

Rural Migration News

Blog 188

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DOL Changes AEW Methodology

The H-2 (A) program has since 1952 allowed US farmers who anticipate too few US workers to fill seasonal farm jobs to be certified to recruit and employ guest workers. During the 1950s, the then H-2 program certified fewer than 10,000 US farm jobs a year to be filled with Caribbean farm workers, while over 450,000 Mexican Braceros a year were admitted under a separate program.

After the Bracero program ended in 1964, DOL required farm employers to pay H-2 guest workers and US workers a special minimum wage

called the Adverse Effect Wage Rate at a time when US farm workers were not covered by federal minimum wage laws. Many farmers did not want to pay minimum wages to US workers, and H-2 certifications remained low during the 1970s and 1980s,

The H-2 program was changed to H-2A in the Immigration Reform and Control Act of 1986, and was expected to expand as federal sanctions on employers reduced the employment of unauthorized workers. Instead, unauthorized migration

surged in the 1990s, the Florida sugarcane harvest that employed 10,000 H-2A workers was mechanized, and the H-2A program certified fewer than 20,000 farm jobs a year.

The H-2A program expanded in the past decade as unauthorized Mexico-US migration slowed in the wake of the 2008-09 recession. The number of jobs certified more than doubled between FY12 and FY19 to almost 258,000. About 80 percent of DOL certifications result in H-2A visas being issued to foreigners, since some employers do not follow through and some H-2A workers fill two US jobs, as when an association brings H-2A workers into the US and moves them from one farm to another, so 204,000 H-2A visas were issued in FY19.

AEWRs

In order to receive certification from US DOL to employ H-2A workers, farm employers must satisfy three major criteria, they must try and fail to recruit US workers, offer free and approved housing to guest workers and out-of-area US workers, and pay their state's Adverse Effect Wage Rate, which ranged from almost \$12 to over \$15 an hour across US states in 2020. AEWs are higher than federal or state minimum wages, the prevailing hourly or piece rate wage, or the wage in an applicable collective bargaining agreement.

Guest workers have contracts with their US employer that provide for an average six months of US farm work. If H-2A workers are employed for an average 1,000 hours in the US and earn \$12,000 to \$15,000 each, then 200,000 H-2A workers who earn an average \$12,000 generate \$2.4 billion a year in US earnings, and at \$15,000 the H-2A wage bill is \$3 billion a year. Each one percent change in the AEW translates into \$24 million to \$30 million.

AEWRs in 2020 Ranged from \$11.71 in the Southeast to \$15.83 in the Northwest



Source: <https://www.thepacker.com/article/produce-groups-call-action-farm-labor-reform>

Employers Report to the OES the Number of Workers in Each Range of Wages Paid

7 Please use the following pages to report the employees found in your firm. Please write in each unique occupational title, a short description of duties, the number of employees found in each wage column, and the total employment for each occupation. Refer to the detailed instructions on how to report by occupation and how to determine wages. If additional space is needed to report all of the workers in your establishment, please photocopy this page.

OCCUPATIONAL TITLE AND DESCRIPTION OF DUTIES	NUMBER OF EMPLOYEES IN SELECTED WAGE RANGES (Report Part-time Workers According to an Hourly Rate)												Total
	A	B	C	D	E	F	G	H	I	J	K	L	
	Hourly (part-time or full-time)	under \$9.25	\$9.25 - 11.99	\$12.00 - 15.49	\$15.50 - 19.74	\$19.75 - 25.49	\$25.50 - 32.74	\$32.75 - 41.99	\$42.00 - 53.99	\$54.00 - 69.49	\$69.50 - 89.49	\$89.50 - 114.99	
Annual Salary (full-time only)	under \$19,240	\$19,240 - 24,959	\$24,960 - 32,239	\$32,240 - 41,079	\$41,080 - 53,039	\$53,040 - 68,119	\$68,120 - 87,359	\$87,360 - 112,319	\$112,320 - 144,559	\$144,560 - 186,159	\$186,160 - 239,199	\$239,200 and over	
EXAMPLE:													
Registered Nurses (RN)- Provide nursing care to sick or injured patients.						2	4	1					7

Source: https://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf

DOL has since 1987 set the AEWR that farm employers must offer and pay to H-2A and US workers employed alongside them at the average hourly earnings of non-supervisory field and livestock workers reported by farm employers to USDA's NASS and published in Farm Labor (supervisor earnings are included in the all hired wage reported in Farm Labor, but not in the field and livestock worker wage). Farm employers report employment and earnings data for the week that includes the 12th of the month of January, April, July, and October.

