

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

2023 H-2A Adverse Effect Wage Rate (AEWR) Final Rule FAQs

Implementation of FAQs

March 9, 2023

On February 28, 2023, the Department of Labor (the Department) published a [final rule](#) promulgating regulations establishing a new methodology for determining hourly AEWRs for non-range occupations (i.e., all occupations other than herding and production of livestock on the range) for temporary labor certifications in the H-2A program. The Department is providing these FAQs to assist employers, workers, and other interested parties in understanding this final rule as it goes into effect on March 30, 2023.

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 hourly AEWRs for non-range occupations?

An employer seeking to employ foreign agricultural 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 (CBA) 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 H-2A workers and workers in corresponding employment cannot be negotiated. It serves to prevent localized wage stagnation or depression relative to the wages of workers in the United States similarly employed in areas and occupations in which employers desire to employ H-2A workers. Requiring employers to pay the AEWR when it is the highest applicable wage is one of the primary regulatory controls the Department uses to meet its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of workers in the United States similarly employed, while ensuring that employers can legally access agricultural labor.

The Department determined that the 2010 Final Rule AEWR methodology did not adequately prevent adverse effect on the wages of agricultural workers in the United States similarly employed in two principal ways. First, that methodology did not accurately reflect the wages paid to workers in jobs outside the Standard Occupational Classification (SOC) codes for field and livestock workers (combined) (e.g., supervisors, construction, logging, tractor-trailer truck drivers). Second, that methodology did not accurately reflect the wages paid to workers in every State or region where employers may seek to employ H-2A workers (e.g., Alaska or Puerto Rico). The Department therefore engaged in rulemaking to address these concerns with the AEWR methodology.

After consideration of comments received, on February 28, 2023, the Department published the [final rule](#), *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*. The final rule implements a methodology that uses a combination of wage data reported by the U.S. Department of Agriculture (USDA) Farm Labor Survey (FLS) and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey. The methodology adopted in this final rule enables the Department to establish appropriate AEWRs in all geographic areas and for all SOC codes in which employers may seek to employ H-2A workers.

Reminder: Prospective employers of workers to be engaged in herding or production of livestock on the range are covered by 20 CFR 655.200 through 655.235, which include a distinct list of wage sources applicable to H-2A job orders for work in those occupations and a distinct methodology to establish a monthly AEWR for herding and production of livestock on the range occupations.

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

Under this final rule, the Department will continue to determine the AEWR for field and livestock worker occupations, which comprise the vast majority of H-2A occupations, using USDA FLS data, as the 2010 methodology did, when FLS reports data for this group and State. In the event the FLS data does not report wages for these workers in certain States or regions, the Department will use the BLS OEWS survey to set a single statewide AEWR applicable to H-2A job opportunities for field and livestock workers (combined) in that State or region, or equivalent district or territory. Currently, the Department anticipates the OEWS survey will be used to set statewide AEWRs for field and livestock worker occupations only in Alaska, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. The field and livestock workers (combined) category includes workers who “plant, tend, pack, and harvest field crops, fruits, vegetables, nursery and greenhouse crops, or other crops” or “tend livestock, milk cows, or care for poultry,” including those who “operate farm machinery while engaged in these activities.”¹ The current SOC codes and titles associated with these workers, and which will be subject to this wage setting approach, are: 45-2041 - Graders and Sorters, Agricultural Products; 45-2091 - Agricultural Equipment Operators; 45-2092 - Farmworkers and Laborers, Crop, Nursery, and Greenhouse; 45-2093 - Farmworkers, Farm, Ranch, and Aquacultural Animals; 53-7064 - Packers and Packagers, Hand; and 45-2099 - Agricultural Workers, All Other.

For all occupations other than field and livestock workers (combined), the hourly AEWRs will be set by the statewide annual average hourly wage for the SOC code, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC, the AEWR will be the national annual average hourly wage reported by the OEWS survey.

¹ USDA NASS, *Crosswalk from the National Agricultural Statistics Services (NASS) Farm Labor Survey Occupations to the 2018 Standard Occupational Classification System*, available at [https://www.nass.usda.gov/Surveys/Guide to NASS Surveys/Farm Labor/farm-labor-soc-crosswalk.pdf](https://www.nass.usda.gov/Surveys/Guide%20to%20NASS%20Surveys/Farm%20Labor/farm-labor-soc-crosswalk.pdf).

