology under the 2010 Final Rule did not adequately prevent adverse effects on the wages of such workers in the United States similarly employed, contrary to the Department's statutory mandate, as discussed above. In addition, whereas in 2010 H–2A Labor Contractors (H–2ALCs) comprised a much smaller percentage of participants in the H–2A program, H–2ALC participation has grown in recent years, which supports using OEWS wage data collected from farm labor contractors who employ workers to perform duties not covered by the six field and livestock workers (combined) category SOC codes, as an appropriate source of actual market wages in agriculture to determine the AEWR for these SOC codes.[71]

The Department understands the common concern of several employers and trade associations that OEWS-based AEWRs would, in some cases, result in wage increases compared to the FLS-based AEWR applicable under the 2010 Final Rule AEWR methodology. For example, a trade association compared average wages for the three SOC codes covering Construction Laborers, Bus Drivers, and Light Truck Drivers, based on the 2020 OEWS and the 2021 FLS, which showed that the 2020 OEWS for each occupation resulted in a higher AEWR than when using the 2021 FLS for field and livestock workers (combined). Based on its independent research, which is a topic the Department addresses in the Administrative Information section below (Section III), another trade association expressed concern that OEWS-based AEWRs would be significantly higher than the national average 2010 H–2A Final Rule FLS-based AEWR. These comments reflect the Department's concerns about the continued use of FLS-based AEWRs for SOC codes outside the field and livestock workers (combined) category not adequately addressing the Department's statutory mandate regarding *all* H–2A job opportunities, concerns that resulted in this rulemaking. In addition, some commenters appeared to believe, without providing supporting evidence, that using the OEWS survey would always produce SOC-specific AEWRs higher than the FLS rate for the field and livestock workers (combined) category, which, if true, would bolster the Department's concerns regarding adverse effect of the 2010 AEWR methodology and the need for rulemaking.

As previously stated, the Department has discretion to determine the

[69] The OEWS uses the term ''mean.'' However, for purposes of this regulation the Department uses the term ''average'' because the two terms are synonymous, and the Department has traditionally used the term ''average'' in setting the AEWR from the FLS.

[70] Other commenters also addressed the potential for SOC code assignments that employers may view as inaccurate, including assignment of more than one SOC code to an employer's job opportunity; these comments are addressed in the Department's discussion of job opportunity evaluation and SOC code assignment in Sections II.C.3 and II.C.4, below.

[71] For example, based on a review of OFLC H–2A certification data covering 2010 through 2019, the USDA Economic Research Service (ERS) reported that H–2ALCs (also known as Farm Labor Contractors (FLC)) have become the dominant employer type in the vegetable and melon sector—among the most labor-intensive agricultural sectors in the United States. Specifically, USDA ERS noted that ''the number of certifications obtained by both individual employers and FLCs increased every year between 2011 and 2019; however, the number of certifications obtained by FLCs increased faster, which led contractors to overtake individual employers in 2016. The share of certifications obtained by FLCs steadily increased from 17 percent in 2011 to its maximum of 57 percent in 2018, decreasing slightly to 53 percent in both share and number in 2019.'' *See* USDA, Examining the Growth in Seasonal Agricultural H–2A Labor (August 2021), Economic Information Bulletin No. (EIB–226), *https://www.ers.usda.gov/webdocs/publications/102015/eib-226.pdf?v=8349.1* (accessed September 12, 2022). More recently and based on a review of H–2A applications covering all agricultural sectors certified by OFLC during the most recent 3 fiscal years covering October 1, 2019, through September 1, 2022, the proportion of H–2A worker positions certified for employers operating as H–2ALCs increased from 36 percent in FY 2020 to more than 43 percent in FY 2022. In FY 2020, of the 275,430 worker positions certified nationally, 99,505 (or 36.1 percent) were issued to H–2ALCs. From October 1, 2021, through September 1, 2022, for FY 2022, of the 352,103 worker positions certified nationally, 151,706 (or 43.1 percent) were issued to employers operating as H–2ALCs. *See https://www.dol.gov/agencies/eta/foreign-labor/performance* (accessed September 12, 2022).

methodological approach that best allows it to meet its statutory mandate.[72] The Department remains cognizant of the fact that the ''clear congressional intent was to make the H–2A program usable, not to make U.S. producers non-competitive'' and that ''[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.'' [73] However, the Department is not required to set the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose, and the Department may also consider factors relating to the sound administration of the H–2A program in deciding how to set the AEWR. The approach adopted in this final rule is reasonable and strikes an appropriate balance under the INA. The Department recognizes that the revised methodology may result in some AEWR increases in those SOC codes for which the Department will use the OEWS survey, depending upon geographic location and the specific SOC code. These changes, however, would be the result of the Department's use of more accurate occupational data that better reflect the actual wage paid, and thus better protect against adverse effect. In the Department's policy judgement, any incremental burden placed on employers is outweighed by the benefits attendant to better protection against adverse effect on the wages of workers in the United States similarly employed.

With regards to commenter concerns about variation in OEWS-based AEWRs from year to year, the OEWS-based AEWRs generally would experience lower rates of change per year than the FLS AEWR variations to which employers are accustomed to adjusting. While the FLS calculates annual findings from quarterly estimates of data collected during a single year, ''each set of OE[W]S estimates is calculated from six panels of survey data collected over three years,'' an approach that moderates year-to-year fluctuation. However, as the AEWR methodology adopted in this final rule bases AEWR adjustments on changes in wages actually paid to similarly employed workers from year to year, annual variation in the AEWRs—both FLS-based AEWRs and OEWS-based AEWRs—are normal and provide the best available information on changing market conditions.

Several commenters were concerned that by factoring in wages in both non-metropolitan areas and metropolitan areas (where they assume wages are higher because of a higher cost of living), the use of a statewide OEWS wage would mean that employers in non-metropolitan areas would be required to pay inflated wages. Another commenter expressed a similar concern with respect to statewide or national AEWRs generally. Two additional commenters justified support for using OEWS wage data, rather than the FLS, for SOC codes outside of field and livestock workers (combined) category by noting that the OEWS produces available data at the local level, while the FLS does not capture data at this level of precision. While the OEWS can provide data at a smaller geographic level than statewide, such as by Metropolitan and Non-Metropolitan Statistical Areas, the Department is adopting the proposal to use statewide OEWS data to better protect against localized wage depression. As explained in prior rulemakings, the Department is concerned about localized wage depression in the H–2A program, particularly because of the economic vulnerability of agricultural workers and the fact that the H–2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.[74] Thus, a statewide wage, which includes a broad variety of geographic areas, is more likely to protect against wage depression from a large influx of nonimmigrant agricultural workers that is most likely to occur at the local level.[75] In the Department's policy judgment, even if the commenter's assumptions were accurate (*e.g.,* that agricultural wage rates in metropolitan areas are higher than those in non-metropolitan areas; that metropolitan and non-metropolitan areas house distinct labor markets), protecting a vulnerable workforce from wage depression outweighs potential concerns regarding potential upward pressure on wages that may occur because of the inclusion of metropolitan areas. For these reasons, the Department believes it is important to use the statewide OEWS wage where one exists for the particular SOC code. In the limited circumstances in which there is no statewide wage, use of the national annual average gross hourly wage reported for the particular SOC code will ensure an AEWR determination can be made each year for each SOC code outside of the field and livestock workers (combined) category.

d. The Department's Decision Not To Use ECI-Adjusted AEWRs or Other Methodologies Suggested in Comments

The Department received comments from employers, trade associations, agents, and workers' rights advocacy organizations suggesting alternative methods of determining the AEWR, including use of the ECI; use of the wage source that produces the highest wage, regardless of geographical or occupational scope; use of the median wage rate, instead of the mean; implementation of a two-tiered wage system permitting employers to pay foreign workers less; and imposition of caps on AEWR growth. As discussed below, the Department declines to adopt the suggested alternatives because none of them provides an administratively feasible method of allowing the Department to carry out its statutory mandate of ensuring that the employment of foreign workers will not adversely affect the wages of workers in the United States similarly employed.

Several commenters suggested the Department reconsider use of a broad index like the ECI instead of using the FLS to determine the AEWR, and some specifically asserted these indices are less likely to be suspended than the FLS, and more likely to produce consistent, moderate wage increases. Such indices, the commenters asserted, would avoid wage stagnation among agricultural workers and ''provide wage stability [that] is critically important to the viability of the H–2A program.'' Three of these commenters also urged the Department to cap AEWR increases by setting a ''percentage-change 'floor' and 'ceiling' to further limit uncertainty.'' Some commenters suggested the Department should determine the AEWR based on ''one of the myriads of models passed in the U.S. House of Representatives,'' such as setting the AEWR at 115 percent of Federal or State minimum wage, or by using other similar models.

As in prior rulemakings, some commenters also asserted that the Department should or must determine the existence of adverse effect in particular areas or occupations before issuing any AEWR determination. For

[72] 2020 AEWR final rule at 70450, 2021 AEWR NPRM at 68176, and Section I.A above, which cite *AFL–CIO, et al.* v. *Dole,* 923 F.2d 182, 184 (D.C. Cir. 1991) (Congress did not ''define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements.''); *United Farmworkers* v. *Solis,* 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010) (the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate).

[73] 54 FR 28037, 28046 (July 5, 1989).

[74] See, *e.g.,* 75 FR 6883, 6895.

[75] Id. at 6899 (The Department ''consistently has set statewide AEWRs rather than substate [ ] AEWRs because of the absence of data from which to measure wage depression at the local level'' and use of surveys reporting data at a broader geographic level ''immunizes the survey from the effects of any localized wage depression that might exist.'')

example, one commenter noted recent efforts to address truck driver labor shortages in the United States and asserted the Department ''should provide additional analysis to determine if there is an adverse effect on U.S. workers given these current dynamics.'' However, as the Department and courts have long explained, the INA does not require DOL to prove or rely on the existence of past adverse effect but instead is focused on prevent[ing] future adverse effect.'' [76] Further, the AEWR is one of the primary regulatory controls to prevent—not compensate for—adverse effects.

In contrast, a nonprofit public policy advocacy organization and a workers' rights advocacy organization suggested the Department should use the wage sources that results in the highest wage rate, whether determined by either the FLS or OEWS, regardless of the SOC code or geographic level of specificity (*e.g.,* the Department should consider State, regional, and national FLS data; and local, State, and national OEWS data, when determining the AEWR). Similarly, two commenters urged the Department to require the employer to pay the FLS-based AEWR to workers performing duties outside the six SOC codes covering field and livestock workers (combined) category, such as construction labor and first-line supervisor, if this wage is higher than the OEWS-based AEWR for the SOC code(s).

The Department declines to adopt the use of the ECI or other broad indices to determine the AEWR, even if the use of such indices would provide greater wage continuity and predictability from year-to-year. Unlike the FLS and OEWS, which provide actual wage data in the States and regions where these workers are employed, the ECI provides a general measure of changes in the cost of labor across the private sector in the United States, but does not provide actual wage data for agricultural workers in particular geographic areas. In addition, the FLS—the Department's preferred wage source for establishing the AEWR for the field and livestock workers (combined) category—is again available, eliminating the Department's primary impetus for having elected to use the ECI to adjust AEWRs in future years under the since-vacated 2020 AEWR Final Rule. Where the FLS is not available, the Department believes that the OEWS survey is better suited to determining the AEWR for H–2A applications involving non-range job opportunities, and a better substitute to use to determine the AEWR when the FLS is not available than using the ECI for adjusting AEWRs, because the OEWS survey provides actual wage data specifically tailored to geographic areas and non-range occupations common in the H–2A program.[77] As the FLS and OEWS surveys both consistently report wage data annually, the Department declines to adopt an indexing mechanism, like the ECI, to determine the AEWR.

The Department also declines to adopt a methodology that would set the AEWR at a predetermined minimum wage, such as the State minimum wage, or some version of an enhanced local, State, or Federal minimum wage. Such predetermined wages would be untethered from data on wages employers pay to workers in the United States similarly employed. As explained in prior rulemakings, the Department establishes the AEWR for non-range job opportunities based on actual wages paid by agricultural employers to workers in the United States similarly employed. Establishing an AEWR for all H–2A job opportunities, based on either the Federal minimum wage or the applicable local or State minimum wage, would not meet that purpose, and would instead immediately and dramatically reduce the wages of many H–2A and similarly employed workers in the United States [78] and not be responsive to actual increases or decreases in wages paid in SOC codes common in the H–2A program. As the Department noted ''a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects'' discussed above.[79]

For similar reasons, the Department declines to impose an arbitrary cap on wage increases. As discussed above, the AEWR is based on surveys of actual wages paid or projected to be paid to workers in the United States similarly employed, and changes in the AEWR reflect changes in wages employers pay to these workers. Commenters did not provide a reasoned economic basis to impose an arbitrary cap on H–2A wages, and imposition of such a cap would produce wage stagnation, most significantly in years when the wages of agricultural workers are rising faster due to strong economic and labor market conditions. As with the other methods suggested by commenters, this disconnection between actual wages paid and a capped AEWR is contrary to the Department's statutory mandate.

The Department also declines to implement the workers' rights advocacy organization commenters' proposals to require employers to pay the highest of all wage sources in the proposed methodology, regardless of the applicable SOC code or geographic scope. As noted above and in prior rulemaking, the FLS is a ''superior wage source. . .'' for field and livestock worker job opportunities for many reasons, including the comparatively broad geographic scope and the fact that ''only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.'' [80] The workers' rights advocacy commenters did not state that the higher wage would be a more accurate wage, nor did they allege deficiencies in the FLS for particular States or regions or for specific field and livestock worker job opportunities. Because the FLS is the most accurate and best available wage information source for field and livestock workers, the Department has limited use of the OEWS to circumstances in which the FLS is not available to determine the AEWR for the field and livestock workers (combined) category and for those SOC codes not adequately surveyed or represented by the FLS. Requiring payment of the highest wage rate among all available

[76] 54 FR 28,037, 28,046–47 (Jul. 5, 1989); 75 FR 6884, 6895 (Feb. 12, 2010) (reiterating justification for protection against future adverse effect in 1989 rule); 73 FR 77110, 77167 (Dec. 18, 2008) (noting the D.C. Circuit observed there is no ''statutory requirement to adjust for past wage depression''); *see also* 75 FR 6884, 6891 (Feb. 12, 2010) (''By computing an AEWR to approximate the equilibrium wages that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H–2A program. In this sense, the AEWR avoids adverse effects . . .''); *Overdevest Nurseries* v. *Walsh,* 2 F.4th 977, 984 (D.C. Cir. 2021) (finding reasonable the Department's definition of ''corresponding employer'' based on prospective view of adverse effect, *i.e.,* intended to prevent future adverse effect).

[77] Since 2015, the Department has adjusted the AEWR applied to H–2A range occupations using the ECI. The nature of range occupations—located in remote areas, with non-traditional work schedules that generally require workers to be on call 24 hours per day, 7 days per week—required the Department to adopt a different AEWR methodology for range occupations than non-range occupations. *See* 80 FR 62958, 62986 (Oct. 16, 2015). The Department explained at length the reasoning for using a base minimum wage adjusted by the ECI for these occupations, rather than the FLS or OEWS. *See* 80 FR at 62991–62992.

[78] For example, the AEWR in Nebraska in 2022 was $16.47 per hour. Using the Nebraska State minimum wage of $9.00 per hour in 2022, or 115 percent of the Federal minimum wage (*i.e.,* $10.35 per hour) would significantly reduce the wages of H–2A workers and workers in the United States similarly employed.

[79] 73 FR 8537, 8550 (Feb. 13, 2008).

[80] 84 FR 36168, 36183–36184, 36243 (July 26, 2019).

sources at all levels of geographic specificity, regardless of the applicable SOC code(s), would, in many cases, require an employer to pay an enhanced wage untethered to the best available information on the actual wages paid to similarly employed workers. This result would not only unreasonably increase the labor costs of H–2A employers in those cases, but could reduce agricultural job opportunities and place unnecessary upward pressure on wages in order for employers to attract a sufficient number of available workers. The Department believes this approach does not reasonably ''balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic workers.'' [81]

The proposed system of multiple potential wage sources for all H–2A job opportunities also would result in an exceedingly complex and confusing set of minimum wages. The use of sub-state level OEWS wages, for example, would introduce significant complexities in establishing the offered wage. Agricultural associations filing master applications that cover members and worksites across two States or other job opportunities involving work across multiple States according to a planned itinerary would have to keep pace with many dozens of different local wage sources and the potential adjustments to each of those during the course of a work contract period. The wage payment, recordkeeping, and compliance burden associated with that kind of AEWR methodology would be substantial and unjustifiable.

In addition to the comments discussed above, the Department received some comments requesting specific changes to aspects of existing wage data sources or the Department's use of them. One commenter objected to the Department's use of the mean wage rate to calculate the AEWR and suggested that the Department calculate the AEWR using the median wage rate, which the commenter asserted would produce a more representative wage because it would prevent ''outliers'' on both the low and high end of the wage distribution from unduly influencing the AEWR. In addition, the commenter suggested the Department consider only guaranteed hourly rates, not piece or incentive pay, when determining the AEWR to ''avoid a skewed wage floor.'' The commenter noted that the USDA considered modifying the FLS to capture only base pay data, but ''reverted back to reporting the gross rate of pay'' due to ''funding limitations . . .'' The commenter also suggested the Department consider data on wages paid to H–2A workers and corresponding workers when determining the AEWR in areas where ''more than ten percent of the agricultural workforce is composed of H–2A workers . . .'' The commenter asserted that in these areas, an AEWR based only on wages paid to U.S. workers would lead to disproportionate annual wage increases because non-H–2A employers set their wages above the AEWR each year to ensure retention of their U.S. workers.

Another commenter suggested the Department adopt a two-tiered wage system under which employers would pay the OEWS rate to U.S. workers performing duties like construction labor but would pay foreign workers performing the same or similar duties the AEWR based on FLS data for the field and livestock workers (combined) category. The commenter acknowledged this would provide employers an incentive to hire foreign workers over U.S. workers, but suggested the Department could counter this incentive by ''imposing additional penalties and scrutiny on U.S. employers [for] failing to hire domestic labor . . .''

