

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION

2015 H-2A Herder Rule FAQs: *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*

Round 1: Implementation, Major Provisions

The Department of Labor (the Department) is issuing a Final Rule governing the certification of employment of nonimmigrant workers in herding and production of livestock on the range in temporary or seasonal agricultural employment and obligations that apply to employers of those H-2A workers and U.S. workers similarly employed. These FAQs summarize major provisions of the Final Rule and are provided to assist employers, workers, and other interested parties in understanding the Final Rule. The Final Rule becomes effective 30 days after publication in the Federal Register.

1. Why did the Department of Labor issue an H-2A Herder Rule for herding and the production of livestock on the range?

The Department promulgated the H-2A Herder Rule in response to a court decision concerning the Department's Training and Employment Guidance Letters (TEGLs) for range herding and production of livestock occupations, which held that the Department must engage in notice and comment rulemaking to set standards governing the employment of foreign herders. *Mendoza et al. v. Perez*, 754 F. 3d 1002 (D.C. Cir. 2014).

In addition to responding to the *Mendoza* case, the Department engaged in this rulemaking to replace the existing inadequate wage setting methodology for these occupations, which has resulted in wage stagnation; clarify and codify standards; and create a single set of procedures for these occupations.

This H-2A Herder Rule will be effective 30 days after its publication in the Federal Register.

2. What types of job opportunities does the new H-2A Herder Rule cover?

The H-2A Herder Rule only applies to employers seeking to employ foreign herders to tend to species of domestic hooved animals customarily raised on the range, including sheep, goats, cattle and horses. Specifically, the H-2A Herder Rule provides processing procedures and standards for the job opportunities that will be performed on an "on-call" basis 24 hours per day/7 days per week. The rule involves

work performed on the range the majority of the workdays in the contract period (i.e., more than 50 percent of workdays), which generally requires the use of range housing; and consist entirely of duties and activities that are, or are closely and directly related to, herding and livestock production.

Where an employer's job opportunity does not fall within the defined scope of the H-2A Herder Rule, the employer must comply with all of the standard procedures for the H-2A program.

3. I received a certification for range workers before the effective date of the H-2A Herder Rule. What will happen to my certification?

An H-2A application for range workers filed and certified before the effective date of the H-2A Herder Rule remains valid as certified, except as to the required wage rate. The Adverse Effect Wage Rate (AEWR) required by the new rule will be effective for all work in herding and range production of livestock performed on or after the new rule's effective date, which is 30 days from the rule's publication in the Federal Register, including work performed under a current certification. The requirement that a new AEWR apply to current and pending certifications when adjusted, is consistent with earlier herder rules issued as special procedures, as well as the requirements of the standard H-2A regulations. The new AEWR must be paid effective 30 days after the new rule's publication in the Federal Register if it is the highest of the applicable wage sources (i.e., collective bargaining agreement, or applicable minimum wage required by law or court action). After the effective date of the H-2A Herder Rule, adjusted monthly AEWRs for range occupations will be published annually using the methodology established in the H-2A Herder Rule.

4. My H-2A application for range workers was pending on the effective date of the H-2A Herder Rule. What will happen to my application?

The Chicago National Processing Center (NPC) will process each application according to the procedures and standards effective at the time the application was submitted, except for the wage rate as discussed in question 3 above. Accordingly, except for the wage rate, an H-2A application seeking to hire temporary range workers received before the effective date of the H-2A Herder Rule is not covered by the requirements of the new H-2A Herder Rule, but subject to the requirements of the special procedures in place at the time of hiring.

5. I am submitting an H-2A application for range workers on or after the effective date of the H-2A Herder Rule. Is my application subject to the new provisions?

Yes. H-2A applications seeking to hire temporary range workers filed on or after 30 days from the date of the rule's publication in the Federal Register are processed under the H-2A Herder Rule.

6. What are the major provisions of the H-2A Herder Rule?

Below is a brief list of some of the major provisions of the H-2A Herder Rule:

Single Set of standards for Herding or Production of Livestock on the

Range: Prior to this Final Rule, the standards and procedures governing sheep, goat and cattle herders were set forth separately in two different TEGLs. The standards for the unique occupations covered by these TEGLs were largely the same. Therefore, the H-2A Herder Rule sets procedures and standards for sheep and goat herding, and the range production of livestock.

