



# H-2A Program: Ag Labor Laws

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Presented by Brandon Davis



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# Purpose and Scope of Discussion

1. Learning the Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)
2. Federal Rulemaking and the economic impact on agricultural labor
3. Understanding the procedural posture of ETA-2021-006 and its impact on harvesting & hauling wages in agriculture
4. Understanding the scope of DOL Amended Regulations, 87 FR 61660, Effective Nov. 14, 2022, Governing certification of Agricultural Labor or Services
5. Identifying means of modifying practices to absorb regulatory changes

# Learning the Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

# The Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)

## Scope of Rule and Authority 20 CFR 655.103(a)

- No sufficient U.S. Workers able, willing and qualified to work
- In area of intended employment
- Will not adversely affect wages and working conditions of U.S. workers similarly employed

# Understanding the H-2A Programs

## *Overview of the Immigration Process*

### Step 1



Obtain a labor certification from the **Department of Labor**

- Requires conducting a labor market test with the State Workforce Agency where work will be performed

### Step 2



Obtain an approved petition from the **DHS United States Citizenship and Immigration Service** for a specific number of workers under H-2A visa classification

### Step 3



After receiving USCIS petition approval, workers will apply with one of the **Department of State** visa-issuing consulates abroad for an H-2A visa

### Step 4



After receiving the visa from a DOS consulate, workers arrive at a port of entry where **DHS's Customs and Border Protection** officers verify eligibility for admission and length of stay

# The Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)

## Regulatory Definition of “*Agriculture*”

On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

# The Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)

## Regulatory Definition of “Agriculture” (cont.)

In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(iv) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

# The Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)

Understanding seasonal limits 20 CFR 103(d) –

- For the purposes of this subpart, employment is of a *seasonal nature where it is tied to a certain time of year by an event or pattern*, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations.
- Employment is of a *temporary nature* where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

# The Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers)

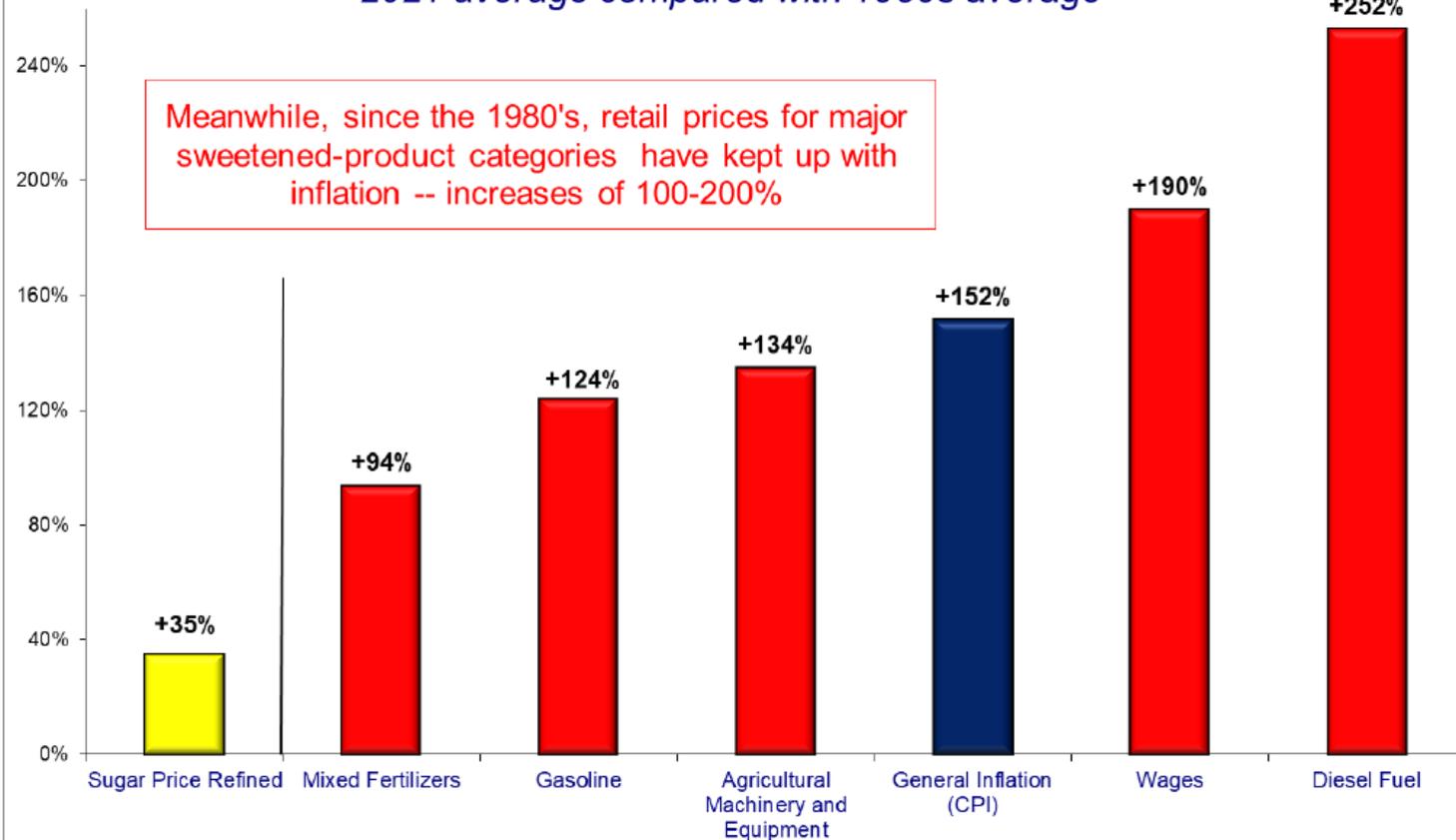
Understanding the offered wage rate 20 CFR 655.120(a) –