As noted in prior rulemakings, the Department believes use of the mean wage best meets the Department's obligation to protect workers in the United States similarly employed against the adverse effects on their wages that could be caused by the employment of foreign workers.[82] The Department has a long-standing practice of using the average or mean wage to determine the AEWR in the H–2A program, and it uses the mean wage within the OEWS wage distributions to determine prevailing wages for other employment-based visa programs. The Department declines to use the median because it does not represent the most predominant wage across a distribution, but instead represents only a midpoint. The mean provides equal weight to the wage rate received by each worker in the SOC code across the wage spectrum and represents the average wage paid to workers to perform jobs in the SOC codes.[83] Setting the AEWR below the mean in the relatively less skilled agricultural SOC codes that predominate in the H–2A program may have a depressive effect on the wages of workers in the United States similarly employed. Use of the mean is also consistent with the Department's determination of prevailing wages for other foreign worker programs.

The Department also declines to exclude piece rate or incentive pay from FLS data or to request that USDA modify the FLS so that it reports a base pay that excludes piece rate and incentive pay. Comments suggesting the Department modify or seek modification of FLS methodology are beyond the scope of this rulemaking. As noted in prior rulemaking, the Department does not have control over the FLS, and the FLS is not conducted exclusively for the purpose of setting the AEWR. Similarly, the OEWS survey is not produced exclusively for temporary agricultural labor certification purposes, and it collects wage data for straight-time, gross pay, exclusive of premium pay, which includes incentive-based pay and production bonuses, for example. Moreover, as some agricultural jobs guarantee only the State or Federal minimum wage and otherwise pay based on a piece rate, advertising an hourly wage that does not include ''incentive pay'' is not a reasonable ''base rate'' for H–2A employers to advertise to U.S. workers.

With regard to the comment suggesting the wages of H–2A workers be ''considered'' when determining the AEWR using the FLS, the Department notes that FLS collects wage data for all workers, which necessarily includes wage data for H–2A workers. It is appropriate to base the AEWR on actual wages paid to all similarly employed workers since the AEWR, as the wage necessary to ensure the employment of foreign workers does not adversely affect the wages of workers similarly employed in the United States, should be based on market conditions. To the extent the commenter may be suggesting a methodological change to wage data collection through the FLS, the suggestion is beyond the scope of this rulemaking.

Finally, the Department declines to adopt a two-tiered system by which employers' wage obligations to U.S. workers are determined using an OEWS-based, SOC-specific wage rate, while their wage obligations to foreign workers are determined using the FLS without regard to the applicable SOC code. To do so would create a wage system that advantages H–2A employers over non-H–2A employers, bases skilled H–2A worker wages on wage data that does not cover similarly employed workers in the SOC code (*e.g.,* construction), and provides a disincentive to the hiring of U.S. workers that is contrary to the INA and cannot be justified through increased

[81] *Am. Fed'n. of Labor & Cong. of Indus. Organizations (AFL–CIO)* v. *Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991).

[82] *See* 80 FR 24146, 24159–24160 (Apr. 29, 2015); *see also* 78 FR 24047, 24058 (Apr. 24, 2013).

[83] *See* 80 FR 24146, 24159 (Apr. 29, 2015).

enforcement or scrutiny of program users and the labor market test.

Having considered the concerns of commenters, including both employers and workers' rights advocacy organizations, the Department has determined that adoption of the methodology proposed in the NPRM will best allow the Department to fulfill its statutory mandate and balance the competing goals of the statute. The methodology in this final rule uses the OEWS to provide appropriate wage increases for many highly skilled workers in positions like construction labor and first-line supervisors, and will better protect the wages of workers in States or regions where the FLS does not provide wage data. The methodology continues to base the AEWR for the field and livestock workers (combined) category on the FLS, the most accurate and reliable source of wage information for most agricultural job opportunities in the H–2A program. Finally, the Department notes that prevailing wages for particular geographic areas and agricultural activities, determined using State-conducted prevailing wage surveys, will continue to serve as an important protection for workers in crop and agricultural activities that offer piece rate pay or higher hourly rates of pay than the AEWR.[84]

2. The Department Will Publish FLS-Based AEWRs and OEWS-Based AEWRs Coinciding With Those Surveys' Publication Schedules

The Department proposed to continue to require the OFLC Administrator to publish an AEWR update as a notice in the **Federal Register** at least once in each calendar year, on a date to be determined by the OFLC Administrator. The Department explained in the NPRM that the OFLC Administrator would apply this annual notification requirement to each of the AEWRs to be determined under the proposed methodology. Therefore, the OFLC Administrator would publish an announcement in the **Federal Register** to update the AEWRs based on the FLS, effective on or about January 1, and a separate announcement in the **Federal Register** to update the AEWRs based on the OEWS survey, effective on or about July 1. *See* 86 FR 68174, 68184 (Dec. 1, 2021). After considering the comments on this proposal, addressed in detail below, the Department adopts the proposal with technical conforming edits to 20 CFR 655.120(b)(2).[85]

Two workers' rights advocacy organizations expressed support for the Department's proposal to issue new AEWRs at two points in the year based on the separate release schedules of FLS and OEWS survey data. These commenters viewed the proposal as a method of ensuring that the AEWR reflects real-time changes to wages in the labor market. In addition, these commenters stated the approach would provide clarity and predictability to both employers and workers.

Comments from trade associations, an employer, and an agent opposed the proposal to use two different AEWR adjustment cycles, one for FLS-based AEWRs and one for OEWS-based AEWRs. These commenters expressed concern that the two cycles of AEWR adjustment could create conflict among employees and add complexity and confusion for employers. For example, two trade associations observed that the different AEWR adjustment cycles could result in some employees receiving a mid-season wage increase, while other employees, whose work is subject to the other AEWR adjustment cycle, would not. One of the same trade associations and a third trade association asserted that separate publications of the AEWRs, particularly with the OEWS-based AEWR adjustment occurring during the growing season, would cause budget, planning, and contracting challenges for farmers who use the H–2A program.

The Department appreciates the opportunity to clarify that the incidence of H–2A job opportunities that are assigned multiple SOC codes and subject to two different AEWR adjustment cycles is expected to be rare, and that the vast majority of H–2A job opportunities will continue to be subject only to FLS-based AEWR adjustment, effective on or about January 1. Based on program experience, discussed above, and the Department's approach to evaluating the SOC code(s) applicable to an employer's job opportunity, discussed below, the Department estimates that approximately 98 percent of H–2A job opportunities will experience no change in assigned SOC code, wage source, or AEWR adjustment cycle under this final rule. The OFLC Administrator will continue to announce the FLS-based AEWR adjustment—which potentially impacts all job opportunities classified in the field and livestock workers (combined) occupational group located in the 49 States covered by the FLS—with an effective date on or about January 1. For those job opportunities classified in the field and livestock workers (combined) occupational group that are not located in the 49 States covered in the FLS (*e.g.,* job opportunities in Alaska), the methodology adopted in this final rule will establish a single statewide AEWR, adjusted annually based on the OEWS survey wage data release, with an effective date on or about July 1. Similarly, an H–2A job opportunity classified with an SOC code outside the six SOC codes within the field and livestock workers (combined) category will be subject only to a single AEWR adjustment cycle, as the final rule will establish a single statewide AEWR for each SOC code outside the field and livestock workers (combined) category, adjusted annually based on the OEWS survey wage data release, with an effective date on or about July 1. Both annual AEWR adjustment notices will potentially impact an employer's wage obligation to workers under a temporary agricultural employment certification only in the rare circumstances in which a job opportunity requires workers under the job order or work contract to perform not only field and livestock workers (combined) category duties (*e.g.,* grading and sorting produce), but also duties from another SOC code (*e.g.,* transporting produce to storage or market using a heavy tractor trailer, transporting workers using vans) for which the OEWS-based AEWR may be higher. Also, where an employer files multiple H–2A applications, each for distinct job opportunities within the employer's agricultural operation, the employer's wage obligation to the workers hired under one certified application may be potentially impacted by one AEWR adjustment notice (*e.g.,* the FLS-based AEWR adjustment in January), and its wage obligation to the workers hired under the other certified application may be potentially impacted by another AEWR adjustment notice (*e.g.,* the OEWS-based AEWR adjustment in July). For example, if an employer submits an H–2A application for workers to grade and sort produce and a separate H–2A application for a first-line supervisor, the employer's

[84] *See* 84 FR 36168, 36179–36180 (July 26, 2019) (discussing the purpose and interaction of the AEWR and PWD and changes the Department recently proposed to modernize the PWD process and ''empower States to produce a greater number of reliable prevailing wage survey results.'').

[85] Technical changes to 20 CFR 655.120(b)(2) were necessary because of the vacatur of the 2020 AEWR Final Rule and the publication of the 2022 Final Rule. The 2022 Final Rule reinstated the 2010 Final Rule's AEWR methodology and therefore reinstated the 2010 Final Rule's language regarding OFLC's publication of the AEWRs, *i.e.,* referring to publication of the AEWRs ''for each State.'' 87 FR 61660, 61796 (Oct. 12, 2022); 75 FR 6884, 6962 (Feb. 12, 2010). The new methodology adopted in this AEWR Final Rule renders the reference to ''each State'' inapt, and therefore section 655.120(b)(2) in this rule refers simply to ''each AEWR.''

wage obligation for worker(s) engaged in grading and sorting produce would potentially be impacted by the FLS-based AEWR adjustment notice in January, and its wage obligation for the worker(s) engaged in first-line supervisory duties would potentially be impacted by the OEWS-based AEWR adjustment notice in July. Although some employers may be required to evaluate and implement payroll adjustments corresponding with both AEWR adjustment cycles, the Department anticipates the incidence of a single temporary agricultural employment certification being subject to both AEWR adjustment notices to be rare, primarily given the prevalence of H–2A job opportunities encompassed within the field and livestock workers (combined) category. In addition, the Department considers the likelihood of confusion or disruption among workers subject to different temporary agricultural employment certifications to be low.

Some employers and a trade association suggested the Department revise the proposed rule to limit the potential for change in the AEWR from year-to-year, such as by implementing an annual cap on AEWR adjustment increases. Two of these commenters expressed concern that unmoderated year-to-year AEWR increases could outpace wage growth in local economies, may not reflect current conditions in the agricultural economy, and would not allow the program to function properly. The Department understands the importance of stability and predictability for both growers and workers, but declines to adopt the commenters' suggestion to cap annual AEWR increases. As explained in the previous section, the AEWR serves its purpose best when it reflects actual wages paid to similarly employed workers from year to year.

3. AEWR Bifurcation and Disaggregation of SOC Codes

The Department proposed to bifurcate the determination of AEWRs for the field and livestock workers (combined) category, a group of six SOCs, from the determination of AEWRs for work performed in any other SOC codes that qualify for the H–2A program. For H–2A job opportunities represented by the six SOC codes comprising the field and livestock workers (combined) category that the FLS reports—which comprise approximately 98 percent of H–2A job opportunities—the Department proposed to continue to determine a single statewide AEWR, as proposed in paragraph (b)(1)(i). For any non-range occupations other than the six field and livestock workers (combined) SOC codes, the Department proposed to determine a distinct statewide AEWR for each SOC code (*i.e.,* disaggregate the AEWR by SOC code), as proposed in paragraph (b)(1)(ii). After considering comments, discussed in detail below, the Department adopts these proposals without change.

A variety of commenters, including workers' rights advocacy organizations, trade associations, a nonprofit public policy advocacy organization, and an employer, supported the proposed bifurcation. The consensus among commenters who supported the proposal was that a single statewide AEWR for the field and livestock workers (combined) category provides some stability and consistency for employers and workers.

Among commenters who expressed concern about the proposal to bifurcate AEWR determinations, a trade association opposed bifurcation as ''arbitrary and capricious,'' asserting that the Department did not substantiate the premise that continuing to use a single statewide AEWR for all workers in the H–2A program may adversely affect wages of workers who perform the duties of SOC codes outside the field and livestock workers (combined) category. Conversely, a workers' rights advocacy organization suggested the Department use occupation-specific AEWRs for all job opportunities, unless the Department would exclude SOC code 45–2091 (Agricultural Equipment Operators) and aquaculture work [86] from paragraph (b)(1)(i) (field and livestock workers (combined) category). This commenter asserted that agricultural equipment operator and aquaculture work is differently skilled and higher paying than the other work in the field and livestock workers (combined) category, making an AEWR determined using field and livestock workers (combined) category wage data inaccurate for this work. In contrast, another trade association asserted that the Department should expand the group of SOC codes subject to paragraph (b)(1)(i) to include SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers), alleging that such job opportunities involve skills that are readily learned in a short period of time and do not increase with long-term experience. Similarly, several other commenters, including trade associations and employers, advocated expanding the SOC codes subject to the single statewide AEWR determination under paragraph (b)(1)(ii) to include SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) as well as, for example, SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers) and SOC code 47–2061 (Construction Laborers),[87] asserting that field and livestock workers generally perform a variety of duties, some of which are included within one (or more) of these SOC codes.

Some commenters expressed concern regarding the potential impact of the proposal on employers whose H–2A job opportunities involve tasks not encompassed within the field and livestock workers (combined) category SOC codes, which would be subject to the AEWR determinations under paragraph (b)(1)(ii). Commenters, including trade associations, a government agency, a State government, and an employer, commented that the proposed methodology would have a greater impact on smaller operations, where a worker is more likely to be required to perform a wider variety of duties, than on a larger operation, which may be more likely to have specialized positions. A trade organization asserted that the proposals would price one part of the industry—presumably those hiring workers to perform duties outside the field and livestock workers (combined) occupational group—out of existence.

The Department declines to expand or contract the group of six SOC codes for which the Department will use the FLS to establish a single statewide AEWR, where available. The Department's objective in this rulemaking is to establish an administratively efficient method for producing AEWRs sufficiently tailored to protect workers in the United States similarly employed. By using the same group of six SOC codes as the FLS uses to report its single wage finding for its field and livestock workers (combined) category, the Department satisfies its objective of basing AEWR determinations on actual wage data for workers in the United States similarly employed, when such data is available. In addition, the broad, overlapping nature of tasks listed in the Occupational Information Network (O*NET) for the six field and livestock workers (combined) SOC codes is consistent with comments above providing anecdotal accounts of common tasks performed in agricultural

[86] Aquaculture is not a distinct SOC code within the SOC system. Rather, aquaculture tasks are encompassed in SOC code 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals).

[87] The commenters did not identify the occupations by SOC codes, although one capitalized the titles of the three occupations highlighted, which correspond to the SOC codes noted.

operations and the variety of duties employers may require of field and livestock workers during a typical workday or intermittently during the period of employment. Establishing a single statewide AEWR for this group of six SOC codes provides a reasonable amount of flexibility with respect to the type of duties a field and livestock worker may perform without added recordkeeping, administrative burden, or uncertainty regarding wage obligations. While the Department finds a single statewide AEWR for this group of SOC codes to be appropriate, applying that AEWR to other SOC codes would not satisfy the Department's objective to strikes a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. For other SOC codes, such an approach would not use actual wage data for workers similarly employed to determine the AEWR. Both employers and workers benefit from a clear process to ensure that work is correctly compensated.

Although the Department's experience indicates that the duties in most H–2A job opportunities fall within the field and livestock workers (combined) category, subject to the single statewide AEWR determination under paragraph (b)(1)(i), the Department recognizes that some H–2A job opportunities may include duties that fall both within and outside of that category. For example, some employers may submit H–2A applications for job opportunities that require workers to perform a variety of duties (*e.g.,* general crop tasks encompassed in SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and construction work encompassed in, *e.g.,* SOC code 47–2061 (Construction Laborers)). For these types of mixed job opportunities, discussed in Section II.C.4, the Department believes that using the AEWR for the higher paid SOC code is necessary to prevent adverse effects on the wages of workers in the United States similarly employed resulting from inaccurate SOC code assignment.

Given the significance of the SOC code in determining the applicable AEWR under the proposed rule, some commenters expressed concern or requested clarification regarding the SWA and Certifying Officer's evaluation of an employer's H–2A job opportunity to determine its occupational classification (*i.e.,* SOC code). Commenters expressed concern that SOC code determination would create processing delays and inefficiency, rather than simplifying the process for ensuring that workers are correctly compensated. Several trade associations anticipated that employers would file additional applications for each distinct SOC code, and that SWAs and the Department would therefore be required to process those additional applications, increasing the administrative burden. One of the trade associations and an agent expressed concern about uncertainty for employers who may not be able to anticipate the AEWR to be applied to their H–2A job orders. Comments expressed concern that it could be difficult and would be an administrative burden for the Department to determine SOC codes, that the Department's SOC code determinations would be based on infrequently performed tasks, and that, as a result, wage obligations could dramatically increase. Some commenters asserted the proposals would be unworkable because tracking a worker's time performing tasks subject to different pay rates would increase administrative burden, with one employer additionally expressing concern about increased compliance liability.

The Department shares the commenters' interest in methodological clarity, processing efficiency, and accurate determinations; and straightforward application of wage obligations during the employment period. The Department accounted for these interests in its proposal to apply a single statewide AEWR to all job opportunities within one of the six field and livestock workers (combined) SOC codes. As a group, the six field and livestock workers (combined) SOC codes encompass the tasks required in approximately 98 percent of H–2A job opportunities. Each of the six SOC codes encompasses a broad variety of tasks, some of which overlap (*i.e.,* the same or similar duties are included in more than one of the six SOC codes). Although an employer may not be certain whether the SWA and Certifying Officer (CO) will assign SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) or SOC code 45–2091 (Agricultural Equipment Operators) to a particular job opportunity, for example, the same statewide AEWR would apply to that job opportunity under either SOC code. All job opportunities that require workers to perform tasks fully encompassed in any one or more of the field and livestock workers (combined) SOC codes will be subject to the same statewide AEWR. Using this approach will provide a reasonable level of flexibility in a worker's agricultural duties and predictability in employer wage obligations, while ensuring that the wages of workers in the United States similarly employed are not adversely affected. This approach also provides continuity, a reasonable level of predictability, and wage protections to workers who may perform work encompassed within multiple SOC codes included in the field and livestock workers (combined) category, whether during a workday or a work contract period.