Duration of Temporary Need: For range sheep or goat herding or production occupations, the period of need must be no more than 364 calendar days. For range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, the period of need must not exceed 10 months.

Definition of On the Range: A definition of range has been provided to include a series of factors deemed to be indicative of the range, including: uncultivated land; wide expanses of land; location in remote, isolated areas; and typically requiring range housing to enable the herder to constantly attend to the herd. Significantly, fencing is not included as an indicator of whether land is range land.

Wage Methodology: Employers must offer, advertise during recruitment and pay each worker a wage that is the highest of the monthly Adverse Effect Wage Rate (AEWR), the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State legislation or judicial action. The monthly AEWR will be published by the OFLC Administrator at least once in each calendar year in the Federal Register. The employer must pay the adjusted monthly AEWR upon publication by the Department in the Federal Register.

Beginning 30 days from the date of the rule's publication in the Federal Register, the AEWR will be \$1,206.31 per month. This rate is based on the current federal minimum wage of \$7.25 per hour multiplied by 48 hours worked per week and 4.333 weeks per month, with a two-year transition period to full implementation of the new wage methodology. The AEWR from the effective date of this rule through calendar year 2016, is 80 percent of the calculation discussed above. The AEWR will be 90 percent of the calculation in calendar year 2017, with full implementation beginning in calendar year 2018. Beginning in 2017, an annual adjustment will be made based on the prior year's Employment Cost Index for wages and salaries (ECI).

Application and Job Order Filing by Employers, Associations, or H-2ALCs:

Under the H-2A Herder Rule, the job order will not be filed in advance with the State Workforce Agency. Rather, the *Agricultural and Food Processing Clearance Order* ETA Form 790 will be filed directly with the Chicago National Processing Center (NPC) along with the completed H-2A *Application for Temporary Employment Certification*, ETA Form 9142A and Appendix. An attachment must also be filed which identifies with as much geographic specificity as possible for each farmer/ rancher, the names, physical locations and estimated start and end dates of need where work will be performed under

the job order. The Chicago NPC Certifying Officer will review the application and job order and will work with the employer to address any deficiencies.

Post-Filing Recruitment Model: Employers filing under the H-2A Herder rule will submit job orders directly to the Chicago NPC (not to the State Workforce Agency or SWA). Where the Certifying Officer (CO) determines that the job order meets the regulatory requirements, the NPC will issue a Notice of Acceptance. The Notice of Acceptance authorizes conditional access to the interstate clearance system. The CO will transmit the job order to the SWAs having jurisdiction over the worksites and will direct the SWA to place the job order into intrastate and interstate clearance for the recruitment of U.S. workers.

Approved Job Orders: All job orders for range occupations must remain active until 50 percent of the work contract period has elapsed.

National Electronic Job Registry: All approved job orders, including those for range occupation jobs, will appear in the Department's national electronic repository on the iCERT Visa Portal System at <https://icert.doleta.gov/> until 50 percent of the work contract period for the job opportunity(ies) has elapsed.

Newspaper Advertisements: Placement of newspaper advertisements is not required under the H-2A Herder Rule.

On the Range Housing: The rule establishes specific standards for range housing used for range workers, identifying the circumstances in which heating equipment is required and providing that "range housing" includes housing that is remote, but it need not be mobile. It also provides for SWA inspection at least every three years, while permitting SWAs to inspect more frequently. Between inspections, the employer may submit a valid SWA housing certification along with a self-certification that its housing continues to meet established standards, including structural and sanitation requirements and heating standards.

Off Range Housing: The rule includes housing standards while located at or near the ranch (e.g., access to showers and toilets), even where the worker will continue to sleep in his or her assigned range housing.

Tools and Equipment: The employer must provide all tools and equipment necessary to perform the job to workers free of charge. Due to the unique nature of occupations involving herding or production of livestock on the range, employer provided equipment must include communication equipment that provides an effective means of communicating with persons capable of responding to the worker's needs in case of an emergency.

