

U.S. Department of Labor
Employment and Training Administration
Implementation FAQs

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

November 2, 2020

1. What is the Adverse Effect Wage Rate (AEWR) and why is the Department publishing a final rule to revise the methodology by which it establishes the annual AEWRs for non-range occupations?

An employer seeking to employ foreign workers under the H-2A program is required 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. The AEWR is a minimum wage rate that provides a floor below which the wages of agricultural workers cannot be negotiated. Requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation to certify that the employment of foreign workers will not adversely affect workers in the United States similarly employed.

Consistent with Executive Order (E.O.) 13788, Buy American and Hire American, and the Administration's goal of ensuring employers can access legal agricultural labor without undue cost or administrative burden while maintaining the program's strong protections for workers in the U.S. similarly employed, the Department proposed changes to the H-2A program regulations, including changes to the hourly AEWR methodology, through a Notice of Proposed Rulemaking (NPRM) published on July 26, 2019.¹

After consideration of comments received in response to the NPRM, the Department published this final rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, amending the AEWR methodology for non-range agricultural occupations based on hourly wage data reported by the U.S. Department of Agriculture (USDA) Farm Labor Survey (FLS) and the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey. The new rule improves the consistency of the AEWRs and establishes better stability and predictability for employers in complying with their wage obligations.

2. What are the major changes to the AEWR methodology the Department is implementing under this final rule?

The Department has determined it is appropriate to use the 2020 AEWRs, which were based on the average annual gross hourly wage rate for field and livestock workers (combined) as reported for the state or region by the FLS published in November 2019, as the AEWRs for field and livestock worker occupations through calendar year 2022. Beginning in 2023, and

¹ E.O. 13,788 (Apr. 18, 2017), 82 FR 18,837 (Apr. 21, 2017); Proposed Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 FR 36168 (July 26, 2019).

annually thereafter, the Department will annually adjust these AEWRs by the percentage change in BLS's Employment Cost Index (ECI) for wages and salaries for the preceding 12-month period. For all other agricultural occupations, the Department will annually adjust and set the hourly AEWRs based on the statewide annual average hourly gross wage for the occupational classification reported by the OES survey. If the OES survey does not report a statewide annual average hourly gross wage for the occupation, the AEW shall be the national annual average hourly wage reported by the OES survey.

If the job duties on the employer's *Application for Temporary Employment Certification* do not fall within a single occupational classification, the Department will determine the applicable AEW based on the highest AEW for all applicable occupational classifications. In rare cases where an employer's job opportunity requires the performance of duties encompassed by two or more distinct occupational classifications (e.g., an occupation subject to the FLS-based AEW and an occupation subject to the OES AEW), the Department will assign the highest AEW among all applicable occupational classifications.

3. When do the final rule and revised AEW methodologies become effective?

This final rule is effective 45 days after publication, and the Department will implement the new AEW methodologies on the effective date of the final rule. Employers that submit a job order on or after the effective date of this final rule are subject to the new AEW methodology for the job order and the related *Application for Temporary Employment Certification*. In contrast, employers that have already received a temporary agricultural labor certification, or that have submitted a job order or *Application for Temporary Employment Certification* before the effective date of this final rule, will not be subject to wage obligations under the new AEW methodology until the OFLC Administrator publishes the next AEW adjustment applicable to the employer's job opportunity.

4. I have previously filed my job order (Form ETA-790/790A) with the State Workforce Agency (SWA) for review and have yet to receive an approval in order to file my H-2A application (Form ETA-9142A) with the OFLC National Processing Center (NPC). Does the final rule affect the wage offer on my previously filed job order?

No. The methodology in this final rule will apply only to job orders filed on or after the effective date of the regulation, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the OFLC NPC for emergency situations under 20 CFR 655.134. Employers that submitted a job order before the effective date of this final rule will not be subject to wage obligations under the new AEW methodology until the OFLC Administrator publishes the next AEW adjustment applicable to the employer's job opportunity.

5. I have an approved job order (Form ETA-790/790A) from the SWA and previously filed an H-2A application (Form ETA-9142A) with the OFLC NPC and have yet to receive a final determination. Does the final rule affect the wage offer on my previously filed H-2A application?