The Department reiterates that it has discretion to determine the methodological approach that it believes best allows it to meet its statutory mandate to ensure that the employment of H–2A foreign workers does not adversely affect the wages of workers in the United States similarly employed. In exercising that discretion, the Department considered issues relating to the sound administration of the H–2A program, such as uniformity in process and predictability in AEWR determinations, protecting workers, and providing efficient temporary agricultural labor certification determinations to employers, among other factors. In the Department's policy judgment, the benefits of a more tailored AEWR, based on actual wage data for similarly employed workers, outweigh the added complexity of the proposed methodology because it ensures work that is not encompassed within the six SOC codes applicable to the field and livestock workers (combined) category will be more accurate and better reflect market conditions for workers in those occupational classifications. In addition, the Department is not required to set the AEWR at the highest or lowest conceivable point. The Department is exercising its broad discretion in this rulemaking to revise the AEWR methodology in a way that more accurately yields an appropriate wage determination reflective of wages paid to workers in the United States similarly employed for each H–2A job opportunity. The Department has determined the AEWR methodology that best protects such workers and supports sound administration of the H–2A program is the bifurcated methodology in this final rule, under which the Department will continue to issue a single, statewide AEWR for job opportunities in the field and livestock workers (combined) category using the FLS, when available, and will issue an SOC-specific statewide AEWR based on the OEWS survey for all other non-range

job opportunities. The Department adopts the proposal in this final rule.

4. For Job Opportunities Involving a Combination of SOC Codes, the Highest AEWR for the Assigned SOC Codes Governs the Employer's Wage Obligation

The Department's H–2A regulations governing an H–2A employer's wage obligations at 20 CFR 655.120(a), 655.120(c)(3), and 655.122(l) refer to ''the AEWR'' in the singular. Similarly, 20 CFR 655.120(b)(3) refers to ''the updated AEWR'' in the singular. The Department recognizes that the AEWR methodology proposed in this rulemaking could result in more than one AEWR determination applicable to an employer's H–2A job opportunity; an employer's H–2A job opportunity may require skills and duties that are encompassed within more than one SOC code and the assigned SOC codes may be subject to different AEWR determinations. For example, if an employer chooses to file a single H–2A application requiring workers to perform a variety of duties covering multiple SOC codes, the H–2A job opportunity may be assigned one SOC code that is subject to the AEWR determined under paragraph (b)(1)(i) (*e.g.,* SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse)) and another SOC code subject to an AEWR determined under paragraph (b)(1)(ii) (*e.g.,* SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers)), or an employer's H–2A job opportunity may be assigned more than one SOC code subject to more than one AEWR determined under paragraph (b)(1)(ii) (*e.g.,* SOC code 45–1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers) and SOC code 47–2061 (Construction Laborers)). To address potential confusion, and for conformity, the Department proposed paragraph (b)(5). Under proposed paragraph (b)(5), if an employer's H–2A job opportunity were assigned more than one SOC code, and the SOC codes assigned are subject to different AEWR determinations, the highest of the applicable AEWR determinations would be ''the AEWR'' and ''the updated AEWR'' for purposes of the employer's H–2A program wage obligations.[88] That is, the highest of the AEWRs applicable to the H–2A job opportunity would be ''the AEWR'' in 20 CFR 655.120(c)(3) and 655.122(l) and ''the updated AEWR'' in 20 CFR 655.120(b)(3), which is then compared to the other wage sources (*e.g.,* a prevailing wage determination or State minimum wage) in 20 CFR 655.120(a). The highest wage rate applicable to the H–2A job opportunity among those in 20 CFR 655.120(a) is the employer's minimum H–2A wage obligation. After considering public comments and providing clarification and examples of the provision's application to H–2A job opportunities, the Department adopts the proposal.

A trade association commented that the Department's proposal in paragraph (b)(5) is unnecessary because employers already voluntarily offer wages higher than the AEWR for job opportunities that require workers to perform the duties of multiple SOC codes due to market pressure. Although the Department recognizes that some employers offer and pay wages higher than the wage floor established through the AEWR, the Department continues to view paragraph (b)(5) as an important clarification regarding the AEWR determination to be used to evaluate an employer's wage obligations in the H–2A program and an essential component of the Department's responsibility to prevent adverse effect on the wages of workers in the United States.

While H–2A job opportunity assessment and SOC code assignment, discussed in more detail below, is both consistent with long standing practice in the H–2A program and OFLC's practice across the employment-based visa programs it administers (*e.g.,* H–2B and H–1B), the proposed AEWR methodology introduced the potential for an employer's H–2A job opportunity to have more than one applicable AEWR determination. Paragraph (b)(5) was intended to address the rare situation in which an employer chooses to file a single H–2A application requiring workers to perform a variety of duties covering multiple SOC codes by using an approach consistent with prevailing wage determinations in other employment-based programs OFLC administers (*e.g.,* H–2B and H–1B). Similarly, under paragraph (b)(5), the CO will use the highest AEWR among those applicable to the SOC codes assigned an employer's H–2A job opportunity as ''the AEWR'' used to evaluate the employer's wage obligations under 20 CFR 655.120(a), 655.120(b)(3), 655.120(c)(3), and 655.122(l). As previously discussed, SOC codes not included in the field and livestock worker (combined) data collection generally account for more specialized, higher paid job opportunities (*e.g.,* construction labor, logging workers, heavy truck and tractor-trailer drivers, first-line supervisors). However, in some cases, an SOC code not included in the field and livestock workers (combined) data collection may have a lower statewide OEWS survey result than the FLS survey result for field and livestock workers (combined) category. Where an employer's job opportunity involves a variety of duties, some of which are consistent with higher paid SOC codes in the State, territory, or equivalent area, the Department would not satisfy its statutory obligation if it were to establish the required wage floor for H–2A employers at a lower rate than the AEWR applicable to workers in the United States who perform work in the higher paid SOC code. An AEWR determined using the lower-paid SOC code does not adequately guard against adverse effect on the wages of workers in the United States similarly employed. In contrast to anecdotal concerns expressed in comments about a wage requirement based on duties performed for a minimal amount of time, which are discussed below, the Department generally finds that duties requiring particular skills are typically assigned to a subset of an employer's workforce—those workers who have qualifications or experience related to the duties—and, as a result, the amount of time spent performing those duties is not minimal. In addition, determining the AEWR applicable to an employer's job opportunity using the highest of the AEWRs applicable to all duties to be performed provides predictability, consistency, and administrative efficiency with regard to H–2A program wage requirements, which benefits both employers and workers.

Among comments that addressed this proposal, many expressed concern regarding how employers would adjust their operations (*e.g.,* division of labor, number of jobs offered, types of jobs offered) due to the perceived impact of paragraph (b)(5). Commenters asserted that the proposal would result in higher wage obligations for employers who include a variety of duties in the H–2A job order, which the employer considers to be routine farm work, but which the Department views as a combination of SOC codes subject to a higher AEWR determination. Commenters asserted that employers would have to reorganize operations in order to offer single-SOC code job opportunities in their H–2A applications, which would result in more H–2A applications per employer and operational disruptions, such as less flexibility in work assignments, more recordkeeping and

[88] The proposal in the 2021 AEWR NPRM is consistent with the Department's proposal in the 2019 AEWR NPRM, which was adopted in the now-vacated 2020 AEWR Final Rule.

worker oversight, and confusion or conflict among workers paid at different rates. In addition, these commenters asserted that some employers would have to hire more workers to perform the more limited spectrum of duties of each SOC-specific H–2A application, potentially for short periods, and some employers may not be able to offer a full-time job opportunity to perform only those duties. Another trade association asserted that employers would reduce operations or otherwise reduce job opportunities due to the impact of the AEWR methodology proposed. Expressing concern with burden and cost associated with filing H–2A applications, a State government, an employer association and its members, a trade association, and an agent asked the Department to clarify whether employers will be required to file multiple applications for different SOC codes and urged the Department to permit an employer to include several SOC codes in one job order.

The AEWR methodology adopted in this final rule does not dictate how many H–2A applications an employer may choose to file, the duties included in each H–2A application filed, or whether an employer chooses to address its labor needs through the H–2A program or through options other than the H–2A program. Rather, it provides a minimum wage rate threshold that an employer must offer and pay a worker for performing the H–2A job opportunity, including those H–2A job opportunities that require a worker to perform a combination of tasks that cannot reasonably be classified within a single SOC code. The Department understands that the AEWR determination applicable to an H–2A job opportunity—and the employer's resulting H–2A wage obligation—and the costs or benefits associated with filing multiple single-SOC code-specific H–2A applications or filing one H–2A application for a job opportunity encompassing a combination of duties from multiple SOC codes, subject to paragraph (b)(5), may be factors employers weigh when making business decisions regarding their agricultural operations. However, the Department maintains that the final rule does not require employers to file additional SOC-specific H–2A applications for job opportunities that require performing job duties encompassed by a combination of SOC codes. Employers may determine whether it is more cost effective—or beneficial to their business operation in other ways—to file one H–2A application for a job opportunity encompassing duties of more than one SOC code; to file more than one H–2A application, each focused on the duties of a single SOC code; or, to find avenues other than H–2A to address particular duties that are not regularly required, such as driving a semi tractor-trailer truck to market when crops are harvested. In any event, the Department has determined that requiring the payment of the highest applicable AEWR is necessary to protect against adverse effect, as discussed above.[89]

In lieu of requiring an employer to pay workers the highest of the AEWR determinations applicable to the SOC codes assigned to the employer's H–2A job opportunity, some commenters suggested the Department require the employer to compensate workers on a per-hour basis at the AEWR determination applicable to the particular duties performed during that hour. However, two commenters, who may have misunderstood the Department's proposal to use a single AEWR determination applicable to the job opportunity, regardless of when a worker would perform particular duties within the employment period, expressed concern regarding burdens associated with tracking duties, time, and pay rates, even under the Department's proposed methodology, which would not require extensive recordkeeping. The Department declines to adopt the commenters' suggestion to apply an applicable AEWR on a per-hour basis, which would increase complexity and confusion regarding pay obligations for both employers and workers.

SOC Code Assessment

Commenters expressed various concerns regarding the SWA's and CO's assessments of H–2A job opportunities and assignment of SOC code(s), which commenters understood could impact the AEWR applicable to an employer's job opportunity and, therefore, the employer's wage obligations under 20 CFR 655.120(a), 655.120(b)(3), 655.120(c)(3), and 655.122(l). Several commenters stated that the Department had not adequately explained how the SOC code assessment and related AEWR determination process would function. Two trade associations expressed concern about the potential for the SWA and CO to assess an H–2A job opportunity differently, resulting in conflicting SOC code assignments, including the assessment of whether a job opportunity involves duties covering multiple SOC codes. An agent expressed concern about the potential for misclassification of job opportunities under an inappropriate SOC code. A law firm expressed concern about the potential for inconsistencies in SOC code assignments (*e.g.,* between SWAs), the potential for increased use of general SOC codes, and the absence of a detailed administrative process, like the process used for prevailing wage determination requests in the H–2B program that includes requests for information, appeals, and requests for reconsideration. Similarly, trade associations asked for clarification regarding how an employer would challenge or appeal SOC code decisions.

The Department reiterates that the evaluation of tasks associated with an employer's job opportunity and SOC code assignment is not new in the H–2A program and declines to introduce a new, separate administrative process. Due to the time-sensitive nature of receiving and processing H–2A applications under the statute, the SWA will continue to evaluate an employer's job opportunity in the first instance—and determine the appropriate SOC code(s) for the job opportunity—when it reviews an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. The SWA will continue to enter the SOC code assigned to the employer's job opportunity on the Form ETA–790, *Agricultural Clearance Order.* After the employer files its *H–2A Application for Temporary Employment Certification,* the OFLC CO will continue to perform a secondary evaluation of the employer's application and job order, including SOC coding. As is currently the case, the CO may determine whether a different SOC coding is necessary, for example, based on additional information received during processing.

In making a determination of the applicable SOC code(s), the CO will continue to compare the duties and requirements of the employer's job opportunity with SOC definitions, skill requirements, and tasks that are listed in O*NET. Where similar tasks appear in more than one SOC code (*i.e.,* overlapping tasks), such as transporting workers or agricultural commodities or maintaining and repairing farm equipment, the CO will continue to consider other factual information presented in the employer's application and job order (*e.g.,* special skill or license requirements) that provide context for determining which SOC code or codes best represent the employer's job opportunity.

Even where the CO evaluates the totality of circumstances presented in

[89] *See also* 86 FR 68174, 68183 (Dec. 1, 2021) (''The Department best protects against adverse effect by setting the AEWR applicable to the job opportunity at the highest of the applicable AEWRs.'').

the employer's job order and H–2A application and determines that more than one SOC code must be assigned to appropriately reflect the job offered, the job opportunity may or may not be subject to paragraph (b)(5). For example, an H–2A job opportunity that requires a worker to hand harvest field crops and operate light trucks to drive themselves along with other farmworkers from place to place around the farm property during the course of performing hand-harvest work, may be assigned SOC code 45–2091 (Agricultural Equipment Operators), which encompasses driving ''trucks to haul . . . farm workers,'' [90] in addition to SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). As both SOC codes 45–2091 and 45–2092 are subject to the same AEWR determination (*i.e.,* the AEWR determination under paragraph (b)(1)(i)), this H–2A job opportunity is subject to a single AEWR determination, and paragraph (b)(5) would not apply. In contrast, an H–2A job opportunity that requires a worker to perform hand-harvest work and to pick-up farmworkers, according to a regular schedule, from employer-provided housing or a centralized pick-up point, in a van used only for passenger transport, on public roads (*e.g.,* from a motel to the farm), and drive them to the place(s) of employment to perform hand-harvest work, may be assigned SOC code 53–3053 (Shuttle Drivers and Chauffeurs), in addition to SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). SOC codes 53–3053 and 45–2092 are subject to different AEWR determinations; SOC code 53–3053 is subject to the AEWR determination under paragraph (b)(1)(ii), while SOC code 45–2092 is subject to the AEWR determination under paragraph (b)(1)(i). Therefore, paragraph (b)(5) applies when determining the employer's H–2A wage obligation, and the higher of the two AWERs (*i.e.,* the AEWR applicable to SOC code 53–3053 and the AEWR applicable to SOC code 45–2092) is the single AEWR for evaluating the employer's wage obligations for all of the work performed for this job opportunity. Similarly, for an H–2A job opportunity that requires a worker to perform hand-harvest work and help the farm supervisor direct or monitor the work of other workers engaged in planting and harvesting activities in the field, the CO may assign only SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), as that SOC code encompasses ''direct[ing] and monitor[ing] the work of other seasonal help during . . . harvesting.'' However, if the duties identified in the job order include tasks such as training workers, monitoring compliance with safety regulations, or scheduling work crews, which are not encompassed in SOC code 45–2092, then the CO may also assign SOC code 45–1011 (First-Line Supervisors of Farm Workers) to the H–2A job opportunity. As SOC code 45–1011 is subject to the AEWR determination under paragraph (b)(1)(ii), while SOC code 45–2092 is subject to the AEWR determination under paragraph (b)(1)(i), paragraph (b)(5) applies when determining the employer's H–2A wage obligation, and the higher of the two AEWRs (*i.e.,* the AEWR applicable to SOC code 45–1011 and the AEWR applicable to SOC code 45–2092). If the AEWR applicable to SOC code 45–1011 is higher than the AEWR applicable to SOC code 45–2092, then the AEWR applicable to SOC code 45–4011 is the single AEWR for evaluating the employer's wage obligations for all of the work performed for this job opportunity, unless a subsequent adjustment to either of the applicable AEWRs changes which of the two AEWRs is highest. Similar to the highest of the wage sources governing an employer's wage obligations under 20 CFR 655.120(a), the highest of the applicable AEWRs governs which rate is ''the AEWR'' for evaluating an employer's wage obligations under 20 CFR 655.120(b)(3), 655.120(c)(3), and 655.122(l).

For job opportunities involving driving duties, as explained in the NPRM, the CO will continue to look at factors such as the type of equipment involved (*e.g.,* pickup trucks, custom combine machinery, or semi tractor-trailer trucks; makes and models of machines to be used), the location where the work will be performed (*e.g.,* on a farm or off), and any qualifications and requirements for the job opportunity in order to determine the appropriate SOC code to assign to the employer's job opportunity. Similarly, for job opportunities that involve driving farmworkers from place to place around the farm property during the course of performing hand-harvest work, the CO will consider factors such as the type of vehicle (*e.g.,* a farm truck or van or a hired van or bus, such as a Calvans vehicle), the location where the farmworker transport will be performed (*e.g.,* around the farm, including on private roads, or on public roads), and any qualifications and requirements for the transport (*e.g.,* type of driver's licensure, gross vehicle weight, vehicle maintenance responsibilities, paperwork requirements) to determine the appropriate SOC code to assign to the employer's job opportunity. Because each employer's need for labor or services is unique to its operational needs, the CO must evaluate each H–2A job opportunity on a case-by-case basis, considering the totality of the information in an H–2A application and job order, to determine the appropriate SOC code(s).

As in current practice, if the CO determines that the employer's wage offer is less than the wage rate that must be offered to satisfy H–2A program requirements (*e.g.,* the wage offer is less than the highest of the wage sources listed in 20 CFR 655.120(a), including the AEWR determination applicable to the H–2A job opportunity), the CO will issue a Notice of Deficiency alerting the employer to the issue and providing an opportunity for the employer to amend its wage offer. If the employer chooses not to amend its wage offer, the CO will deny the application for failure to satisfy criteria for certification, and the employer may appeal the final determination. If the SOC code assigned to the H–2A job opportunity is material to the CO's final determination, the employer may contest the SOC code assessment on appeal.