DOL uses FLS data to set AEWRs for states and multistate regions. USDA canceled the FLS in September 2020, worker advocates sued, and a federal judge in October 2020 ordered USDA to conduct the Farm Labor survey so that DOL could continue to use FLS average hourly earnings data to set AEWRs.

Instead, DOL on November 5, 2020 changed the basis for cal-

culating AEWRs by issuing a final rule that freezes AEWRs for most field and livestock occupations at 2020 rates until 2022 (<https://www.federalregister.gov/documents/2020/11/05/2020-24544/adverse-effect-wage-rate-meth-odology-for-the-temporary-employment-of-h-2a-nonimmigrants-in-non-range>). Beginning in 2023, AERWs will be adjusted according to changes in DOL's Employment Cost Index for private wage and salary workers.

Even though AEWRs have been changing each year, DOL justified the two-year wage freeze for field and livestock occupations by asserting that keeping 2020 wages in place until 2023 would "provide employers with greater certainty and a reasonable amount of time to plan their labor needs and agricultural operations under the new wage baseline before new adjustments to the existing wage rates take effect."

AEWRs for other agricultural occupations, such as supervisor and equipment operator, will be set using the average annual statewide gross wage in the Occupational Employment Statistics (OES) survey for the particular occupation. Respondents report the number of employees by job title in each category of wages, such as the number of crop workers earning \$12 to \$15.49 per hour.

DOL will use the OES to determine AEWRs for equipment operators and supervisors, who are among the workers most likely to be paid overtime wages. However, the OES excludes overtime wages.

The OES surveys 200,000 nonfarm firms by mail in May and November, with the sampling list drawn from firms registered with each state's unemployment insurance system, and aims for a 70 percent response rate. The OES uses three years of data or six surveys, using data from 1.1 million establishments with 57 percent of US employment to generate

OES Wages Exclude Overtime and Extra Pay for Night and Weekend Work

Instructions for Reporting Wage Information

For all employees:

- Please use the hourly and annual wage rate categories to report employees. If wages are not recorded by hour or year (bi-weekly, or monthly for example), convert them into an hourly wage rate.
- For part-time workers, please report the specific hourly wage rate, not an average.
- For tip, commission, and piece-rate workers, please estimate the earnings (base pay plus tips, commissions, or piece rates), and report the appropriate wage.
- For salaried workers who do not work a standard 2080 hours per year (40 hours per week), please report wages on an hourly basis. For workers who are paid an annual salary by contract, such as airline pilots, report their annual salary.
- Include and/or exclude from pay as follows:

Include as pay:

- Base rate
- Commissions
- Tips
- Deadheading pay
- Guaranteed pay
- Hazard pay
- Incentive pay
- Longevity pay
- Piece rate
- Portal-to-portal rate
- Production bonus
- Cost-of-living allowance

Exclude as pay:

- Attendance bonus
- Back pay
- Draw
- Holiday bonus
- Holiday premium pay
- Jury duty pay
- Lodging payments
- Meal payments
- Merchandise discounts
- Nonproduction bonus
- On-call pay
- Overtime pay
- Perquisites
- Profit sharing payment
- Relocation allowance
- Tuition repayments
- Severance pay
- Shift differential
- Stock bonuses
- Tool allowance
- Weekend pay
- Uniform allowance

We estimate that the time required to complete this report will vary from 10 minutes to 2 hours, depending on factors such as the size of the establishment. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this information. If you have any comments regarding these estimates or any other aspects of this report, including suggestions for reducing this burden, send them to the U.S. Bureau of Labor Statistics, Division of Occupational Employment Statistics (1220-0042), 2 Massachusetts Ave NE, Suite 2135, Washington, DC 20212. This report is authorized by law 29 U.S.C. §2. We request your cooperation to make the results of this report comprehensive, accurate, and timely. You do not have to complete this questionnaire if it does not display a currently valid OMB control number. Form Approved, O.M.B. No. 1220-0042.