No. Employers that submitted a job order or *Application for Temporary Employment Certification* before the effective date of this final rule will not be subject to wage obligations under the new AEWL methodology until the OFLC Administrator publishes the next AEWL adjustment applicable to the employer's job opportunity.

6. I currently employ H-2A workers to perform apple harvesting duties under Standard Occupational Classification (SOC) code 45-2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse, which is covered by the FLS-based AEWL. How does this final rule affect my wage obligations under my previously certified H-2A application (Form ETA-9142A)?

H-2A employers are required to pay the highest of the AEWL, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. An employer certified to employ H-2A workers at a wage rate approved prior to the effective date of this final rule is required to pay that wage through the remainder of the work contract, unless the next adjustment to the FLS-based AEWL published by the OFLC Administrator in calendar year 2021 is higher than the previously approved rate, in which case the employer will be required to pay the new, higher AEWL.

7. I currently employ H-2A workers to perform construction duties on farms under SOC code 47-2061, Construction Laborers, which is covered by an OES-based AEWL under the final rule. How does this final rule affect my wage obligations under my previously certified H-2A application (Form ETA-9142A)?

H-2A employers are required to pay the highest of the AEWL, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. An employer certified to employ H-2A workers at a wage rate approved prior to the effective date of this final rule is required to pay that wage through the remainder of the work contract, unless the next adjustment to the OES-based AEWL published by the OFLC Administrator in calendar year 2021 (*i.e.*, on or about July 1, 2021) is higher than the previously approved rate, in which case the employer will be required to pay the new, higher AEWL.

8. How can I determine which AEWL applies to my job opportunity?

The vast majority of H-2A job opportunities fall within one of the SOC codes associated with the combined field and livestock worker category and will be subject to the FLS-based, ECI-adjusted AEWL. If the employer's job opportunity does not fall within one of the common occupations associated with the combined field workers and livestock workers category, the appropriate SOC code will depend on the nature of the job opportunity. Employers may consult the Department's Occupational Information Network (O*NET) website at <https://www.onetonline.org/> to understand which SOC code(s) and descriptions best apply to the duties to be performed by worker. As under the 2010 Final Rule, if the employer does not include an accurate occupational classification and corresponding wage rate in its job

order, the SWA will issue a Notice of Deficiency to the employer, directing the employer to modify its job order to reflect the correct occupational classification and wage rate.

As an example, a job opportunity involving driving duties may be properly classified under SOC 45-2091 (Agricultural Equipment Operators), SOC 53-3032 (Heavy and Tractor-Trailer Truck Drivers), or a combination of the two, depending on the duties described in the employer's job order. A job opportunity for workers to drive tractors and other mechanized, electrically-powered or motor-driven equipment on farms to plant, cultivate, and harvest a crop (including driving tractors in and out of fields carrying bins and driving forklifts to transfer and stack bins of full product onto trailers), which requires 12 months of experience operating such equipment, would be properly classified under SOC 45-2091 and subject to the FLS-based AEW. R.

In contrast, a job opportunity for workers to drive semi tractor-trailer trucks to and from specified destinations within area of intended employment (including maneuvering trucks into and out of loading and unloading positions as well as driving in both on-road (paved) and off-road conditions), which requires 12 months of experience operating such equipment and a valid Class A CDL or equivalent, would be properly classified under SOC 53-3032 and subject to the OES-based AEW. R. In the event an employer seeks workers to both drive tractors and other mechanized, electrically-powered or motor-driven equipment on farms and semi tractor-trailer units, as described above, the employer's job opportunity constitutes a combination of SOC 45-2091 and SOC 53-3032, subject to either the FLS-based AEW. R. for SOC 45-2091 or the OES-based AEW. R. for SOC 53-3032, whichever is a higher rate per hour.

9. I intend to file a job order (Form ETA-790/790A) with the SWA after the effective date of this final rule seeking labor certification to employ H-2A workers to perform construction work on farms. What wage source serves as the AEW. R. for occupations performing construction work that qualifies under the H-2A program?

The appropriate SOC code and corresponding AEW. R. will depend on the nature of the job opportunity and the duties to be performed by workers. Generally, construction-related work falling under SOC 47-2061 – Construction Laborers does not fall within the FLS occupations for field and livestock workers and, therefore, will be subject to the OES-based AEW. R. that will be annually adjusted by the Department on or about July 1.