Many commenters expressed concern that the SWA and CO would assign multiple SOC codes, even though all of the duties may be encompassed within a single SOC code, because those duties appeared in multiple SOCs as overlapping tasks. The Department recognizes that its statement in the NPRM that multiple SOC codes would be assigned if duties ''can be classified in multiple SOCs'' could have been misinterpreted as allowing or encouraging the SWA or CO to search for and assign as many SOC codes as may be relevant to any of the duties, qualifications, or requirements included in the employer's job opportunity description.[91] This was not the Department's intent. Rather, the Department's intent was more clearly expressed where the Department explained in the NPRM that ''[g]enerally, a job opportunity corresponds with a single SOC code if all of the duties fall within a single occupation and the qualifications, requirements, and other factors are consistent with that occupation'' and the CO will assign more than one SOC code only if the job opportunity ''cannot be classified within a single SOC.'' As

[90] The tasks listed in O*NET are derived from surveys of workers, who may use terms like ''trucks'' to refer to a variety of vehicles (*e.g.,* vans or sports utility vehicles (SUV)).

[91] *See* 86 FR 68174, 68183 (Dec. 1, 2021).

demonstrated in examples provided in this section, multiple SOC codes will be assigned in situations where the employer's job opportunity includes duties that are not found within a single SOC code and, therefore, multiple SOC codes must be assigned in order to reflect all of the duties within the SOC system.

After reviewing comments received and scenarios raised in requests for clarification or expressing concern that employers will experience disruption in the assignment of the applicable AEWR to their job opportunities, the Department believes that the vast majority of job opportunities will continue to be covered by the six field and livestock workers (combined) SOC codes. Those codes are quite broad, both individually and as a grouping, and any H–2A job opportunity classified as any one or more SOC codes within this group of six SOC codes will not be impacted by this final rule, as only one AEWR determination will apply. For example, absent additional job details that might indicate otherwise, an H–2A job opportunity that requires a worker to care for livestock, including driving a truck loaded with supplemental feed to the locations where livestock are grazing and repairing fences, would be assigned only SOC code 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), as the list of tasks for this SOC code in O*NET includes duties driving trucks to distribute feed and repairing fences and other enclosures. Likewise, an H–2A job opportunity that requires a worker to manually harvest crops in a field or orchard, perform other crop cultivation duties, and move the truck that holds the harvested crop from one place in the field or orchard to another and to storage or a pick-up point on the farm would be assigned only SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), as the list of tasks for this SOC code in O*NET includes duties driving trucks loaded with agricultural products on the farm. If, in the second example, the ''truck'' was a heavy or more specialized piece of agricultural equipment than the basic example suggests (*e.g.,* a harvesting machine that gathers and holds the crop during harvest), SOC code 45–2091 (Agricultural Equipment Operators) would be assigned in addition to SOC code 45–2092, because operating heavy agricultural machinery is not covered in SOC code 45–2092, but it is covered in SOC code 45–2091, while manual harvesting is covered in SOC code 45–2092, but is not covered in SOC code 45–2091. However, based on the description of the location, type of equipment involved, and purpose of the truck driving in this example (*i.e.,* driving trucks loaded with harvested crops from one location to another on the farm), neither SOC code 53–3033 (Light Truck Drivers) nor SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) would be assigned to the job opportunity. Therefore, even if the SWA and CO assign a combination of SOC codes—45–2091 and 45–2092—paragraph (b)(5) would not impact the AEWR determination applicable to the employer's job opportunity, as both SOC codes are subject to the same AEWR determination under paragraph (b)(1)(i).

In addition, the Department reminds employers that H–2A job opportunities must include only qualifications and requirements that are bona fide and consistent with non-H–2A job opportunities in the same or comparable occupations and crops.[92] This also applies to H–2A job orders that include duties that fall under a combination of SOC codes. For example, an H–2A job order seeking workers to perform hand-harvest tasks, accounting tasks, and semi-truck driving tasks would present an unusual combination of duties, spanning multiple SOC codes, and either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of the combination of duties specified in the job offer.

Some commenters objected to the SWA and CO's consideration of all duties listed in an employer's H–2A job opportunity description when assessing SOC code assignment. Most of these commenters urged the Department to adopt some form of a primary or majority duties test or otherwise disregard duties an employer characterizes as minor, infrequent, or intermittent. A trade association asserted that using a ''primary duties'' test would reduce the risk of inconsistent SOC code assignments between the SWA and CO and simplify employer filings by not requiring separate applications for each SOC code.

Trade organizations, a government agency, and an employer offered various approaches for identifying duties that should be included or excluded from consideration during SOC code assessment. Among commenters suggesting the SOC code should be based on the principal or most important duty the worker performs, some suggested the Department only consider duties performed 51, 80, or 90 percent of the time, or that an SOC code should apply only if workers perform mostly the same duties as in the SOC code description. Other suggestions included disregarding any duty performed as less than 10 percent of a worker's day-to-day activities; a duty performed for 1 hour during an 8-hour workday; any duty performed less than 20 percent of the time, although without specifying whether ''time'' meant per day, per work week, or throughout the entire employment period; ''minor truck driving,'' without specifying the meaning of ''minor''; and construction labor performed intermittently during the employment period, without specifying the meaning of ''intermittently.'' Some employers and trade associations recommended that the Department require the employer to identify the percentage of time per duty on their H–2A application and attest that if the percentage changes for any of the workers such that a different duty becomes the primary duty, the employer will notify the Department and the SWA of the change and request an updated wage for that worker.

The Department declines to adopt commenters' suggestions. For one, the Department is concerned with how such suggestions would work in practice. Rather than resulting in more appropriate and consistent AEWR determinations, assigning an SOC code based on the ''primary duties'' or the percentage of time identified for each duty in an employer's job opportunity description could permit or encourage employers to combine work from various SOC codes, interspersing higher-skilled, higher-paying work among many workers so that the higher-paying work is never a duty performed by any one employee more than the specified percentage. Such an approach would undermine the Department's goals of providing predictability, consistency, and administrative efficiency in AEWR determinations, and of preventing inaccurate SOC code assignment. In addition, such an approach to assigning SOC codes could permit an employer to gain the benefit of work in a higher paid SOC code, while paying less than the AEWR applicable to that work. Ultimately, a ''primary duties''-type approach runs a risk of adversely affecting the wages of workers in the United States who are employed in the higher paid SOC code. In addition, implementing the ''percentage per duty'' disclosure requirement would increase administrative burden for employers (*e.g.,* substantial recordkeeping to ensure that the actual work each worker performed aligns with the percentages

[92] *See* 20 CFR 655.122(b).

disclosed), and potentially restrict fluid movement of workers among all the duties the employer requires in the job opportunity, which was a concern many commenters expressed. The Department believes that the CO's review of the totality of each H–2A job opportunity, as discussed above, addresses commenters' concerns regarding consistency and accuracy of SOC code assignment, without increasing administrative burden, complexity, or risk of inadequate AEWRs.

Similarly Employed by SOC Code, not Industry

Some commenters asserted that truck driving, mechanic, and construction duties performed in agriculture are categorically different than truck driving, mechanic, and construction duties performed in other industries and should not be classified using SOC codes outside the field and livestock workers (combined) occupational group, subject to the AEWR determinations based on OEWS, and potentially resulting in H–2A job opportunities assigned multiple SOC codes and subject to paragraph (b)(5). Commenters asserted that the truck driving conditions involved in H–2A applications are distinct from those that are classified as SOC code 53–3033 (Light Truck Drivers) or SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers), or that the nature of the commodity being hauled (*e.g.,* a harvested crop, rather than a nonagricultural commodity) should be dispositive in the SOC code assignment of an H–2A job opportunity involving truck driving. These commenters stated that farmers may require a worker to drive only short distances and only through rural areas (*e.g.,* between the farm and a nearby packing house), never hundreds of miles at a time, navigating urban areas, or delivering industrial goods. In addition, commenters asserted that SOC code 45–2091 alone should apply to drivers who haul a farmer's crop or commodity from the field, including drivers of semi-trucks hauling the crop or commodity off the farm and ''regardless of whether the driver is operating the semi-truck with a Class A CDL license or operating the semi-truck with a Standard Driver's License under the Farm-Related CDL Exemption.''

The Department acknowledges that some H–2A job opportunities involving truck driving would not appropriately be classified as SOC code 53–3033 (Light Truck Drivers) or SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) based on the equipment, vehicle weight, location, and other factors involved, as discussed above. However, the Department disagrees that SOC code 45–2091 (Agricultural Equipment Operators) is the only SOC code appropriate for truck-driving duties listed on an H–2A application. As discussed in the NPRM, an H–2A job opportunity requiring a worker to operate semi-trucks with at least 26,001 pounds Gross Vehicle Weight (GVW), whether a commercial driver's license is required or not, over public roads (*e.g.,* hauling the crops away from the farm to market, to a packing facility, or to storage) would likely result in the CO assigning SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers). Thus, the Department views operating semi-trucks hauling commodities over public roads to generally involve the same or similar skills, qualifications, and tasks, whether the commodity is agricultural or nonagricultural in nature.

One commenter who addressed construction labor asserted that SOC code 47–2061 involves tasks that are too highly skilled to apply to construction on farms. The Department respectfully disagrees. The Department receives H–2A applications involving skilled construction labor or services, some requiring licensure, particularly where a grower contracts with an H–2ALC for a project requiring construction labor. For example, the Department receives H–2A applications for livestock confinement or grain bin elevator construction on farms that require workers to perform duties such as reading and following plans and measurements; aligning and sealing structural components (*e.g.,* walls and pipes), sometimes by welding; building frameworks (*e.g.,* walls, roofs, joists, studding, and window and door frames); installing metal siding, windows, ceiling tiles, and insulation; and pouring concrete. These construction duties are consistent with SOC code 47–2061, not with SOC code 45–2093. In addition, the location of the work—on a farm or off a farm—or type of structure to be constructed—a livestock confinement building or a retail building—does not alter the essential duties or skills required of the worker. Where an H–2A job opportunity's tasks, qualifications, and requirements indicate skilled construction work will be performed, then SOC code 47–2061 (Construction Laborers) may be assigned, or potentially a different SOC code if the construction work is even more specialized (*e.g.,* 47–2051 (Cement Masons and Concrete Finishers)).

Two trade associations and an employer asserted that on-farm mechanics perform very limited mechanic work that is very different from the duties mechanics outside the agricultural industry perform. One stated that on-farm mechanics perform routine maintenance on a farm's equipment to keep it operational, ''not reprogramming computer-based trucks or rebuilding engines.'' The Department acknowledges that some on-farm mechanics may perform only the type of routine maintenance consistent with SOC code 45–2091's (Agricultural Equipment Operators) listed tasks of ''[o]perate or tend equipment used in agricultural production, such as tractors, combines, and irrigation equipment'' or ''[a]djust, repair, and service farm machinery and notify supervisors when machinery malfunctions.''[93] However, the Department receives H–2A applications for mechanics that include duties such as the following: diagnose, repair, and overhaul engines, transmissions, components, electrical and fuel systems, etc. on tractors, irrigation systems, generators and/or other farm equipment; make major mechanical adjustments and repairs on farm machinery; repair defective parts using welding equipment, grinders, or saws; repair defective engines or engine components; replace motors; fabricate parts, components, or new metal parts using drill presses, engine lathes, welding torches, and other machine tools (grinders or grinding torches); test and replace electrical circuits, components, wiring, and mechanical equipment using test meters, soldering equipment, and hand tools; read inspection reports, work orders, or descriptions of problems to determine repairs or modifications needed; and maintain service and repair records. Duties of this type and scale are encompassed within 49–3041 (Farm Equipment Mechanics and Service Technicians), and not within the routine general maintenance or repair tasks associated with SOC code 45–2091. The Department notes that if, in addition to duties on the list above, an H–2A job opportunity included diagnosing, repairing, and overhauling engines, transmissions, components, electrical and fuel systems, etc. on cars, the H–2A job opportunity would be a combination of occupations: 49–3041 (Farm Equipment Mechanics and Service Technicians) and 49–3023 (Automotive Service Technicians and Mechanics), which encompasses duties that include diagnosing, adjusting, repairing, or overhauling automotive vehicles. Similarly, if the H–2A job opportunity included diagnosing, repairing, and overhauling engines, transmissions, components, electrical and fuel systems,

[93] *https://www.onetonline.org/link/summary/45-2091.00* (last accessed August 5, 2022).

etc. on trucks (including diesel trucks) or busses, the H–2A job opportunity would be a combination of SOC codes: 49–3041 (Farm Equipment Mechanics and Service Technicians) and 49–3031 (Bus and Truck Mechanics and Diesel Engine Specialists), which encompasses duties that include diagnosing, adjusting, repairing, or overhauling trucks and busses; or maintaining and repairing any type of diesel engines.

Corresponding Employment

Trade associations asked the Department to clarify how the AEWR determined under the proposed methodology would interact with the definition of ''corresponding employment'' at 20 CFR 655.103(b). Specifically, these commenters asked the Department to clarify whether where the H–2A job opportunity involves duties that span multiple SOC codes, non-H–2A workers who only perform the duties associated with one SOC code included in the job opportunity would be in ''corresponding employment'' with H–2A workers who perform any of the same duties as well as the duties associated with another SOC code.[94] As explained in *Overdevest Nurseries LP* v. *Walsh,* 2 F.4th 977 (D.C. Cir. 2021), a non-H–2A worker is in ''corresponding employment'' with an H–2A worker if the non-H–2A worker performs any duties included in the H–2A job order, or any other agricultural work performed by the H–2A worker(s), regardless of whether the non-H–2A worker performs all of the duties listed in the job order. Agreeing with the Secretary's reasoning behind the corresponding employment regulation, the D.C. Circuit explained that this requirement ''advances the statute's purpose . . . by requiring employers to pay non-H–2A workers the same amount that they pay the H–2A workers when they are doing the same work.'' *Id.* At 984 (internal citations omitted). The Court concluded that this is an ''eminently reasonable interpretation'' of the statute's mandate to prevent ''adverse effect'' on workers in the United States ''similarly employed.'' *Id.* Applying the AEWR methodology adopted in this final rule, a non-H–2A worker is engaged in corresponding employment when the worker performs any of the duties listed in the H–2A job order, regardless of whether the worker performs or does not perform all of the duties listed in the job order. The worker in corresponding employment must be paid at least the applicable H–2A wage rate for all time so spent. For example, consider an employer whose H–2A job opportunity includes hand-harvesting and driving a semi-truck to haul the harvested crop to delivery points away from the farm. Assuming the AEWR determination for SOC code 53–3032 (Heavy and Tractor-Trailer Truck Drivers) is higher than the AEWR determination for SOC code 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse Workers) and all other potential wage sources (*e.g.,* any applicable State minimum wage), the employer must offer and pay all of its workers employed in the H–2A job opportunity the higher AEWR amount for all hours worked, *i.e.,* for hours spent performing the hand-harvesting duties and for hours spent performing the truck-driving duties. The employer also employs non-H–2A workers to perform only hand-harvesting work. These workers would be in ''corresponding employment'' when performing the hand-harvesting duties described in the job order, regardless of whether such workers do or do not also perform the truck-driving duties, and must receive the same pay as the H–2A workers receive for performing that same work. Accordingly, the employer must pay these workers in corresponding employment at least the H–2A wage rate (in this example, the AEWR determination for SOC code 53–3032) for time spent engaged in such corresponding employment. As discussed above, the Department anticipates that most H–2A job opportunities will fall within one or more of the SOC codes encompassed within the six field and livestock workers (combined) SOC codes, and, therefore, wage complexities related to ''corresponding employment'' are unlikely to occur.

Importance of Appropriate SOC Code Assignment

As explained in the NPRM, determining the appropriate SOC code is an important component of the Department's decision to move to SOC-specific wages. The H–2A program is not limited to job opportunities classifiable within the six field and livestock workers (combined) SOC codes. Based on the statutory and regulatory framework governing the definition of what constitutes agricultural labor or services, the Department's experience is that a wide range of jobs within the U.S. agricultural economy, depending on the nature and location of work performed, could be eligible under the H–2A visa classification. Though the vast majority of job opportunities will be classifiable within a relatively small number of SOC codes, the Department has issued H–2A certifications to employers covering jobs classified in dozens of SOC codes, including approximately three dozen in fiscal year 2021 alone. Use of the highest applicable wage in these cases reduces the potential for employers to offer and pay workers a wage rate that, while appropriate for the general duties to be performed, is not appropriate for other, more specialized duties the employer requires. In addition, use of the highest applicable wage imposes a lower recordkeeping burden than if the Department permitted employers to pay different AEWRs for job duties falling within different SOC codes on a single *Application for Temporary Employment Certification.* This policy is also consistent with the way the Department determines prevailing wage rates for jobs that cover multiple SOC codes in other employment-based visa programs.

Under this final rule, if the job duties on the H–2A application (including the job order) constitute a combination of SOC codes that do not all fall within the field and livestock worker (combined) occupational grouping, the Department will determine the applicable AEWR based on the highest AEWR among the SOCs assigned to the job opportunity. In the event an employer's job opportunity requires the performance of duties that are not encompassed in a single SOC code's description and tasks and the SOC codes that must be assigned to cover the entirety of the employer's job opportunity are subject to different AEWRs (*e.g.,* a field and livestock worker (combined) SOC code and an SOC code not encompassed in the field and livestock worker (combined) occupational group, or two SOC codes neither of which are encompassed in the field and livestock worker (combined) occupational group), the AEWR for the job opportunity is the highest AEWR for all applicable SOC codes to reduce the potential for inaccurate SOC code assignment and AEWR determination and effectuate the purpose of the AEWR (*i.e.,* protect against adverse effect on the wages of workers in the United States similarly employed).

The Department has considered all the comments it received and has decided to adopt the language of the NPRM as proposed. Under this final rule, if the job duties on the job order are not encompassed within a single SOC code, the CO will determine the applicable AEWR based on the highest

[94] *See* 20 CFR 655.103(b) (The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.'')

AEWR for all applicable SOC codes, as provided in paragraph (b)(5).