- To comply with its obligation under § 655.122(I), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEW, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

# Agricultural Labor Statistics

## Since 1980's: Farmers' Input Costs Have Risen Far More than Sugar Prices

-- 2021 average compared with 1980s average --



Meanwhile, since the 1980's, retail prices for major sweetened-product categories have kept up with inflation -- increases of 100-200%

1980's average compared with 2021 average to-date.

Sugar price data source: USDA, Table 5; Wholesale refined price (midwest markets). Input cost and inflation data source: U.S. Labor of Statistics.

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# Federal Rulemaking and the Economic Impact on Agricultural Labor: The American Sugar Cane League

# Proposed Final Rule ETA – 2021-0006 concerning Adverse Effect Wage – Rate Methodology for Temporary Employment of H- 2A Workers

# Context

To comply with its obligation under § 655.122(l), an employer must offer,

- advertise in its recruitment,
- pay a wage that is the highest of the AEW R, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage,
- except where a special procedure is approved for an occupation or specific class of agricultural employment.

## Immigration and Nationality Act (INA)

- The 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) and 1188.

# Adverse Effect Wage Rates (AEWR)



Wage rates that must be paid to H-2A workers.

- ensure that H-2A workers are paid a living wage
- ensure that employers do not undercut local workers by paying foreign workers a lower rate.

# What Does This Mean for H-2A Dependent Employers?

## Combined field and livestock workers

- Proposal - use OEWS wage data in limited circumstances
- AEW R would be set using OEWS wage data in circumstances where FLS wage data is unavailable or insufficient to generate a State or regional wage finding
- in the event FLS wage data becomes unavailable for the State or region due to future changes in methodology or the survey's suspension or termination, the Department proposes to immediately use OEWS wage data for this occupational grouping to establish the AEW R

## All other occupations

- Proposal - use the OEWS survey to establish the AEW R s for each occupation under which the AEW R will be the statewide annual average gross hourly wage for the occupational classification, as reported by the OEWS survey, or the national annual average hourly wage for the occupational classification reported by the OEWS survey, if the OEWS survey does not report a statewide annual average gross hourly wage for the occupation.

# H-2A Agriculture Program

## *Wage Setting Requirements*

### **Job Descriptions: Be Thorough, Yet Concise**

- **DO** include **relevant** facts about the **nature and extent** of each duty
  - Descriptions of the size/scope of trenching work must be sufficient to permit a determination of whether the work is hazardous
  - Descriptions of food preparation/handling duties must be sufficient to permit a determination of the type of food and whether the worker cooks and/or serves the food
    - Cook hamburgers, French fries and chicken patties using a repetitive process
    - Cook menu items according to recipe
    - Assemble sandwiches and serve to customer at counter
    - Serve premade foods/beverages to customers at counter and accept payment
  - What and where loading/unloading of products or commodities is occurring
    - Unload bags of crawfish from truck
    - Unload finished table legs from lathe
    - Load boxes of shingles onto pallet then onto the warehouse shelves using a forklift

# H-2A Agricultural Program

## *Preparing the Form ETA-790 – General Requirements*

- Employer's job opportunity must . . .
  - Offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers
  - Not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2A workers
  - Offer job qualifications and requirements that are bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops
  - CO or SWA may require employer to submit documentation substantiating the appropriateness of any qualification contained in the ETA Form 790

# Occupational Employment and Wage Statistics

## National estimates for this occupation:

Employment estimate and mean wage estimates for this occupation:

Employment <a href="#">(1)</a>	Employment RSE <a href="#">(3)</a>	Mean hourly wage	Mean annual wage <a href="#">(2)</a>	Wage RSE <a href="#">(3)</a>
1,856,130	0.6 %	\$22.52	\$46,850	0.2 %