Meals and Water: The rule requires employers to provide adequate food, free of charge, and adequate potable water to range workers. Under the rule, employers must provide herders a minimum of 4.5 gallons of potable water per day for drinking and cooking purposes. Where potable water cannot be transported to the worker by motorized vehicle, the employer may rely on natural sources of water provided that the employer provides the worker with the means to test and render that water potable.

Employer obligations and assurances under H-2A are enforced by the Department's Wage and Hour Division. For compliance guidance, please visit: http://www.dol.gov/whd/ag/ag_h-2a.htm.

7. What are the major differences between the previous Training and Employment Guidance Letters (TEGLs) and the H-2A Herder Rule?

While the H-2A Herder Rule largely continued certain procedures under the TEGLs, the H-2A Herder Rule introduces several important changes:

Consolidated procedures/standards: The H-2A Herder Rule establishes a single set of regulations covering all range occupations. Previously, the Department processed range occupations under two separate but largely similar TEGLs, one covering sheep and goat herders and the other covering other range production of livestock. Where appropriate, the H-2A Herder Rule expands procedures and standards to apply to all range occupations. For example, all employers seeking temporary range herders through the H-2A program will concurrently submit their job orders directly to the Chicago NPC simultaneously with the H-2A Application for Temporary Employment Certification, Form ETA-9142A. Previously, this waiver of the regulatory requirement for employers to file first with the SWA applied only to agricultural associations submitting master applications seeking sheep or goat herders. Also, under the H-2A Herder Rule local newspaper advertisements are not required recruitment activity and the job orders will be active both in the Electronic Job Registry and SWA system until 50 percent of the work contract period has elapsed.

Wage methodology: The H-2A Herder Rule establishes a new methodology for setting an appropriate minimum wage rate for these occupations. Under the Department's TEGLs, the Department used the results of SWA surveys to set the AEWR annually; however, inadequate survey results resulted in wage stagnation for nearly 20 years. The new methodology uses 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 adverse effect wage rate (AEWR) for range occupations will be adjusted annually based on the Employment Cost Index for wages and salaries (ECI) beginning in 2017. Employers must pay a wage, which equals or exceeds the highest of the monthly AEWR (described more below), collective bargaining agreement wage, or minimum wage set by court or legislation (e.g., Federal, State or local minimum wage), free and clear at least twice monthly during the entire certified period of employment.

Meals: The H-2A Herder Rule requires employers to provide all range workers with adequate meals or food to prepare meals, free of charge. This was a requirement

for sheep and goat herder employers under the TEGE; it was also required as a result of prevailing practice for other range production of livestock workers.

Range housing standards: The H-2A Herder Rule sets the standards for housing provided to range workers, which are generally consistent with the standards presented in the TEGEs, when those workers are on the range. The H-2A Herder Rule clarifies certain standards, such as the circumstances under which heating equipment must be provided, and sets the minimum amount of potable water the employer must provide for consumption and cooking, specifically 4.5 gallons per day. Also, the H-2A Herder Rule specifies that range workers must have access to facilities, such as toilets and showers, when located at the ranch or other similar fixed-site location.

Definition of “Range”: The H-2A Herder Rule establishes a definition of range, which is discussed in question 6 above.

8. How does worker pay under the H-2A Range Rule differ from the previous pay methodology?

Under the H-2A Herder Rule range workers must be paid a wage which equals or exceeds the highest of the monthly adverse effect wage rate (AEWR) (described more below), collective bargaining agreement wage, or minimum wage set by court or legislation (e.g., Federal, State or local minimum wage), free and clear at least twice monthly during the entire certified period of employment.

The H-2A Range rule adopts a new methodology for determining the AEWR for these occupations. The prior methodology, using wage surveys to determine the AEWR, resulted in wage stagnation in these occupations for nearly 20 years, with AEWRs currently set at \$750 per month for sheep and goat herders in most States and \$875 per month for cattle in all States. The new methodology uses 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. Under the new methodology and transition period, the initial monthly AEWR will be \$1,206.31 per month for all range occupations.

9. Will herders see a pay increase? How much, on average?

Yes. Under the Final Rule and through calendar year 2016, the AEWR will improve the average wages paid to herders by approximately \$1.53 in hourly wages paid to herders (assuming a 48 hours of work per week).