D. Out-of-Scope Comments on the Proposed Rule

The Department received comments on several issues that were unrelated to its proposal to revise the methodology it uses to determine the AEWR for non-range job opportunities in the H–2A program. Some comments requested regulatory action beyond the proposed changes that the Department presented for public comment in the NPRM or discussed potential Congressional action (*e.g.,* immigration reform). Some commenters noted general farm worker labor shortages and commented on the current administration's policies (*e.g.,* programs to address the trucking shortage) that the commenters asserted are exacerbating the shortage. A workers' rights advocacy organization noted the historical and current exclusion of agricultural workers from laws that protect workers in the United States (*e.g.,* National Labor Relations Act). Comments about policies or laws outside the parameters of the H–2A program are all out of scope. Other comments addressed topics unrelated to the H–2A program, such as requests for employment, matters at a U.S. Consulate, or related to COVID–19, all of which are beyond the scope of this rulemaking. Many commenters suggested that the Department abandon the AEWR altogether as a means of preventing the employment of H–2A workers from adversely affecting the domestic workforce. These comments were not within the scope of this rulemaking, which the NPRM expressly limited to revising the methodology for calculating the AEWR. 86 FR at 68185 (''[t]he Department is not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H–2A program . . . .'') For example, some commenters objected to the Department's continued use of the AEWR as one of the primary means of preventing adverse effects of H–2Arkers on the domestic workforce, with some commenters characterizing the underlying assumptions of the AEWR (*e.g.,* regarding the existence of workers in the United States similarly employed who require protection) as outdated. These commenters noted the growth of the H–2A program and paucity of SWA referrals and a limited number of hires from those few referrals as an indicator of the lack of domestic labor. Some commenters asked the Department to hold hearings on whether to continue using the AEWR concept. Some asserted that the Department misuses the AEWR as a preventative measure and should instead use the AEWR only after a factual finding of adverse effect in particular areas or occupations. Others stated the Department should examine current dynamics in the labor market (*e.g.,* particular labor shortages), hold public hearings to ''examine the underlying tenants [*sic*] of the Department's mandate and test solutions'' obtained through testimony presenting agricultural industry realities, or otherwise engage in further evaluation of adverse effect with focus on the employers' perspective. One commenter stated the Department should, in consultation with USDA, assess the impact of the continued use of AEWR on the global competitive position of farmers in the United States and on U.S. workers, due to offshoring or innovations to reduce employers' dependence on labor (*e.g.,* mechanization and automation). The continued use of the AEWR was not the subject of this rulemaking, so these comments are out of scope.

Other comments outside the scope of this rulemaking addressed program issues unrelated to the methodology for setting the AEWR for non-range job opportunities, such as regulation of farm labor contractors, U.S. worker recruitment, employment eligibility of applicants referred for employment, prevailing wage survey methodology, the AEWR methodology for range occupations, logging, the definition of agricultural labor or services, and the length of H–2A certifications. For example, some commenters expressed concern about employers refusing to offer wages higher than the AEWR during recruitment of prospective workers. One of these commenters expressed concern about the failure of wage sources *other than* the AEWR to protect U.S. workers' wages. The commenter asserted that a Federal minimum wage rate that is lower than the AEWR and the absence of prevailing wage survey findings, collective bargaining agreements, and State minimum wage rates applicable to H–2A job opportunities undermine workers' efforts to demand higher wages. Two other commenters urged the Department to require that employers ''reasonably negotiate'' wages with applicants—both prospective H–2A workers and U.S. applicants—and to reconsider whether U.S. workers who demand wages above an employer's offer are considered ''available'' within the meaning of 8 U.S.C. 1188(a)(1)(A) for purposes of reducing the number of H–2A workers potentially certified. To the extent these comments object to the use or role of the AEWR in the H–2A program overall or suggest concerns with aspects of the H–2A program beyond the AEWR methodology (*e.g.,* recruitment and consideration of U.S. applicants; prevailing wage surveys), these comments address issues beyond the scope of this rulemaking, which is limited to proposed changes to the methodology the Department uses to determine the AEWR for non-range job opportunities in the H–2A program. However, as explained above and below, the Department continues to believe that the AEWR, functioning as a wage floor, is a critical measure to protect against adverse effect on the wages of agricultural workers in the United States, a particularly vulnerable workforce, and that the improvements made in this final rule to the AEWR methodology will serve to better protect against such adverse effect.

III. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OIRA reviewed this final rule and has determined that it is a significant regulatory action under E.O. 12866, but not an economically significant regulatory action within the scope of section 3(f)(1).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored

to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Public Comments

Multiple commenters stated the Department underestimated cost increases for employers and suggested the rule should be economically significant. The comments claimed this increased labor cost can put pressure on farms and reduce their advantage in the global marketplace and regional marketplaces, and potentially put them out of business. The Department recognizes that there will be some cost increases to some employers as described in the analysis of transfer payments section. The analysis in this final rule estimates the impacts of the rule based on actual wage records in Fiscal Year (FY) 2020 and FY 2021 to determine the most accurate impact of the revised AEWR structure in the final rule. Of the 25,150 certifications between FY 2020 and FY 2021, only 732 (2.91 percent) have wage impacts and the average certification would have an impact of $63,943 with an average per worker wage impact of $5,117. Based on the Department's analysis, the overall transfer payments imposed by the rule are less than $100 million and, therefore, not economically significant.

Multiple commenters asserted that the Department failed to use the most recent data available and suggested the Department has not taken into account the average 11 percent year-over-year increase in applications since 2017, resulting in an inaccurate estimate of wage impacts on farms affected by the AEWR. They also suggested that the OEWS does not accurately reflect farmworker wages. The proposed rule calculated wage impacts using the most recent data available at the time of publishing which consisted of data through Quarter 3 of FY 2021. In addition, the proposed rule calculated assumptions used in the analysis such as wage rates, growth rates, and impacted entities using the most recent full year of data available, 2020. In this final rule, the Department has updated the analysis to include the entirety of FY 2021 disclosure data to calculate wage impacts and updated data sources and growth rate calculations to include 2021 data now that there is a full year of disclosure data available. The growth rate calculations, as discussed in the analysis below, account for the increasing number of certifications that have occurred historically, resulting in an estimate of increased wage impacts over time.

One commenter asked the Department to compare existing FLS wage rates for field and livestock workers (combined) occupations with State or national OEWS data when the FLS is not available to facilitate evaluation of the impact of wages in the event the FLS were to become unavailable beyond the geographical limits discussed in this rule (*e.g.,* Alaska). In this final rule, the Department is adding a comparison of wage rates into the docket.

One commenter asserted the analysis in the proposed rule was incomplete because it does not consider how many employers and workers would be impacted by mid-season AEWR adjustments for OEWS updates that will be effective on or about July 1 annually. The Department has considered mid-season changes to wage rates from newly released OEWS data. As discussed in the section on transfer payments, the Department estimates wage impacts assuming that OEWS wages are released in June. The Department reiterates that 98 percent of the job opportunities subject to the AEWR methodology in this final rule will be subject to FLS-based AEWRs only—and related AEWR adjustments, if the employment period crosses the calendar year—and will not be impacted by OEWS adjustments. In addition, for the small percentage of job opportunities subject to an OEWS-based AEWR, wage adjustment would impact only those with an employment period crossing July 1. The Department's estimates of wage impacts due to OEWS-based adjustments during the employment period accounts for a potential impact on this small percentage. The Department's calculations of wage impacts assumes that worker wages would remain constant if the mid-season OEWS shows a decline in wage rates, while worker wages would increase if the mid-season OEWS release shows an increase in wage rates.

Multiple commenters asserted that the Department underestimates the impact of the revised AEWR structure because it does not consider impacts on specialty crops, specific industries, or occupations. Examples include nurseries and greenhouse farms, fruit and tree nut farms, and vegetable and melon operations. The commenter suggested that data used does not accurately represent these varying subsectors. The Department understands that impacts on each industry will be different depending on market dynamics, including local wage rates. The Department has taken the approach of estimating wage impacts using actual historical certification data that allows for detailed wage impacts to be calculated for each certification based on the industry and location of the certification.

Several commenters asserted that the Department underestimates the impact of the revised AEWR structure because it does not consider classifications of workers to new (higher wage) SOC codes as a result of the requirement to pay the highest of applicable SOC code AEWRs. One commenter asserted that all farm work overlaps and classifications should not be based on intermittent activities and others assert that workers should not receive higher wages if they only minimally perform the higher classification.

The Department understands that we may have underestimated the impact of the revised AEWR structure due to the final rule's new requirement to pay the highest of applicable SOC code AEWRs. However, the Department does not have any data readily available to estimate the number of workers that may have their SOC codes reclassified as a result of the final rule,[95] and commenters did not provide such data in their comments on the NPRM. In addition, the Department considers the impact of this potential underestimation to be *de minimis* for the reasons included in our discussion and clarification above regarding SOC assignment and assignment of the highest AEWR applicable, namely, that the Department anticipates low incidence of multiple SOCs assigned, resulting in job opportunities subject to the highest of multiple AEWRs.

Many comments asserted that the equity analysis in the proposed rule was insufficient and asserted that the Department was claiming that the transfers from employers to H–2A workers is good for diversity, equity, and inclusion. In addition, commenters

[95] The group of potentially reclassified SOCs fall into two groups: (1) jobs that were assigned an inappropriate SOC code; and (2) combination of SOC-code jobs that were assigned the field and livestock worker (combined) SOC. Commenters are correct that the specific incidences are case-specific and require detailed analysis to assign codes. To determine the number of potentially reclassified certifications would require review of each case in the certification dataset. As such, the number of workers who may have their SOC codes reclassified because of this final rule is not readily accessible to the Department.

stated that the equity analysis does not consider impacts on individuals in rural communities. The Department contends that the distributional impact analysis section does not make any claims about the positives or negatives of transfers from employers to H–2A workers. The distributional impact analysis only shows the distribution of U.S. workers within the SOC codes impacted by the H–2A program. E.O. 12866 does not require an analysis of impacts on rural communities or an analysis in general of underserved communities, as that term is defined by E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. However, the Department expects that the wage impacts estimated in this regulatory impact analysis (RIA) will predominantly occur in rural communities where farms are located.

Multiple commenters asserted the Department does not consider administrative costs including increased paperwork, filing fees to DOL and U.S. Citizenship and Immigration Service (USCIS), attorney costs, and costs to DOL to review increased applications. One of these commenters suggested that the number of applications could increase by three to four times. The Department does not have data to quantify administrative costs. As discussed in the unquantifiable cost section of the RIA below, the Department expects some administrative costs such as payroll changes to be *de minimis* because employers already need to update payrolls when AEWR wage rates are released annually. The Department acknowledges that there may be other administrative costs, but commenters did not provide specific data to quantify those costs.

Finally, one commenter asserted that the impacts of the proposed rule would increase food inflation. The Department does not have data to quantify impacts on food inflation from the estimated wage transfers. However, the Department reiterates that the analysis shows only 2.9 percent of certifications would have wage impacts under the AEWR methodology in this final rule and, as discussed in the Regulatory Flexibility Act of 1980 (RFA), the wage impacts are not significant for 98 percent of small employers. The Department does not expect this final rule alone will cause a general increase in food prices because there are many other factors such as an overall increase in the price level and an increase in the transportation and material costs that would have more substantive impacts on food prices.[96]

Outline of the Analysis

Section III.A.1 describes the need for the final rule, and Section III.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section III.A.3 explains how the provisions of the final rule will result in quantifiable costs and transfers and presents the calculations the Department used to estimate them. In addition, Section III.A.3 describes the unquantified costs of the final rule, a description of qualitative benefits, and presents an analysis of distributional impacts of the rule. Section III.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfers of the final rule. Finally, Section III.A.5 describes the regulatory alternatives that were considered during the development of the final rule.

Summary of the Analysis

The Department estimates that the final rule will result in costs and transfers. As shown in Exhibit 1, the final rule is expected to have an annualized cost of $0.073 million and a total 10-year quantifiable cost of $0.51 million at a discount rate of 7 percent.[97] The final rule is estimated to result in annual transfers from H–2A employers to H–2A employees of $38.22 million and total 10-year transfers of $268.47 million at a discount rate of 7 percent.[98]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE

[2021 $millions]

	Costs	Transfers
Undiscounted 10-Year Total	$0.51	$375.07
10-Year Total with a Discount Rate of 3 percent	0.51	322.73
10-Year Total with a Discount Rate of 7 percent	0.51	268.47
10-Year Average	0.05	37.51
Annualized at a Discount Rate of 3 percent	0.06	37.83
Annualized with at a Discount Rate of 7 percent	0.07	38.22

The total cost of the final rule is associated with rule familiarization. Transfers are the results of changes to the AEWR methodology and, more specifically, in H–2A job opportunities where the FLS does not adequately collect or consistently report wage data at a State or regional level. See the costs and transfers subsections of Section III.A.3 (Subject-by-Subject Analysis) for a detailed explanation.

The Department was unable to quantify some costs and benefits of the final rule and describes them qualitatively in Section III.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

As discussed above, court-issued injunctions prevented USDA from suspending FLS data collection for CY 2020 and prevented the Department from further implementing the 2020 AEWR Final Rule on December 23, 2020, resulting in a return to the 2010 Final Rule AEWR methodology. Under

[96] The Department does not have data to estimate the impact of this rule on specific types of food. The Department believes that the impact of the rule will most likely affect Puerto Rico and Alaska, where no AEWRs currently exist because the FLS data does not collect wage data covering those geographic areas.

[97] The final rule will have an annualized cost of $0.06 million and a total 10-year cost of $0.51 million at a discount rate of 3 percent in 2021 dollars.

[98] The final rule will have annualized transfer payments from H–2A employers to H–2A employees of $37.83 million and a total 10-year transfer payments of $322.73 million at a discount rate of 3 percent in 2021 dollars.

the 2010 Final Rule, FLS wage data is used to determine the AEWRs for all H–2A non-range job opportunities. However, the Department remains concerned that the use of a single AEWR for all non-range job opportunities in the H–2A program may adversely affect the wages of workers in the United States similarly employed in certain jobs where the FLS does not adequately collect or consistently report wage data at a State or regional level. Therefore, the Department will use the bifurcated approach set forth in the 2020 AEWR Final Rule that set a single AEWR based on the FLS for the vast majority of job opportunities used by employers in the H–2A program—six SOC codes covering field workers and livestock workers—while shifting AEWR determinations to the OEWS survey for all other SOC codes for which the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.,* tractor-trailer truck drivers, farm supervisors and managers, construction workers, logging workers, and many occupations in contract employment). As AEWR determinations become more SOC-specific, the Department believes it is appropriate to continue requiring that employers pay the highest applicable wage if the job opportunity cannot be classified within a single SOC code to reduce the potential for employers to misclassify workers, guard against adverse effect on the wages of similarly employed workers in the United States who are engaged in work encompassed in the higher-paid SOC code.

The Department has also determined that two major aspects of the 2020 AEWR Final Rule are inconsistent with the Department's statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect: (1) the imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS published in November 2019, and (2) using the BLS ECI solely to adjust AEWRs annually thereafter. Accordingly, the Department has determined these policies must be reconsidered and will implement revisions in this final rule that better meet the statute's twin goals to ensure that employers can access legal agricultural labor while maintaining strong wage protection for workers in the United States similarly employed.

2. Analysis Considerations

The Department estimated the costs and transfers of the final rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B). This existing baseline is consistent with the 2010 Final Rule because the 2020 AEWR Final Rule was preliminarily enjoined and subsequently vacated by a Federal district court, as explained above.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the final rule (*i.e.,* costs and transfers that accrue to entities affected). The analysis covers 10 years (from 2023 through 2032) to ensure it captures major costs and transfers that accrue over time. The Department expresses all quantifiable impacts in 2021 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of affected entities that are expected to be impacted by the final rule. The average number of affected entities is calculated using OFLC temporary agricultural labor certification data from 2017 through 2021. The Department provides this estimate and uses it to estimate the costs of the final rule.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[CY 2017–2021 average]

Entity type	Number
Annual Unique H–2A Applicants	8,856

Growth Rate

The Department's estimated growth rates for applications processed and certified H–2A workers based on FYs 2012 to 2021 H–2A program data, is presented in Exhibit 3.

EXHIBIT 3—HISTORICAL H–2A PROGRAM DATA

Fiscal year	Applications certified	Workers certified
2012	5,278	85,248
2013	5,706	98,814
2014	6,476	116,689
2015	7,194	139,725
2016	8,297	165,741
2017	9,797	199,924
2018	11,319	242,853
2019	12,626	258,446
2020	13,552	275,430
2021	15,619	317,619

The geometric growth rate for certified H–2A workers using the program data in Exhibit 3 is calculated as 17.9 percent. This growth rate, applied to the analysis timeframe of 2023 to 2032, would result in more H–2A certified workers than projected employment of workers in the relevant H–2A SOC codes by BLS.[99] Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012–2021 H–2A program data to forecast workers and applications, and estimated geometric growth rates based on the forecasted data. The Department conducted multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.[100] Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to

[99] Comparing BLS 2030 projections for combined agricultural workers (SOC 45–2000) with a 17.9 percent growth rate of H–2A workers yields estimated H–2A workers that are about 127 percent greater than BLS 2030 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at *https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm.*

[100] The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

project workers and applications through 2032. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model. This resulted in an estimated growth rate of 7.5 percent for H–2A applications and 6.3 percent for H–2A certified workers. The estimated growth rates for applications (7.5 percent) and workers (6.3 percent) were applied to the estimated costs and transfers of the final rule to forecast participation in the H–2A program.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in Section III.A.3 (Subject-by-Subject Analysis).

Compensation Rates

In Section III.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the final rule. Exhibit 4 presents the hourly compensation rates for the SOC codes expected to experience a change in the number of hours necessary to comply with the final rule. The Department used the mean hourly wage rate for private sector Human Resources Specialists (SOC 13–1071).[101] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [102] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.[103] We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 4—COMPENSATION RATES

[2021 dollars] *

Position	Grade level	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
		(a)	(b)	(c)	d = a + b + c
Private Sector Employees					
HR Specialist	N/A	$34.00	$14.19 ($34.00 × 0.42)	$5.78 ($34.00 × 0.17)	$53.97

* Numbers do not add due to rounding.

3. Subject-By-Subject Analysis

The Department's analysis below covers the rule familiarization costs, unquantifiable costs, transfers, and qualitative benefits of the final rule. In accordance with Circular A–4, the Department considers transfers as payments from one group to another that do not affect total resources available to society. This analysis includes the cost of rule familiarization and transfers associated with the AEWR wage structure in this final rule. The Department also described efficiency impacts, payroll and other transition costs, and the distributional impacts that could result from this final rule.