Source: https://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf

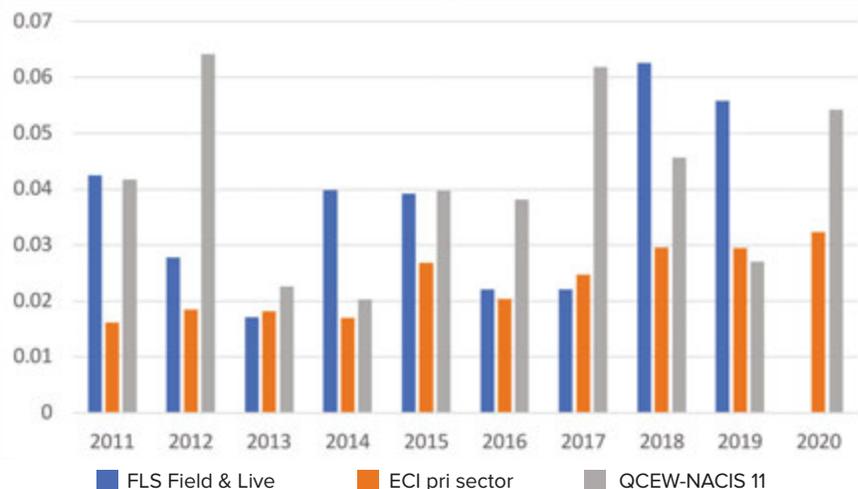
wage estimates for 800 occupations at the MSA, state, and national levels. This means that the May 2019 data were collected as far back as November 2016 and May 2017, and these older wages were “updated” to 2019 levels using the Employment Cost Index (https://www.bls.gov/oes/oes_ques.htm#overview).

The OES does not cover farmers who hire farm workers, that is, employers in the NAICS 111 crop production and NAICS 112 animal production sectors are not in the OES sample. Instead, the OES covers only farm-related businesses that provide support activities for crop production (NAICS 1151) and support activities for animal production (1152). Job titles or occupations are classified according to [Standard Occupational Classification](#) (SOC) coding system, and the OES publishes employment

and mean and median wages for each job title, as well the 25th and 75th percentile wage to indicate the wages of entry-level (25th percentile) and experienced (75th percentile) workers.

The OES found 234,000 workers with agricultural occupations in California in May 2019, including 201,400 or 86 percent with the job title, Farmworkers and Laborers, Crop, Nursery, and Greenhouse, SOC 45-2092,

Annual Change in FLS Hourly Earnings, ECI Index, and QCEW Weekly Wages Since 2011



and 2,400 who are Farmworkers, Farm, Ranch, and Aquacultural Animals, SOC 45-2093. Since AEWRs for these field and livestock workers are set by the FLS, DOL will continue to use FLS data to set AEWRs for 87 percent of jobs provided by nonfarm firms in California agriculture. The May 2019 mean hourly wage of crop workers was \$13.25, and the mean wage of animal workers was \$15.58, while the average annual FLS wage for field and livestock workers in 2019 was \$14.77.

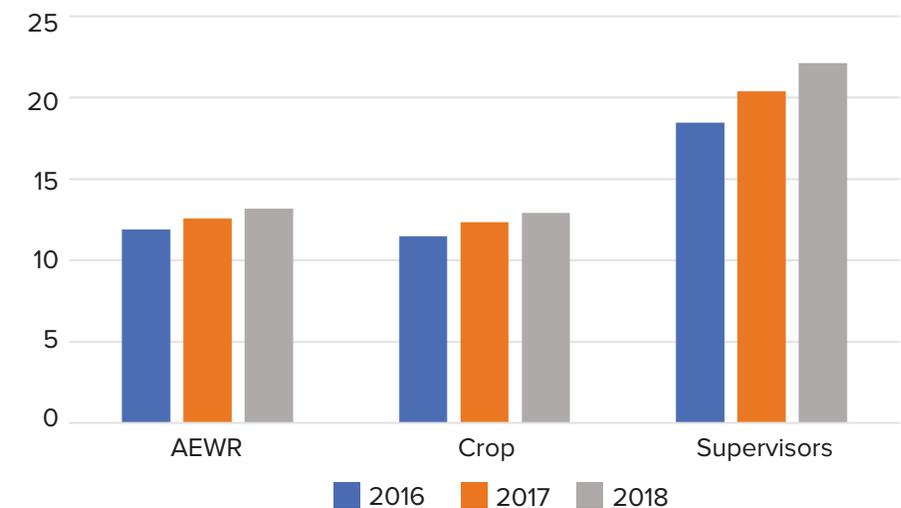
Among the remaining OES job titles, there were 8,300 California graders and sorters (45-2041), 7,450 first-line supervisors (45-1011), and 6,900 agricultural equipment operators (45-2091) that collectively accounted for less than 10 percent of OES agricultural employment. The mean hourly wage of graders and sorters in May 2019 was \$12.91, first line supervisors \$23.52, and equipment operators \$15.93. Using the OES rather than the FLS to set AEWRs for graders, supervisors, and operators will lower the AEWR for California graders and raise the AEWR for supervisors and operators.