Percentile wage estimates for this occupation:

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	\$14.01	\$17.43	\$21.76	\$26.85	\$32.13
Annual Wage <a href="#">(2)</a>	\$29,130	\$36,250	\$45,260	\$55,850	\$66,840

Industries with the highest levels of employment in this occupation:

Industry	Employment <a href="#">(1)</a>	Percent of industry employment	Hourly mean wage	Annual mean wage <a href="#">(2)</a>
<a href="#">Truck Transportation</a>	895,670	58.86	\$22.79	\$47,400
<a href="#">Merchant Wholesalers, Nondurable Goods (4244 and 4248 only)</a>	86,470	8.76	\$23.71	\$49,320
<a href="#">Nonmetallic Mineral Product Manufacturing</a>	66,710	15.91	\$21.53	\$44,790
<a href="#">Warehousing and Storage</a>	58,640	4.83	\$23.57	\$49,030
<a href="#">Merchant Wholesalers, Durable Goods (4232, 4233, 4235, 4236, 4237, and 4239 only)</a>	56,150	3.93	\$21.16	\$44,020

# When Can We Expect This?

Anticipated Effective Dates and interaction with 87 FR 61660, Governing Certification of Agricultural Labor or Services effective Nov. 14, 2022 –

In the final rule effective November 14, 2022, 87 FR 61660, the Department indicated it will address those comments in a separate rulemaking.

# Likely Outcomes – Field and Livestock Workers (combined)

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Within the agricultural sector of the U.S. economy, the OEWS survey collects 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. In addition, 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 in this grouping of occupations.

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Finally, to further address potential data gaps, the Department proposes that in the event neither the FLS nor the OEWS survey report a statewide annual average hourly gross wage for field and livestock workers (combined) in a particular State, the District of Columbia, or U.S. Territory, the AEWG will be the national annual average hourly gross wage for field and livestock workers (combined) in that State (or equivalent district/territory), as reported by the OEWS survey.

# Recommended Actions

**1**

**Re-draft job descriptions and update occupational classification policies for purposes of FLSA.**

**2**

**Advocate regulatory change.**

# Amended Regulations Governing Certification of Agricultural Labor Services performed by H-2A Non-Immigrants

# Amended Regulations

Transitional time period – Feb. 14, 2023 (cutoff)

# Amended Regulations

## Substantive Changes to Program

- Prefiling Procedures (Ag Wages)
- Application Filing Requirements/Procedure
  - Improves safety and health protections for workers housed in rental or public accommodations.
  - Streamlines and updates bond requirements for labor contractors to better hold them accountable and clarifies joint-employer status for employers and associations.
  - Clarifies the housing certification process to allow state and local authorities to conduct housing inspections.
  - Establishes explicit authority to debar attorneys and agents for their misconduct, independent of an employer's violations.
  - Makes electronic filing mandatory for most applications to improve employers' processing efficiency.
  - Modernizes the methodology and procedures for determining the prevailing wage to allow state workforce agencies to produce more prevailing wage findings.

# Amended Regulations

## Substantive changes to program (continued)

- DOL Processing of Applications – no pre-filing recruitment.
- Post-Acceptance Requirements
- Labor Certification Determinations
- Post Certification Obligations (Wages & payroll banks)

# Recommendations for Agricultural Employers

Prepare for wage  
increases

Evaluate job  
classifications and  
job duties

Review FLSA  
requirements

Identify non-  
agricultural  
occupations

# OSHA Publishes Advanced Notice of Propose Rulemaking for Heat Injury and Illness Prevention



# Record-Breaking Heat Waves

A scorching heat wave is rolling around the world, with record-setting temperatures in Asia, Europe and North America. Britain hit a high of 104.5 degrees Fahrenheit on July 19 and in the U.S., nearly a third of the states face excessive heat, with heat warnings and advisories for parts or all of 28 states.



Employers have a duty to make sure workers avoid heat illnesses. Outdoor workers need water, rest and shade to make it to the end of their workday safely. Indoor workers, such as those in warehouses, boiler rooms, kitchens and laundries, can be affected by heat stress, too.

# Managing Retaliation Risk

Federal law entitles employees to a safe workplace. Employers must keep the workplace free of known health and safety hazards.

Employees have the right to speak up about hazards **without fear of retaliation**. Employees also have the right to:

- Receive workplace safety and health training in a language they understand
- Work on machines that are safe
- Receive required safety equipment, such as gloves or a harness and lifeline for falls
- Be protected from toxic chemicals
- Request an OSHA inspection, and speak to the inspector
- Report an injury or illness, and get copies of the employee's medical records
- Review records of work-related injuries and illnesses
- See results of tests taken to find workplace hazards



Thank you!