Costs

The following section describes the costs of the final rule.

Quantifiable Costs

Rule Familiarization

When the final rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H–2A applications (7.5 percent) to the average number of annual unique H–2A applicants from 2017 to 2021 (8,856) to determine the number of unique recurring H–2A applicants impacted in the first year the rule is in effect. The number of unique H–2A applicants (9,520) was multiplied by the estimated amount of time required to review the rule (1 hour).[104] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($53.97 per hour), who the Department assumes will be responsible for rule familiarization as they are typically well versed in the wages and benefits structure of employment. This calculation results in a one-time undiscounted cost of $513,804 [105] in the first year after the final rule takes effect. The annualized cost over the 10-year period is $60,234 and $73,154 at discount rates of 3 and 7 percent, respectively.

Unquantifiable Costs

a. Efficiency Impacts

The final wage methodology is designed to achieve the statute's goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. The AEWR provides a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment. In the case relevant labor markets are perfectly competitive, if the final rule results in a wage floor above competitive market wages, it will produce some deadweight loss (DWL). In the case of when employers have some monopsony market power, if the final rule sets a wage floor below competitive market wages, it may produce some DWL if employers exercise market power, but otherwise will not. Setting minimum wage rates

[101] BLS, *May 2021 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist, https://www.bls.gov/oes/current/oes131071.htm* (last modified Mar. 31, 2022).

[102] *See* Cody Rice, U.S. Environmental Protection Agency, Wage Rates for Economic Analyses of the Toxics Release Inventory Program (June 10, 2002), *available at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[103] *See Employer Costs for Employee Compensation, https://www.bls.gov/news.release/ecec.toc.htm* (last modified March 18, 2022). This shows the ratio of total compensation to wages and salaries for all private industry workers.

[104] This estimate reflects the nature of the final rule. As a rulemaking to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[105] Numbers do not add due to rounding.

has implications on economic efficiency that are complicated and difficult to assess because, in certain combinations of SOC codes and geographies, the gross average hourly wage rates used to determine the AEWRs annually for each State under this final rule may act as a wage floor that is above competitive market equilibrium wages for certain job opportunities, whereas in other job opportunities imperfect competition may suppress domestic labor markets at quantities below the competitive market equilibrium. In this case, if the rule raises the wage floor, resulting wages will be closer to what they would be in a competitive market, resulting in greater efficiency (and reduced DWL).

These two impacts are dependent on local labor market conditions, the nature of the agricultural work to be performed and wage payment structure (*i.e.,* fixed hourly pay versus combination of hourly and piece-rate pay), the relation of the AEWR to the regional OEWS wage, and the shape and components (*i.e.,* makeup of nonimmigrant foreign and domestic workers) of the combined temporary agricultural employment labor supply curve in the local or regional labor market.

The Department is unable to quantify these efficiency impacts because it does not have data on all local labor market conditions for all occupations, data on foreign labor supply curves, and how these interact with employer demand. The Department requested public comment on the DWL or other labor market inefficiencies resulting from the final rule and did not receive any. The efficiency impact of the final rule is limited only to the 2 percent of H–2A workers whose wages the final rule will affect, while there would be no change to the DWL for the other 98 percent of H–2A workers.[106] Therefore, the DWL resulting from the final rule is likely very small. Because the market equilibrium wages for construction workers, supervisors/managers of farmworkers, and logging workers are above current baseline AEWRs, the final rule may create some efficiency gain (or decrease in the DWL) for jobs within the 2 percent when it raises the wage floor from the current baseline AEWRs toward competitive equilibrium wages if employers currently exercise market power to prevent wages from being bid up to competitive equilibrium rates. On the other hand, there may be instances in which the new wage floor (depending on the job and geographic area) could be above the market equilibrium wage; this would result in efficiency loss (or increase in the DWL). A DWL occurs when a market operates at less than or more than the market equilibrium output. The AEWR sets compensation in some cases above the equilibrium level and in other cases may set wage levels that allow employers with market power to suppress wage rates below the competitive equilibrium, resulting in a labor shortage. When the AEWR is set above market equilibrium, the higher cost of labor can lead to a decrease in the total number of labor hours purchased in the local labor market. On the contrary, when the AEWR is set below competitive equilibrium and employers have market power, employers may pay below-competitive-equilibrium wage rates, decreasing the total number of worker labor hours purchased in the local labor market. DWL is a function of the difference between the compensation the employers are willing to pay for the hours lost and the compensation employees are willing to take for those hours. In short, DWL is the total loss in economic surplus resulting from a ''wedge'' between the employer's willingness to pay for, and the employees' willingness to accept work arising from the intervention (in this case the AEWR).

The Department is unable to quantify the DWL without data on the equilibrium wage arising from each locality and occupational code's labor demand and combined immigrant foreign worker and domestic U.S. worker labor supply curves. The following paragraphs qualitatively discuss changes in the AEWR wages that may result in some DWL. In the analysis of wage transfers, only 2 percent of workers would be employed in H–2A job opportunities where the AEWR will change under the final rule from the current baseline. For the 98 percent of workers employed in H–2A job opportunities under the six occupational classifications covering field workers and livestock workers reported by the FLS with no change to wages, the final rule does not change the DWL and existing labor market efficiencies or inefficiencies from the current baseline.

In some cases, the baseline AEWR creates a DWL by setting a minimum wage above the market equilibrium, because the hourly wage represents an annual weighted average across six occupational classifications covering a State or multi-State region. Under the final rule when the AEWR is annually adjusted, the DWL may increase when the AEWR covering the State or multi-State region also increases and remains above market equilibrium. Under the final rule this may occur for some, but not all, positions covering field and livestock workers where the AEWR is determined using the annual weighted statewide gross hourly wage based on the OEWS survey.[107] The OEWS survey does not collect wages for fixed-site farms and ranches but does include data for establishments that support farm production activities (*i.e.,* farm labor contractors) and are engaged in similar agricultural labor or services. Additionally, the types of agricultural establishments included in the OEWS survey, such as farm labor contractors, represent an increasing share of workers certified by the Department on H–2A applications. The OEWS wage for SOC codes associated with these establishments is unlikely to reflect any wage suppression created by nonimmigrant foreign workers' willingness to work at lower wages than domestic U.S. workers. Therefore, an AEWR determined based on OEWS domestic wage data would likely be higher than both the baseline AEWR (based on the FLS) and the market equilibrium wage for temporary agricultural employment. Furthermore, under the final rule, for workers with roles spanning multiple SOC codes, the highest wage would be used, which would be above the market equilibrium wage, on average. Therefore, for most SOC code and area combinations, the AEWRs under this final rule, set at the OEWS wage, would serve as a wage floor and may create DWL in the labor market, as illustrated by Figure 1.

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[106] Under this final rule the Department would use the AEWR methodology set forth in the 2010 Final Rule (*i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined)) for the SOC codes (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) which comprise 98 percent of H–2A workers. Of the 25,150 certifications between FY 2020 and FY 2021 only 732 (2.91%) have wage impacts from the final rule.

[107] Of the 25,150 certifications in 2020 and 2021, 24,430 were for field and livestock workers. Of those 24,430, only 28, or 0.1%, would have AEWR determined based on the OEWS survey.

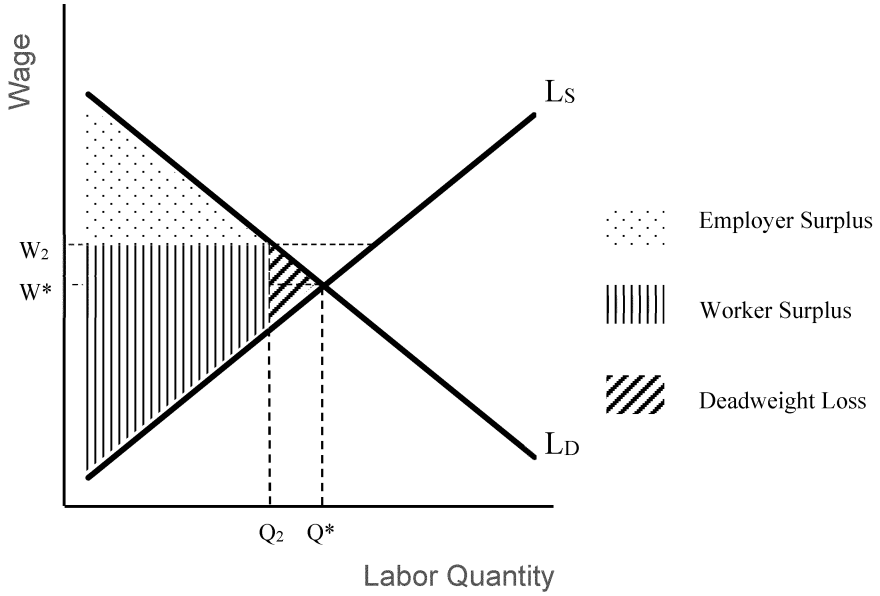

Figure 1: Given a combined nonimmigrant foreign worker and domestic U.S. worker supply curve (L_S) with equilibrium wage W* less than the AEWR set at the OEWS wage (W_2), there will be a DWL in the labor market for that SOC code and area combination.

When employers have market power in the labor market and the AEWR is set below the domestic competitive market equilibrium wage, then there may be a DWL in the associated U.S. labor market. In the H–2A program there are some combinations of SOC codes and geographic areas where this can occur. For example, workers in higher paid SOC codes and SOC codes that are typically performed off farm yet qualify under the H–2A program (*e.g.,* logging operations) have a baseline wage set by the FLS that is substantially below the U.S. market equilibrium according to OEWS data covering the State. Under the final rule the AEWR will be increased for these SOC codes to the State-level OEWS.[108] In addition, workers in SOC codes that continue to have an AEWR set by the FLS, but in areas where FLS data for a given year cannot be reported, will have the AEWR set by a weighted average OEWS wage for the field and livestock worker occupational category which may be below market wage rates for a specific SOC code and geographic area combination.[109] In these examples, some U.S. employers that do not compete with other employers for workers may set wage rates below competitive equilibrium at a wage level that balances the revenue gains from an additional worker against the cost of raising wages for all employees to attract that marginal worker. Some U.S. and foreign workers who would be willing to work at competitive equilibrium wages may not be willing to work at a lower wage. In these cases, a DWL is produced in the U.S. labor market, but under the final rule that DWL is reduced because of the higher AEWR (*see* Figure 2).

[108] For example, Mobile Heavy Equipment Mechanics, Except Engine (49–3042, in ME) has a 2021 AEWR of $14.99 and under the final rule would have an OEWS wage of $22.85.

[109] For example, Agricultural Workers, All Other (45–2099, in SOC) has a 2021 AEWR of $11.81. If FLS data was unavailable it would have a weighted average OEWS wage of $14.18 and the OEWS wage for that specific SOC codes is $16.51. Thus, the weighted average OEWS wage would be below the actual market wage for that SOC code.

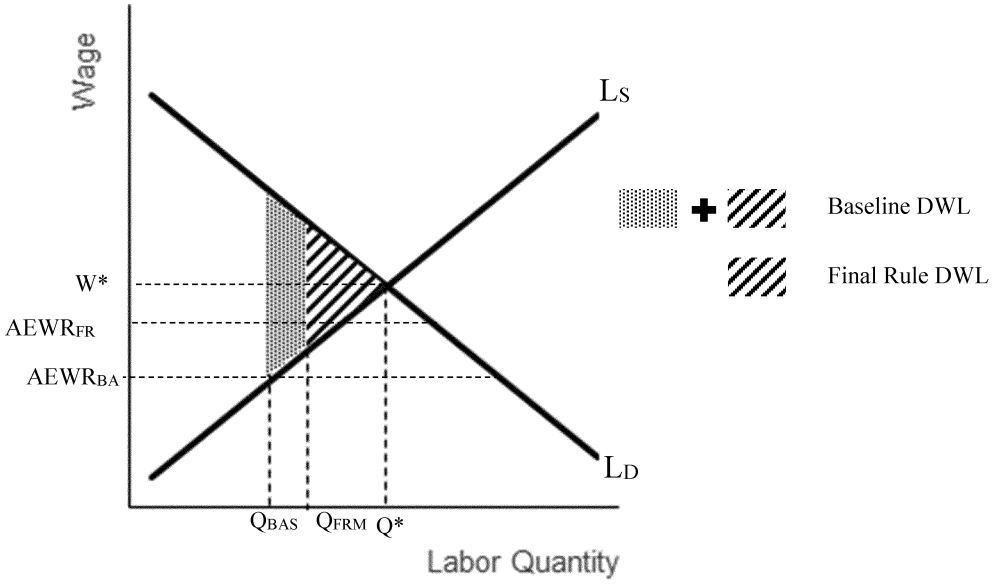

Figure 2: For some SOC code and area combinations the final rule may reduce DWL in the U.S. labor market. Under the baseline the wage set at $AEWR_{BA}$ allows for the legal hiring of foreign workers below the competitive labor market equilibrium wage rate (W*). In a competitive market, employers will bid up wages to W*. If employers do not compete with other employers for workers, they may be able to keep wages below W* even though it creates a labor shortage. With a large supply of workers who lack bargaining power willing to work at the $AEWR_{BASE}$ wage rate, but others unwilling, the total number of workers willing to work at that wage rate is $Q_{BAS,}$ which is below the competitive equilibrium quantity of workers Q*. This results in the Baseline DWL. Under the final rule the wage set at $AEWR_{NPRM}$ is increased, closer to the competitive labor market equilibrium wage rate (W*). More workers (Q_{FR} are willing to work at this rate and the DWL in the U.S. labor market decreases to the Final Rule DWL.

When labor markets are competitive, an AEWR set below the U.S.-only labor market equilibrium wage rate in absence of foreign labor, but above the market equilibrium, with both domestic and foreign labor, results in DWL for the United States because it reduces domestic employer surplus more than it increases domestic worker surplus. In a competitive labor market with no AEWR, there will be no DWL. Figure 3 illustrates this in a simplified case where domestic and foreign agricultural workers are perfect substitutes, and an infinite supply of foreign agricultural workers are willing to work at wage rate $W_{FOREIGN}$ below the U.S.-worker-only market equilibrium wage rate $W_{US\text{-}ONLY}$. The competitive market equilibrium will equal $W_{FOREIGN}$ and domestic employers will hire a combination of $Q_{EFFICIENT\_US}$ domestic workers and ($Q_{EFFICIENT\_TOTAL}$-$Q_{EFFICIENT\_US}$) foreign workers. U.S. DWL will be zero because U.S. total surplus (U.S. employer surplus + U.S. worker surplus) is maximized.

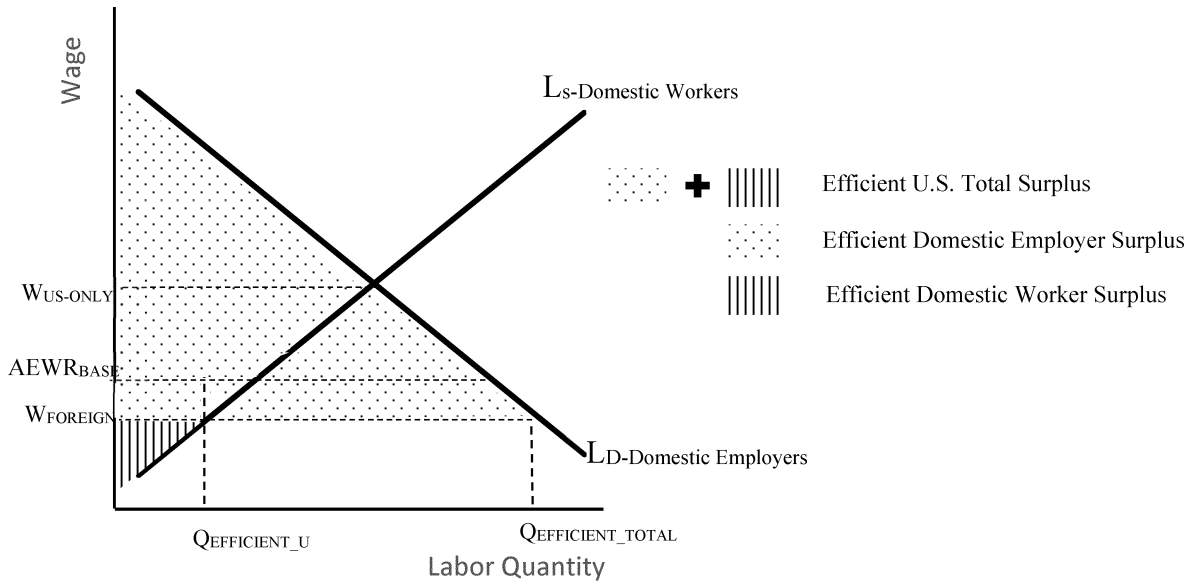

Figure 3: Under the efficient competitive equilibrium with no AEWR, assuming domestic and foreign labor are perfect substitutes and foreign labor is infinitely supplied at wage $W_{FOREIGN}$, U.S. employers will hire Q_{CE_TOTAL} number of workers at the labor market competitive equilibrium wage rate ($W_{FOREIGN}$) below the equilibrium wage rate $W_{US\text{-}ONLY}$ if no foreign workers were allowed. With a large supply of foreign workers willing to work at $W_{FOREIGN}$, U.S. employers will not need to raise the wage rate any further to attract more workers. The number of U.S. workers willing to work at that wage rate is $Q_{Efficient\_U}$. This results in the Efficient Domestic Worker Surplus, the Efficient Domestic Employer Surplus, and the Efficient U.S. Total Surplus. Because any change in quantity of labor would decrease total surplus, total surplus is maximized and DWL is zero.