Impacts

DOL's changes to the AEWR methodology will lower AEWRs for most H-2A workers and raise the AEWRs of supervisors and equipment operators. Since 2011, the average annual earnings of field and livestock workers in the FLS rose 37 percent, while the change in the quarter one employment cost index for private sector workers rose 22 percent. QCEW average weekly earnings for all workers covered by UI in agriculture (NAICS 11), rose 40 percent between 2010 and 2019. Both FLS and QCEW wages rose more each year than the ECI.

Since each percentage point change in the AEWR translates into \$24 to \$30 million a year, changing the

Using Occupation-Specific FLS Wages Lowers AEWRs for Crop Workers and Raises AEWRs for Supervisors



Source: NASS, FLS

AEWR affects farm employers and workers. For example, if the H-2A program remains unchanged in size in 2021 and 2022, leaving AEWRs unchanged could reduce the H-2A wage bill in 2021-22 by up to 10 percent or \$240 million to \$300 million. Beginning in 2023, if the ECI rises by two percent a year while other measures of agricultural wages rise by four percent a year, the H-2A wage will rise half as fast by being based on the ECI.

Perspective

DOL's change to the AEWR methodology is rooted in changes proposed July 26, 2019 that drew over 83,500 comments. DOL proposed to change from one AEWR per state to instead "establish separate AEWRs by agricultural occupation to better protect against adverse effect on the wages of similarly employed workers in the US" (p36171). Most of the commentators opposed the proposed changes, arguing that an AEWR that better protects a relative handful of jobs and workers would increase complexity in the H-2A program and not solve the problem of large year-to-year variation in farm wages and AEWRs. Under the July 2019 proposed rule,

employers would use the Standard Occupational Classification (SOC) system (<https://www.bls.gov/soc>) to designate the occupation of the job to be filled by H-2A workers. Farming occupations are in the SOC 45 code, and include 45-2092 for farm workers, crop, nursery, and greenhouse, 45-2091 for agricultural equipment operators, and 45-1011 for first-line supervisors.

DOL proposed to first look to the FLS to obtain wage data to set AEWRs by occupation, and to use these wage data to set the AEWR for the occupation. For example, the FLS generates data in California for 45-2092 crop workers and 45-1011 for first-line supervisors. California crop worker earnings were \$11.49 in 2016, \$12.33 in 2017, and \$12.92 in 2018, while first-line supervisors earned \$19.48, \$20.38, and \$22.11 per hour, respectively. The AEWR in California was \$11.89, \$12.57, and \$13.18, respectively, so basing AEWRs on occupations reduces the wages that must be paid to the most numerous crop workers by 3.5 percent but raises AEWRs for supervisors by 65 to 68 percent. DOL justified the switch from one AEWR per state to an AEWR for

each occupation to better protect higher-wage US workers such as supervisors and construction laborers. However, setting AEWRs by occupation means more complexity and continued year-to-year variation in AEWRs.

The FLS obtains data only on workers who are hired directly by farmers, while the OES obtains data only on workers brought to farms by agricultural service firms such as farm labor contractors. This means that AEWRs could be derived from different data sources for workers employed on one farm but in different occupations, such as field harvesters and equipment operators.

Conclusions

DOL acknowledged that most commentators opposed its July 2019 proposal to switch from one statewide AEWR to a half-dozen occupation-specific AEWRs. DOL's action is akin to using a sledgehammer to kill a fly. In order to ensure higher AEWRs for a relative handful of equipment operators and supervisors, DOL has increased the complexity of the H-2A program and opened a Pandora's box to disputes over farm labor data.

The farm labor market is dynamic, and has been changing even faster in recent years as the share of unauthorized workers decreases and the shares of US citizen and H-2A workers increases. Farm wages and average earnings have been rising faster than nonfarm wages and earnings due to low unemployment rates, increased state minimum wages, and more consumer demand for labor-intensive commodities such as berries. One result of this dynamism has been rising farm wages, especially in some commodities and areas.

