

## U.S. Department of Labor

### *Employment and Training Administration*

#### **H-2A Final Rule: Range Herding or Production of Livestock in the United States**

- The Department of Labor (DOL) is issuing regulations governing the employment of foreign workers in jobs related to the herding or production of livestock on the range (the H-2A Herder Final Rule). Among other things, the H-2A Herder Final Rule implements a new wage setting methodology to address wage stagnation and prevent adverse effect on U.S. workers.
- Separate standards and procedures are necessary for these occupations because some requirements of the general H-2A Final Rule (published in 2010) do not readily apply to these unique occupations, which are located in remote areas and require an other than regular work schedule involving workers generally being on call 24 hours per day, 7 days per week.
- DOL is issuing the rule to respond to the decision of the court in the case of *Mendoza v. Perez*, requiring that we use notice-and-comment procedures to replace existing sub-regulatory guidance that previously set the standards for the employment of foreign workers in these occupations. In addition, this rule provides that U.S. workers will have access to herder jobs, but that businesses can access foreign workers on a temporary basis when U.S. workers are not available.

#### **Final Rule:**

- Establishes a single regulation covering all jobs related to the herding or production of livestock on the range. The Department currently administers separate procedures through two distinct Training and Employment Guidance Letters; one covering the herding and production of only sheep/goats and the other covering other livestock (e.g. cattle).
- Streamlines the process by allowing employers to file H-2A applications directly with the Chicago National Processing Center (NPC), rather than with the State Workforce Agency (SWA). In addition, agricultural associations of employers, who file as joint employers with one or more of their members in more than two contiguous states, are permitted to file a single “master application” and job order covering the workforce needs of each association-member.
- Strengthens worker protections by establishing a new wage methodology, including improved standards for housing used by workers on the range, and protecting U.S. workers who are doing essentially the same jobs as H-2A workers by preventing adverse effect on their wages and working conditions.

## **Highlights of the Rules:**

### Eligibility Requirements

- Identifies specific eligibility criteria for jobs covered by these procedures and provides that non-range duties and activities are governed by the general H-2A procedures and standards.
- Includes all species of domestic hooved animals customarily raised on the range, including sheep, cattle, goats, horses.
- Covers jobs typically performed on call 24 hours per day, 7 days per week.
- Covers work:
  - performed on the range for the majority of workdays (more than 50 percent);
  - generally requiring the use of range (including remote, non-mobile) housing, where the worksites are not near enough to the worker's residence or ranch to permit the worker to reasonably return to a fixed housing location; and
  - consisting entirely of duties and activities that are, or are closely and directly related to, herding and livestock production. (An enhanced definition includes examples of duties that are and are not closely and directly related.)
- Defines "range" as any area located away from the ranch headquarters where the herder is required to constantly attend to the livestock, evaluated based on the totality of the circumstances using a multi-factor test. Factors include whether the land is uncultivated, involves wide expanses, such as thousands of acres, and/or is located in remote, isolated areas; and whether the work typically requires range housing to enable the herder to constantly attend to the herd.

### Filing Requirements

- Grants a waiver of the regulatory requirement for employers to file first with the SWA. Instead, employers submit job orders directly to the Chicago NPC simultaneously with the H-2A Application for Temporary Employment Certification, Form ETA-9142A.
- Agricultural associations, who file as a joint employer with one or more of their members, are permitted to file a single "master application" and job order covering the workforce needs of each association-member in more than two contiguous states with different start dates of need.

### Recruitment

- **Job order:** Brings consistency to job order clearance by having job orders for all range occupations remain active until 50 percent of the work contract period has elapsed.

- **National electronic job registry:** All range occupation jobs will appear in the DOL’s national electronic repository until 50 percent of the work contract period for the job opportunity(ies) has elapsed, so U.S. workers may easily learn about these job openings and make themselves available for work to employers from across the nation.
- **Newspaper advertisements:** Not required. The rule expands the waiver previously applied to range sheep and goat herding occupations to all range herding and livestock production occupations.

Period of Need

- Employers hiring range workers for herding or production of sheep or goats may list a period of up to 364 days on the application and job order, consistent with longstanding practice.
- Employers hiring range workers for herding or production of other livestock may list a maximum period of 10 months, consistent with longstanding practice.

Range Housing and Working Conditions

- **Housing:** Establishes specific standards for range housing used for range workers, identifies the circumstances in which heating equipment is required and states that “range housing” includes housing that is remote, but need not be mobile. Provides for SWA inspection at least every three years, while permitting SWAs to inspect more frequently.
- **Employer provided items:** Clarifies that the employer must disclose in the job order and provide range workers all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively, without charge or deposit charge. Additionally, the rule continues the requirement that employers provide workers with an effective means of communicating with persons capable of responding to the worker’s needs in case of an emergency.
- **Meals and water:** Requires employers to provide adequate food, free of charge, and adequate potable water to range workers. Quantifies the minimum amount of potable water the employer must provide (4.5 gallons per day for drinking and cooking purposes). Where potable water cannot be transported to the worker by motorized vehicle, the rule allows the employer to rely on natural sources of water provided that it provides the worker with the means to test and render that water potable.

### Wage Requirements

- The unique nature of these occupations (on call 24/7 in remote areas) and scarcity of U.S. workers employed in the occupation have made setting an appropriate minimum wage difficult. Wage surveys historically conducted by the SWAs have resulted in severe wage stagnation for nearly 20 years.
- **Pay the offered wage:** Employers must pay a wage, that equals or exceeds the highest of the monthly AEWR (described more below), collective bargaining agreement, or applicable minimum wage set by court or law (e.g., Federal, State or local minimum wage), free and clear at least twice monthly during the entire certified period of employment.
- **AEWR:** On the effective date of this rule, or thirty days from its publication, the new AEWR will apply to all pending and future requests for prevailing wages, as well as all open certifications. Specifically:
  - It establishes a new methodology for setting the monthly AEWR for all range occupations using the current Federal minimum wage (\$7.25/hour) as the basis for an initial national monthly wage rate, calculated based on a 48-hour workweek. This initial AEWR for range occupations will be adjusted annually based on the Employment Cost Index for wages and salaries (ECI), beginning in 2017.
  - To convert the hourly wage rate to a monthly wage rate, the Department multiplies the hourly wage rate by 48 hours and 4.333 weeks.
  - There will be a two-year transition of the new AEWR: 80 percent of the full wage from the effective date of this rule through calendar year 2016, 90 percent in calendar year 2017, with full implementation beginning in calendar year 2018.