Setting an AEWR above the competitive labor market equilibrium wage creates a DWL. Working from the same assumptions as Figure 3, Figure 4 illustrates that setting $AEWR_{BASE}$ above the competitive equilibrium wage $W_{FOREIGN}$ reduces the total number of workers employers are willing to hire from $Q_{EFFICIENT\_TOTAL}$ to Q_{AEWR_TOTAL}. Because employers now hire fewer workers at a higher wage rate, domestic employer surplus falls. At the higher wage, the number of domestic workers willing and hired to work increases from $Q_{EFFICIENT\_US}$ to Q_{AEWR_US}, possibly increasing domestic worker surplus. Total surplus falls, generating DWL, because the increase in domestic worker surplus is only a fraction of the decrease in domestic employer surplus. Figure 4 depicts U.S. DWL as the amount that the decrease in domestic employer surplus exceeds the increase in domestic worker surplus. Global DWL is smaller than this if we consider the welfare impacts on foreign workers from increasing their wages. Increasing the AEWR under the final rule will extend all these impacts; that is, increase DWL, decrease domestic employer surplus, and increase domestic worker surplus.

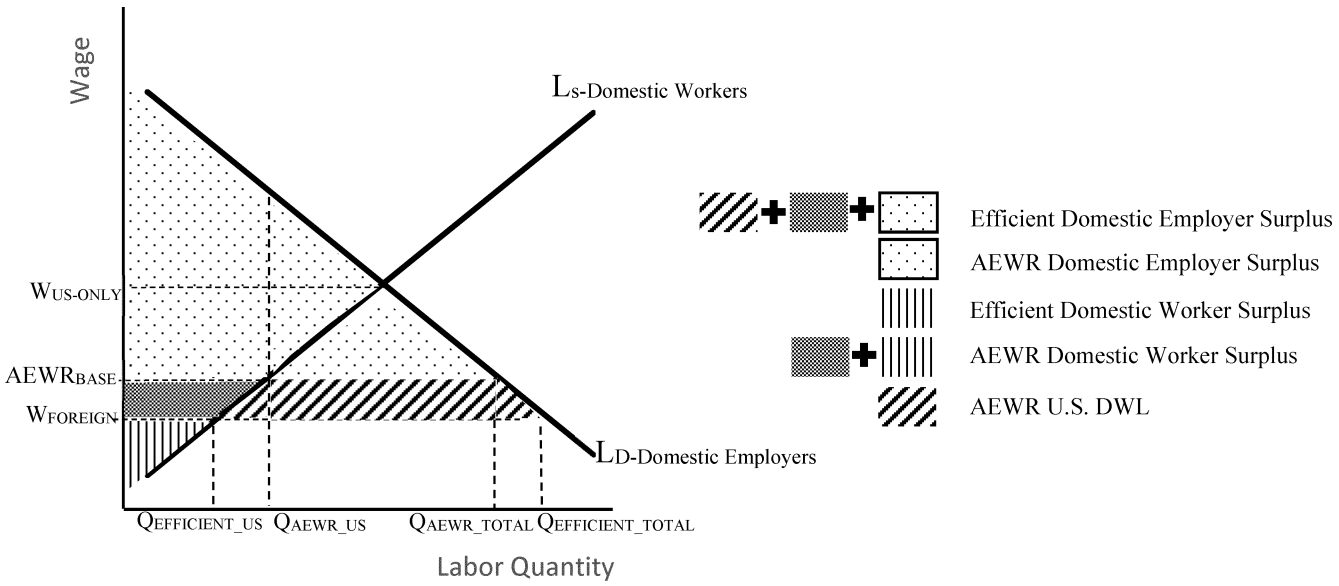

Figure 4: Under the baseline the wage set at $AEWR_{BASE}$ allows for the legal hiring of foreign workers below a U.S.-only labor market equilibrium wage rate ($W_{US-ONLY}$). With a large supply of foreign workers willing to work at the $AEWR_{BASE}$ wage rate the number of U.S. workers willing to work at that wage rate is Q_{AEWR_US}. This results in the AEWR Domestic Worker Surplus, the AEWR Domestic Employer Surplus, and the AEWR U.S. DWL.

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b. Payroll and Other Transition Costs

The final rule will result in new AEWR wage rates for some SOC code and geographic area combinations compared to the baseline. Companies employing H–2A workers will need to update payrolls to account for the new AEWR wage rates. The Department does not quantify this cost and expects it to be *de minimis* because employers already need to update payrolls when AEWR wage rates are released annually. Therefore, they already have the capabilities and processes to quickly, and at *de minimis* cost, update payrolls when AEWR wage rates change.

The final rule may also result in other transition costs to some employers for recruitment and training if they hire U.S. workers for the jobs that H–2A workers perform. The Department sought comment on these transition costs and did not receive any data from commenters allowing for quantification of the potential transition expenses such as recruitment and training.

Transfers

The following section describes the transfers of the final rule related to the revisions to the wage structure. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H–2A workers. H–2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.[110] Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.[111]

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary of Labor determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. As discussed below, the Department's final rule maintains this general wage-setting structure but modifies the methodology by which it establishes the AEWRs.

Currently, pursuant to the 2010 Final Rule, the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's NASS. This methodology produces a single AEWR for all agricultural workers in a State or

[110] Walmsley, Winters, and Ahmed report the remittances to labor income for migrants from Mexico (the primary source of H–2A workers) at nearly 20%. The ratio ranges from close to 5% for migrants from China to close to 70% for migrants from India. These remittances can provide substantial financial assistance for migrant workers' families in their home countries. Terrie L. Walmsley et al., *Global Trade Analysis Project, Measuring the Impact of the Movement of Labor Using a Model of Bilateral Migration Flows* (Nov. 2007), *available at https://www.gtap.agecon.purdue.edu/resources/download/4635.pdf. See also* Dilip Ratha, *Remittances: Funds for the Folks Back Home, International Monetary Fund, https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm* (last updated Feb. 24, 2020); Daniel Costa & Philip Martin, *Economic Policy Institute, Temporary Labor Migration Programs* (Aug. 1, 2018), *available at https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/.*

[111] If, instead, the rule was analyzed from the perspective of the U.S. economy, these wages would be costs since they would be paid to individuals outside the economy.

region, without regard to SOC code, and no AEWR in geographic areas not surveyed by NASS (*e.g.,* Alaska). As discussed in depth in the preamble, the Department is concerned that this methodology may have an adverse effect on the wages of workers in higher paid SOC codes, such as supervisors of farmworkers, tractor-trailer truck drivers, logging workers, and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of the FLS field and livestock workers (combined) occupational category, which does not include those workers.

Under this final rule the Department modifies the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. Both the FLS and OEWS survey provide data tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes employment and gross hourly wage data from employer establishments that support farm production activities. Although they do not represent fixed-site farms and ranches, these establishments employ workers engaged in similar agricultural labor or services as those workers who are directly employed by farms and ranches.

As explained above, these types of employer establishments (*i.e.,* farm labor contractors) participate in the H–2A program and represent an increasing share of the worker positions certified by the Department on H–2A applications both in the predominant field and livestock workers (combined) occupational group and in SOC codes that are less common in the H–2A program. While labor demanded from H–2ALCs (*i.e.,* farm labor contractors) using the H–2A program in non-range occupations has significantly increased in recent years, they only represented approximately 16 percent of all certified H–2A applications in FY 2020.[112] Individual employers and agricultural associations filing for one or more individual association members, which generally hire workers directly for employment, constituted approximately 84 percent of all H–2A applications.[113] Using the FLS, which surveys directly hired agricultural workers, to set AEWRs therefore is more accurate and reasonable because, in addition to being a comprehensive source of farmworker wage data, it also surveys the agricultural employers who make up a significant majority of H–2A applications.

Under this final rule the Department uses the AEWR methodology set forth in the 2010 Final Rule, *i.e.,* setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined) in the State or region, as reported by the FLS, when that data is available, for the following SOC codes:

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

If the FLS does not report the annual gross average hourly wage in the State or region, the Department will set the annual AEWR for these SOC codes (45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) using the statewide gross average hourly wage rate the OEWS survey reports. If the OEWS survey does not report the annual statewide gross average hourly wage, the Department will set the AEWR for these SOC codes by using the annual national gross average hourly wage the OEWS survey reports. To produce an equivalent AEWR for field and livestock worker job opportunities using the OEWS survey under the final rule, BLS will compute an annual weighted average hourly wage using the establishment data reported for these SOC codes at the State and national level.

For all other SOC codes, the Department will annually set the AEWR for agricultural services or labor based on the statewide annual average hourly wage reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the Department will set the AEWR based on the national annual average hourly wage reported by the OEWS survey.

To produce a combined field and livestock AEWR using the OEWS, BLS provided the Department with the weighted average hourly wage for 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099 SOC codes at the State and national level using the OEWS May 2020 survey. The OEWS May 2020 wages are applicable to work occurring between July 1, 2021, and June 30, 2022. The FY 2020 and FY 2021 certification data includes work occurring as early as October 2019. To determine the appropriate weighted average hourly wage for these six SOC codes between October 2019 and the start of the OEWS May 2020 period, July 1, 2021, the Department estimated the weighted average hourly wage for OEWS May 2018 and OEWS May 2019 data sets. Using public OEWS survey data, the Department calculated the average annual percent change for wages in these six SOC codes between OEWS May 2018 and OEWS May 2019 and between OEWS May 2019 and OEWS May 2020. To determine the weighted average hourly wage for the six SOC codes in OEWS May 2019, the Department used the percentage growth in the wages to adjust the BLS weighted average hourly wage.[114]

The Department calculated the impact on wages that would occur from the implementation of the revised AEWR methodology. For each H–2A certification in FY 2020 through FY 2021, the Department calculated total wages under the current AEWR baseline, *i.e.,* pursuant to the 2010 Final Rule, and total wages under the revised AEWR methodology. Then, the Department determined the annual wage impact in CY 2020 and CY 2021 by subtracting the AEWR baseline wage from the final rule wage. The Department summed the wage impacts in each calendar year, converted the wage impact to 2021 dollars using the ECI[115] and took the average impact of CY 2020 and CY 2021.[116] Wage impacts

[112] Based on an analysis of temporary agricultural labor certification data for FY 2020, the Department issued 12,491 temporary agricultural labor certifications covering 272,610 worker positions for non-range employment. Of this total, the Department certified 2,052 H–2A applications covering 116,479 worker positions submitted by, or on behalf of, H–2ALCs; 1,669 H–2A applications covering 34,236 worker positions submitted by agricultural associations by, or on behalf of, one of more individual association members; and 8,770 H–2A applications covering 121,895 worker positions submitted by individual employers (*i.e.,* fixed-site agricultural businesses). *See* ETA, *Performance Data, https://www.dol.gov/agencies/eta/foreign-labor/performance* (last visited Sept. 29, 2021).

[113] *Id.*

[114] The Department divided the BLS calculated weighed average hourly wage rate in OEWS May 2020 by 1 + the average percent change. Similarly, the OEWS May 2018 weighted average hourly wage was determined by dividing the OEWS May 2019 weighted average hourly wage by 1 + the average percent change. The Department completed these calculations at the State and national level.

[115] BLS, *Employment Cost Index Archived News Releases, https://www.bls.gov/bls/news-release/eci.htm* (last modified July 30, 2021).

[116] While there were working days and therefore wage impacts in CY 2019 and CY 2022 in the FY

for 2023 to 2032 were estimated by applying the H–2A workers growth rate (6.3 percent) to reflect that the number of H–2A workers affected (and the total wage impact) will grow annually at 6.3 percent. The Department assumed that the difference in wage rates between the baseline and the final rule wage will be the same over the 10-year analysis period. In addition, it is assumed that the geographic and SOC distribution of H–2A workers remain the same over the 10-year analysis period. Because the final rule wage-setting methodology would not retroactively impact workers and OEWS wages in the May 2022 OEWS will not apply until July 2023, the wage impact in 2023 is divided by 2 to account for the fact that only half the year of wages would be impacted.[117]

The Department provides two examples illustrating the above wage calculation methodology for H–2A certifications. Exhibits 5 and 6 illustrate how total wages are calculated for the baseline and the final rule. The number of workers certified is multiplied by the number of hours worked each day, the number of days in a year that the employees worked, and the AEWR baseline for the year(s) in which the work occurred (Exhibit 5 provides an example of the calculation of the AEWR baseline). In the example provided in Exhibit 5 for SOC code 45–2092, the AEWR baseline wage is not available in Alaska, so the baseline wage, for the purpose of this analysis, is set by the public OEWS State wage as a proxy for estimating wage transfers.

EXHIBIT 5—AEWR WAGE UNDER THE BASELINE (EXAMPLE CASE)

SOC code	Baseline wage source	Number of certified workers	Basic number of hours	Number of days worked in 2020	Number of days worked in 2021	Wage 2020	Wage 2021	Total AEWR wages 2020	Total AEWR wages 2021
		(a)	(b)	(c)	(d)	(e)	(f)	(a*(b/5)*c*e)	(a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); OEWS State.	14	40	152	10	$15.54	$15.72	$264,552.96	$17,606.40

For calculating the AEWR wage under the final rule, the Department multiplied the number of certified workers by the number of hours worked each day, the number of days in a year that the employees worked, and the annual average hourly gross State AEWR wage for SOC codes set by the AEWR. In the example provided in Exhibit 6, for farmworkers (SOC code 45–2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse) the FLS AEWR wage is not available in Alaska, so the AEWR is set by the weighted average OEWS wage. For SOC codes outside of 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, the annual average hourly gross wage from the State-level OEWS-based wage for the appropriate SOC code and worksite State is used, or the national OEWS-based wage is used if the State-level wage is not available.

EXHIBIT 6—AEWR WAGE UNDER THE FINAL RULE (EXAMPLE CASE)

SOC code	Final rule wage source	Number of certified workers	Basic number of hours	Number of days worked in 2020	Number of days worked in 2021	Wage 2020	Wage 2021	Total AEWR wages 2020	Total AEWR wages 2021
		(a)	(b)	(c)	(d)	(e)	(f)	(a*(b/5)*c*e)	(a*(b/5)*d*f)
45–2092	FLS AEWR (unavailable); weighted average OEWS.	14	40	152	10	$15.15	$16.78	$257,913.60	$18,793.60
13–1074	OEWS	10	35	280	50	25.45	29.84	498,820.00	104,440.00

The changes in wages constitute a transfer from H–2A employers to H–2A employees for SOC codes set by the OEWS survey. For SOC codes set by the FLS AEWR there is no wage impact, unless the worksite location is in Alaska or Puerto Rico where no AEWR currently exists because the FLS does not collect wage data covering these geographic areas.[118] To account for the growth rate in H–2A workers the total transfers in each year are increased annually by the estimated growth rate of H–2A workers (6.3 percent).[119] The results are average annual undiscounted transfers of $37.5 million. The total transfer over the 10-year period is estimated at $375.07 million undiscounted, or $322.73 million and $268.47 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $37.83 million and $38.22 million at discount rates of 3 and 7 percent, respectively.

The estimated transfers are likely on the high end of potential transfers. The

2020 and FY 2021 certification data, the Department did not include wage impacts in CY 2019 and CY 2022 in the average annual impact calculations because a full CY of work is not captured in the FY 2020 and FY 2021 certification data for CY 2019 and CY 2022. At the time of publishing only one quarter of FY 2022 is available that would have work for CY 2022, therefore the Department maintains the use of FY 2020 and FY 2021 data.

[117] The Department assumes in the economic analysis of the final rule that the final rule will not become effective until the second half of the year 2023.

[118] There is no FLS wage available for Alaska or Puerto Rico. Because of that, wages under the baseline in this analysis are set by the public OEWS State data as a proxy for estimating wage transfers. The H–2A wage provisions are the highest of (1) AEWR, (2) SWA prevailing wage, (3) CBA wage, or (4) federal or state minimum wage. If an AEWR is not available for a geographic area, which has been the case for Alaska and Puerto Rico, then the current minimum wage shifts to one of the other 3 sources if they are available. If there is no SWA prevailing wage or CBA wage, for example, then the Federal or state minimum wage (whichever is highest) would be minimum wage. However, we cannot accurately identify the baseline wage and its source in the certification when the AEWR is not available and therefore, used the OEWS State wage as a proxy for the baseline wage in the economic analysis that represents a likely wage estimate within the range from the 4 wage sources.

Under the final rule, for SOC codes that have worksite locations in Alaska or Puerto Rico, the hourly wage would be set by the weighted average hourly wage rate calculated by BLS. Therefore, those certifications may have a wage impact under the final rule.

[119] Total transfers in each year are increased with the following formula to account for an annual increase in the underlying population of H–2A workers: Transfer*(1.056^(Current year − Base year)).

Department does not make any adjustment to account for H–2A certifications that are made but do not end up in jobs with realized wages. In FY 2020, according to State Department data, 213,394 H–2A visas were issued.[120] In FY 2020, 275,430 workers were associated with H–2A certifications. The Department is unable to verify the specific H–2A certifications that do not end up in materialized jobs and so cannot adjust wage transfers to account for differences in regional, and by SOC code, job materialization. Overall, the data on H–2A visas compared to workers associated with H–2A certifications indicates that about 80 percent of certified positions have associated H–2A visas. The remaining 20 percent could be jobs that did not materialize or that U.S. workers filled. As a result, our estimates for wage transfers are likely overstated. The Department is unable to identify the occupations associated with the 20 percent of workers that did not materialize. Therefore, the Department believes that our estimates for wage transfers are reasonable based on the available data and historical practice.

The increase (or decrease) in the wage rates for H–2A workers also represents a wage transfer from employers to corresponding workers performing similar work for the employer, not just the H–2A workers employed under the work contract. The higher (or lower) wages paid to H–2A workers associated with the final rule's methodology for determining the AEWRs will also result in wage changes to corresponding workers. However, the Department does not collect or possess sufficient information about the number of corresponding workers affected and their wage payment structures to reasonably measure the transfers to corresponding workers. Employers are not required to provide the Department, on any application or report, the estimated or actual total number of workers in corresponding employment. Although each employer, as a condition of being granted a temporary agricultural labor certification, must provide the Department with a report of its initial recruitment efforts for U.S. workers, including the name and contact information of each U.S. worker who applied or was referred to the job, such information typically reflects only a very small portion of the total recruitment period, which runs through 50 percent of the certified work contract period, and does not account for any other workers who may be considered in corresponding employment and already working for the employer. Because the report of initial recruitment efforts for U.S. workers only captures information from a limited portion of the recruitment period and does not account for workers already employed by the employer who may be in corresponding employment, the Department is not able to draw on this information to meaningfully assess the total number of corresponding workers affected or their wage payment structures, without which the Department is unable to reasonably measure the transfers to corresponding workers. The Department sought public comment on how these wage transfer impacts can be calculated but received no comments. Finally, the Department is not able to estimate how much of the wage transfer stays in the U.S. economy. Likely a substantial portion of the wage transfer is from U.S. employers to the home economy of H–2A workers. Nonimmigrant foreign H–2A workers may spend wages earned in the United States, spend the money outside the United States, send the money outside the United States, or some combination. The Department also invited comments regarding how these wage transfer impacts can be calculated but received no comments.