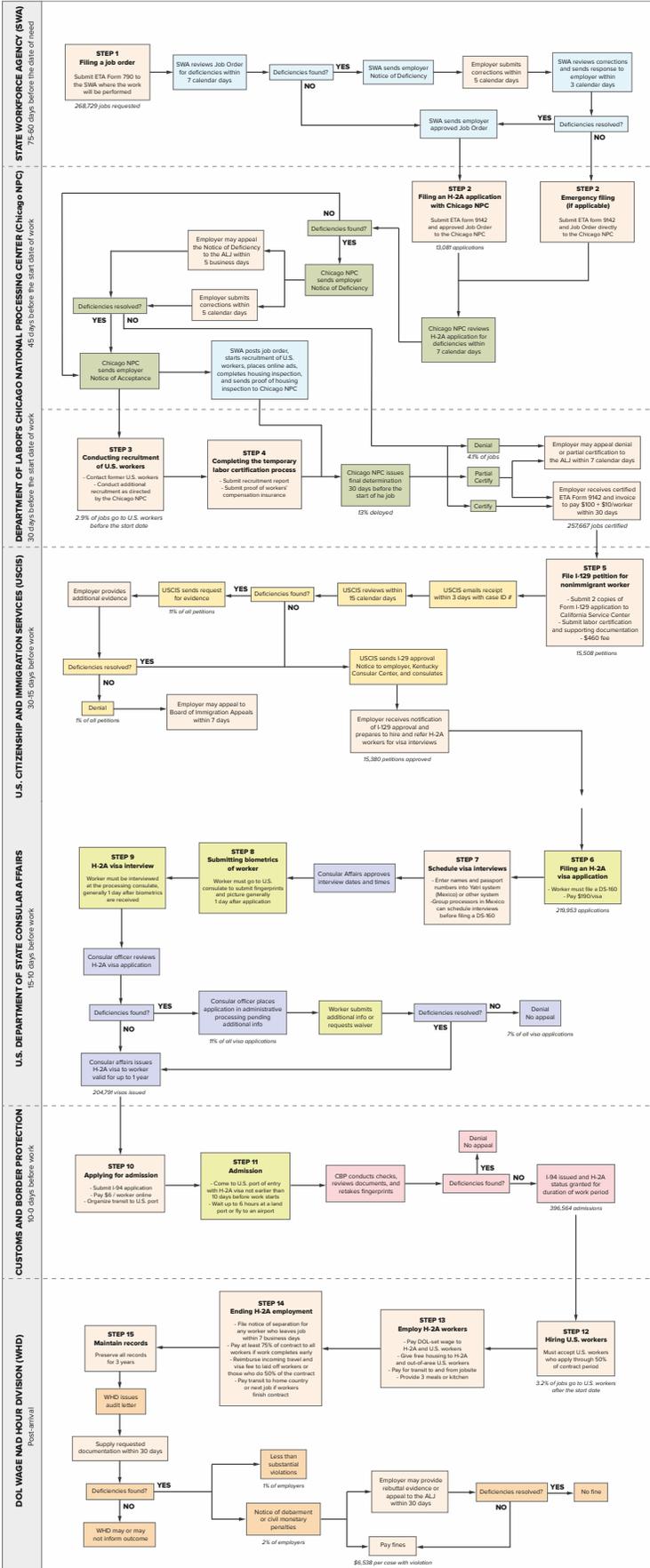
The DOL rule will reduce AEWRs for most H-2A field and livestock workers, reduce increases in the AEWR if the ECI rises slower than FLS earn-

ings, and raise AEWRs for equipment operators and supervisors with the switch to the OES to set their wages.

The DOL changes raise several questions, including:

1. Did DOL really change an AEWR determination system that generated one wage per state since 1987 in order to be "fairer" to a relative handful of more skilled H-2A and US workers?
2. How will the increased complexity involving occupational titles and different AEWRs for each affect the administration of an expanding program with tight timelines for government action? Will there be disputes over whether an H-2A worker is mostly a field worker subject to a lower AEWR or an equipment operator with a higher AEWR?
3. Why is DOL using an aggregate ECI to adjust wages for hired farm workers when there are alternatives that could more reliably track trends in farm worker earnings? For example, the average annual change in the weekly wages of farm workers covered by UI in the QCEW has closely tracked changes in the FLS over the past decade. The QCEW data are available by state, include workers hired directly by farms and workers brought to farms by farm support service firms such as farm labor contractors, and exclude H-2A workers in many states. The QCEW may be a more appropriate database to adjust the AEWR than the hodgepodge of FLS and ECI and OES.

H-2A program application process, 2019



Legend

- Employer actions
- SWA actions
- Chicago NPC actions
- USCIS actions
- Worker actions
- Consular Affairs actions
- CBP actions
- WHD actions

Sources: David Blei, "H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers," Immigration Research and Policy Brief No. 17, Cato Institute, March 10, 2020.



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