Qualitative Benefits

This final rule makes an important update to the AEWR to ensure that it protects workers in the United States in positions where the existing wage methodology may adversely affect wages because the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.,* tractor-trailer truck drivers, farm supervisors and managers, logging workers, construction workers, and many occupations in contract employment). Workers in these positions would benefit from the protections afforded them by an AEWR determined using a more accurate data source.

The AEWR is the rate that the Department has determined is necessary to ensure the employment of H–2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. A more accurate AEWR for workers in jobs where the FLS is inadequate will guard against the potential for the entry of H–2A foreign workers to adversely affect the wages and working conditions of workers in the United States similarly employed in these jobs. The potential for the employment of foreign workers to adversely affect the wages of similarly employed workers is heightened in the H–2A program because the H–2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and occupation could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that ''U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population whose low educational attainment, low skills, low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market.'' [121] As a result, ''their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.'' [122] The AEWR is one way to prevent such adverse effect, as it provides ''a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.'' [123]

Distributional Impact Analysis

E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, seeks to advance equity in agency actions and programs. The term equity is defined as consistent and systematic fair, just, and impartial treatment of individuals, including individuals who belong to underserved communities, such as Black, Latino, and

[120] U.S. Department of State, *Nonimmigrant Visas Issued by Classification, Fiscal Years 2016–2020, available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf.*

[121] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 74 FR 45905, 45911 (Sep. 4, 2009).

[122] *Id.*

[123] *Id.*

Indigenous and Native American persons; Asian Americans and Pacific Islanders; other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

In addition, OMB Circular A–4, which provides guidelines for preparing economic analyses of regulations, discusses various ways that the distributional effects of a regulatory action across the population and economy can be assessed (*e.g.,* income groups, race, sex, industry sector, and geography). Circular A–4 states the following:

''The regulatory analysis should provide a separate description of distributional effects (*i.e.,* how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency (*i.e.,* net benefits). Executive Order 13563 and Executive 12866 authorize this approach. Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups.''

To assess the impact of the final rule on equity the Department used Current Population Survey (CPS) data from BLS [124] to determine the ethnic and racial makeup of the most common SOC codes in the H–2A program. CPS only included data for three races, White, Black or African American, and Asian, and one ethnicity, Hispanic or Latino. The results of this analysis for the top ten H–2A SOC codes that experience wage impacts (SOC codes other than 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, 45–2099) are presented in Exhibit 7. These top 10 SOC codes [125] account for more than 90 percent of all the workers in the FY 2021 certification data that experience wage impacts (certifications with wages set by the OEWS).

EXHIBIT 7—RACIAL/ETHNIC DISTRIBUTION OF THE TOP 10 H–2A SOC CODES BY NUMBER OF WORKERS WITH WAGE IMPACTS

SOC Code	Description	Percent of employed people				# of FY 2021 Q1–Q3 H–2A workers
		White (%)	Black or African American (%)	Asian (%)	Hispanic or Latino (%)	
45–0000	Farming, fishing, and forestry occupations.	90	4	2	43	**
47–2061	Construction laborers	87	8	1	46	2,107
53–3032	Heavy and tractor-trailer truck drivers	77	17	3	23	526
45–1011	First-line supervisors of farming, fishing, and forestry workers.	90	5	3	28	328
47–3012	Helpers—carpenters	N/A	N/A	N/A	N/A	104
45–4022	Logging equipment operators	N/A	N/A	N/A	N/A	57
49–3041	Farm equipment mechanics and service technicians.	94	4	1	19	55
47–2031	Carpenters	88	7	2	36	30
47–3019	Helpers, construction trades, all other	N/A	N/A	N/A	N/A	18
47–2051	Cement masons and concrete finishers.	83	8	1	53	16

*N/A indicates that racial/ethnic data for that SOC code was not reported in the CPS data.
**45–2000 is included as a reference for the racial/ethnic distribution of agricultural workers generally.
Note: Estimates for the above race groups (White, Black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and transfers of the final rule over the 10-year analysis period. The Department estimates the annualized costs of the final rule at $0.07 million and the annualized transfers (from H–2A employers to employees) at $38.22 million, at a discount rate of 7 percent.

EXHIBIT 8—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE

[2021 $millions]

Year	Costs	Transfers
2023	$0.51	$14.57
2024	0.00	30.98
2025	0.00	32.94
2026	0.00	35.01
2027	0.00	37.22
2028	0.00	39.56
2029	0.00	42.05
2030	0.00	44.70

[124] BLS, Labor Force Statistics from the Current Population Survey, *Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex, https://www.bls.gov/cps/tables.htm* (last modified May 14, 2021).

[125] Farm Labor Contractors are within the Top 10 impacted H–2A SOC codes, but because Farm Labor Contractor are employers it is excluded from Exhibit 7.

EXHIBIT 8—ESTIMATED MONETIZED COSTS AND TRANSFERS OF THE FINAL RULE—Continued

[2021 $millions]

Year	Costs	Transfers
2031	0.00	47.52
2032	0.00	50.51
Undiscounted 10–Year Total	0.51	375.07
10–Year Total with a Discount Rate of 3%	0.51	322.73
10–Year Total with a Discount Rate of 7%	0.51	268.47
10–Year Average	0.05	37.51
Annualized with a Discount Rate of 3%	0.06	37.83
Annualized with a Discount Rate of 7%	0.07	38.22

5. Regulatory Alternatives

The Department maintains from the proposed rule the analysis of two alternatives to the final rule. The final rule requires the use of the FLS-based field and livestock worker (combined) average gross hourly wage, where USDA reports such as wage, as the sole source for establishing the AEWR in job opportunities classified under one of the following SOC codes:

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

For each alternative analyzed, job opportunities classified under any other SOC code will have the AEWR set using the same methodology in the final rule: the AEWR for each SOC code would be the statewide annual average hourly gross wage for that SOC code as reported by the OEWS survey. If the statewide wage is not available, the AEWR would be set by the national annual average hourly wage for that SOC code as reported by the OEWS survey.

Under the first regulatory alternative, the Department considered setting the AEWR for job opportunities classified under SOC codes 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, using the *highest* of the annual average hourly gross wage reported by the FLS or the weighted average hourly gross wage provided by the OEWS for these same SOC codes for the State or region. If a statewide annual average hourly gross wage in the State is not reported in the FLS or the OEWS survey, the AEWR for the SOC code shall be determined using the national annual average hourly gross wage as reported by the FLS or the OEWS survey.

The total impact of the first regulatory alternative was calculated using the methodology described to calculate proposed wage impacts using FY 2020 to FY 2021 certification data. The Department estimated average annual undiscounted transfers of $117.03 million. The total transfer over the 10-year period was estimated at $1,170.34 million undiscounted, or $1,007.01 million and $837.71 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $118.05 million and $119.27 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative, the Department would set the AEWR using *only* the OEWS average hourly wage for the SOC code and State (*i.e.,* use of FLS-based wages in establishing AEWRs under the H–2A program would be discontinued). When OEWS State data is not available, the Department would set the AEWR at the OEWS national average hourly wage for the SOC code under this alternative. This alternative reflects the transfers that would occur if, for example, the USDA survey was discontinued or suspended and, as a result, the Department would set the AEWRs for each State using the OEWS data. For SOC codes 45–2041, 45–2091, 45–2092, 45–2093, 53–7064, and 45–2099, the weighted average hourly wage provided by BLS at the State and national level is applied. The Department again used the same method to calculate the total impact of the regulatory alternative and found that, unlike the proposed rule and first regulatory alternative, the second regulatory alternative would result in transfers from H–2A employees to employers. The Department estimated average annual undiscounted transfers of $75.0672.30 million. The total transfer over the 10-year period was estimated at $750.6523.03 million undiscounted, or $645.8923.03 million and $537.3019.28 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $75.713.04 million and $76.503.93 million at discount rates of 3 and 7 percent, respectively.

Exhibit 9 summarizes the estimated transfers associated with the three considered revised wage structures over the 10-year analysis period. Transfers under the proposal and the first regulatory alternative are transfers from H–2A employers to H–2A employees and transfers under the second alternative are transfers from H–2A employees to H–2A employers.

EXHIBIT 9—ESTIMATED MONETIZED TRANSFERS OF THE FINAL RULE

[2021 $millions]

	Final rule (transfers from employers to employees)	Regulatory alternative 1 (transfers from employers to employees)	Regulatory alternative 2 (transfers from employees to employers)
Total 10-Year Transfer	$375	$1,170	$751
Total with 3% Discount	323	1,007	646
Total with 7% Discount	268	838	537
Annualized Undiscounted Transfer	38	117	75
Annualized Transfer with 3% Discount	38	118	76

EXHIBIT 9—ESTIMATED MONETIZED TRANSFERS OF THE FINAL RULE—Continued

[2021 $millions]

	Final rule (transfers from employers to employees)	Regulatory alternative 1 (transfers from employers to employees)	Regulatory alternative 2 (transfers from employees to employers)
Annualized Transfer with 7% Discount	38	119	77

The Department prefers the chosen approach of the final rule because it allows specific OEWS wages for workers in higher paid SOC codes, such as supervisors of farmworkers, tractor-trailer truck drivers, logging workers, and construction laborers on farms while maintaining the use of FLS data for SOC codes with the majority of H–2A workers. As the Department has stated previously, the FLS, which surveys directly hired agricultural workers, is the best source of wage data to set AEWRs for the vast majority of H–2A positions. This is in part because the FLS is a more comprehensive source of farmworker wage date than the OEWS survey. The chosen approach also minimizes transfers compared to the two alternatives, and ensures greater stability in the wage obligations of employers by determining AEWRs, including annual adjustments, using the data source that best reflects the wages of workers in the United States similarly employed.

B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The RFA, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), hereafter jointly referred to as the RFA, initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, requires Federal agencies engaged in rulemaking to assess the impact of regulations that will have a significant economic impact on a substantial number of small entities. The Department certifies that the final rule does not have a significant economic impact on a substantial number of small entities. The Department presents the basis for this conclusion in the analysis below.

Public Comments

Multiple commenters, including the Small Business Administration (SBA), asserted the Department underestimated the costs to small businesses. These costs include transition costs, filing fees, and wage increases that all lower profit margins for small businesses potentially leading to small business closures. One small farm owner stated they do not have enough division of labor to allocate separate workers for specific tasks resulting in the need to pay all workers the higher wage, which they are unable to afford. The Department acknowledges that some administrative costs to small businesses for recruitment and training if they hire U.S. workers for the jobs that H–2A workers perform were not quantified due to the lack of data, as this data would be typically known to small businesses, rather than in the possession of the Department. In the NPRM, the Department sought public comment on these administrative costs but did not receive any comments or information to allow for a quantification of these costs. In addition, the Department considers the impact of the inability to quantify these costs to be *de minimis* because of the limited overall impact of this final rule on small employers. Specifically, the analysis in this RFA section estimates the impacts of the rule based on actual wage records in FY 2020 and FY 2021 for the most accurate impact of the revised AEWR structure. Based on the Department's analysis, approximately 98 percent of all small employers will have impacts of the final rule amounting to less than 1 percent of their revenue.

Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the SBA, in effect as of August 19, 2019, to classify entities as small.[126] SBA establishes separate standards for individual 6-digit North American Industry Classification System (NAICS) industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small is defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[127]

Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle USA[128] and merged that data into the H–2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues. The Department determined the number of unique employers in the FY 2020 and FY 2021 certification data based on the employer's name and city. The Department identified 9,927 unique employers (excluding labor contractors).[129] Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were

[126] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[127] *See https://advocacy.sba.gov/resources/the-regulatory-flexibility-act* for details.

[128] Data Axle USA is a business database that provide information on business size by employment and revenue. *https://www.data-axle.com/.*

[129] Labor contractors are not included because wage impacts associated with this final rule is incurred by employers not by labor contractors. The Department believes that labor contractors will adjust their contracts to the new wage rates and thereby pass the costs of any new wage rates on to their clients.

small (80.5 percent).[130] These unique small entities had an average of 11 employees and average annual revenue of approximately $3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle. The Department's analysis of the impact of this final rule on small entities is based on the number of small unique entities (2,085 with revenue data). Compared to the proposed rule, the final rule added Quarter 4 of FY 2021 certification data which contained 758 new unique employers that did not match employers in the Data Axle data and are, therefore, not included in this analysis. However, the Department expects the impacts for those 758 employers to follow the distribution of impacts analyzed in this RFA.

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 10 shows the number of unique H–2A small entity employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

EXHIBIT 10—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
111998	All Other Miscellaneous Crop Farming	611	31
444220	Nursery, Garden Center, and Farm Supply Stores	162	8
561730	Landscaping Services	134	7
445230	Fruit and Vegetable Markets	127	6
424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4
111339	Other Noncitrus Fruit Farming	78	4
112990	All Other Animal Production	57	3
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	3
424910	Farm Supplies Merchant Wholesalers	41	2
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2

Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.,* the 2010 Final Rule: *Temporary Agricultural Employment of H–2A Aliens in the United States*) to this final rule. As discussed in previous sections, the Department estimates impacts using historical certification data and, therefore, simulates the impacts of the final rule to each actual employer in the H–2A program rather than using representative data for employers within a given sector. The Department estimated the costs of (1) time to read and review the final rule and (2) wage costs. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that small entities not classified as H–2ALCs, which consists of 2,085 unique small entities, would incur a one-time cost of $55.42 to familiarize themselves with the rule.[131]

In addition to the cost of rule familiarization, each small entity may have an increase in the wage costs due to the revisions to the wage structure. To estimate the wage impact for each small entity we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity, the Department calculated total wage impacts of the final rule in CY 2020 and CY 2021. The Department estimates the wage impact on all small entities is $4,582 on average. Many of the small entities have no wage impact from the final rule because they typically do not hire H–2A workers in the occupations that are subject to wage changes in the final rule. Of small entities with wage impacts, their average wage impact is $149,541.

The Department calculated the proportion of each small entity's total revenue that would be impacted by the costs of the final rule to determine if the final rule would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage impact introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

A threshold of 3 percent of revenue has been used in prior rulemakings for the definition of significant economic impact.[132] This threshold is also consistent with that sometimes used by other agencies.[133]

Exhibit 11 provides a breakdown of small entities by the proportion of revenue affected by the costs of the final rule. Of the 2,085 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, 1.3 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2020 data and 1.8 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2021 data. Based on the findings presented in Exhibit 11, the final rule does not have a significant economic impact on a substantial number of small H–2A employers.

[130] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[131] $34.00 + $34.00(0.46) + $34.00(0.17) = $55.42. Numbers do not add due to rounding.

[132] *See, e.g.,* NPRM, *Increasing the Minimum Wage for Federal Contractors,* 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex,* 81 FR 39108 (June 15, 2016).

[133] *See, e.g.,* Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II,* 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant).

EXHIBIT 11—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2020, by NAICS code					
	111998 (%)	444220 (%)	561730 (%)	445230 (%)	All other (%)	Total (%)
<1%	601 (98.4)	162 (100.0)	132 (98.5)	126 (99.2)	1033 (98.3)	2054 (98.5)
1%–2%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	3 (0.3)	3 (0.1)
2%–3%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	1 (0.1)	1 (0.0)
3%–4%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	2 (0.1)
4%–5%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	1 (0.1)	1 (0.0)
>5%	10 (1.6)	0 (0.0)	2 (1.5)	1 (0.8)	11 (1.0)	24 (1.2)
Total >3%	10 (1.6)	0 (0.0)	2 (1.5)	1 (0.8)	14 (1.3)	27 (1.3)

Proportion of revenue impacted	2021, by NAICS code					
	111998 (%)	444220 (%)	561730 (%)	445230 (%)	All other (%)	Total (%)
<1%	599 (98.0)	162 (100.0)	131 (97.8)	126 (99.2)	1021 (97.1)	2039 (97.8)
1%–2%	4 (0.7)	0 (0.0)	1 (0.7)	0 (0.0)	2 (0.2)	7 (0.3)
2%–3%	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	2 (0.1)
3%–4%	1 (0.2)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	3 (0.1)
4%–5%	1 (0.2)	0 (0.0)	0 (0.0)	0 (0.0)	2 (0.2)	3 (0.1)
>5%	6 (1.0)	0 (0.0)	2 (1.5)	1 (0.8)	22 (2.1)	31 (1.5)
Total >3%	8 (1.3)	0 (0.0)	2 (1.5)	1 (0.8)	26 (2.5)	37 (1.8)

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons stated in the preamble, the DOL amends 20 CFR part 655 as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

■ 2. Amend § 655.103(b) by revising the definition of ''*Adverse effect wage rate (AEWR)*'' to read as follows:

§ 655.103 Overview of this subpart and definition of terms.

* * * * *

(b) * * *

Adverse effect wage rate (AEWR). The wage rate published by the OFLC Administrator in the **Federal Register** for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

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■ 3. Amend § 655.120 by adding paragraph (b)(1), revising paragraph (b)(2), and adding paragraph (b)(5) to read as follows:

§ 655.120 Offered wage rate.

* * * * *

(b) * * *

(1) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the occupations shall be the statewide annual average hourly gross wage in the State as reported by the Occupational Employment and Wage Statistics (OEWS) survey; or

(C) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for the occupations shall be the national annual average hourly gross wage as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEWR for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for each occupation shall be the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after March 30, 2023, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134. For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

(2) The OFLC Administrator will publish a notice in the **Federal Register**, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR.

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(5) If the job duties on the job order cannot be encompassed within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable occupations.

* * * * *

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

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