In rare cases an employer’s job opportunity may require the performance of duties that cannot be classified within a single SOC code and the two or more distinct SOC codes assigned are subject to different AEWs (e.g., an FLS-based AEW and an OEWS-based AEW, or two OEWS-based AEWs). In such cases, the State Workforce Agency (SWA) and OFLC National Processing Center (NPC) will use the highest applicable AEW when processing the employer’s *Application for Temporary Employment Certification* (Form ETA-9142A) and job order (Form ETA-790/790A), which will govern the employer’s wage obligations unless a subsequent adjustment to the applicable AEWs changes which of the AEWs is highest.

Important Note: OFLC encourages employers to monitor each of the wage sources that impact their H-2A wage obligation from the time of job order submission (or signing a work contract) until the last date an H-2A worker or worker in corresponding employment is employed under the H-2A job order to ensure that they are in compliance with the obligation to offer, advertise, and pay workers a wage rate that is at least equal to the highest rate among the sources at all times. See 20 CFR 655.120(a) and 655.122(l).

3. When does the revised AEW methodology become effective?

This final rule is effective 30 days after publication (i.e., March 30, 2023) and the Department will implement the new AEW methodology on the effective date of the final rule. Employers who submit a Form ETA-790/790A on or after March 30, 2023, are subject to the new AEW methodology for the job order and the related Form ETA-9142A. In contrast, employers who have already received a temporary agricultural labor certification, or who have submitted a Form ETA-790/790A or Form ETA-9142A before March 30, 2023, 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.

<i>Scenarios</i>	<i>Applicable AEW Methodology</i>
Form ETA-790/790A:	
Submitted <u>before</u> March 30, 2023.....	2010 Methodology
Submitted <u>on or after</u> March 30, 2023.....	2023 Methodology
Form ETA-9142A:	
Submitted <u>before</u> March 30, 2023..... (includes emergency filings under 20 CFR 655.134)	2010 Methodology
Submitted <u>on or after</u> March 30, 2023..... (related job order submitted <u>before</u> March 30, 2023)	2010 Methodology
Submitted <u>on or after</u> March 30, 2023..... (related job order submitted <u>on or after</u> March 30, 2023)	2023 Methodology

Important Note: Any adjustment to an AEW applicable to an employer’s job opportunity, based on the SOC code(s) assigned to the job opportunity before certification, may impact

the employer's wage obligations during the work contract period. Whether an employer's H-2A program certification was adjudicated using the 2010 AEW methodolgy or the 2023 AEW methodolgy, the employer's wage obligation during the work contract period, including any extension granted, is subject to increase if the OFLC Administrator publishes an adjusted AEW during the work contract period and the new AEW is higher than the approved wage rate listed on the employer's job order and/or work contract. This topic is addressed in a separate *Frequently Asked Question* "Will I be obligated to adjust the approved wage rate if the Department publishes a higher AEW during the contract period?" (FAQ #7 below).

4. When and where will the Department publish the AEWs?

The Department has posted the AEWs applicable to each occupational classification and geographic area contemporaneously with the publication of this final rule on the OFLC website at <https://flag.dol.gov/>. For future FLS-based AEWs, the Department will publish notice of AEW adjustments in the *Federal Register*, based on the FLS publication cycle. Similarly, the Department will publish OEWS-based AEWs, based on the OEWS publication cycle. The Department will publish notice of adjustment to each AEW at least once each calendar year.

5. How can I determine which AEW applies to my job opportunity?

The AEW applicable to a job opportunity depends on the SOC code or codes assigned to the job opportunity. The majority of H-2A job opportunities will be classifiable in one of the SOC codes associated with the field and livestock workers (combined) category and will be subject to the FLS-based AEW. If the employer's job opportunity is not classifiable within one of the common SOC codes associated with the field and livestock workers (combined) occupational group, the appropriate SOC code will depend on the nature of the job opportunity (*e.g.*, duties, qualifications, requirements, equipment used). The SOC code(s) can be identified by comparing the employer's job opportunity to the SOC code descriptions and other information on the Department's Occupational Information Network (O*NET) website, located at <https://www.onetonline.org/>.

Example 1: Absent additional job details that might indicate otherwise, an H-2A job opportunity that requires workers to care for livestock, including driving a truck loaded with supplemental feed to the locations where livestock are grazing and repairing fences, would be assigned only SOC code 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), as the list of tasks for this SOC code in O*NET includes duties driving trucks to distribute feed and repairing fences and other enclosures.

Example 2: If the job opportunity in Example 1 also required workers to operate semi-trucks with at least 26,001 pounds Gross Vehicle Weight (GVW), whether a commercial driver's license is required or not, over public roads (*e.g.*, to haul cattle away from the ranch, to market), the job opportunity would be assigned a combination of SOC codes—both SOC code 45-2093 (Farmworker, Farm, Ranch, and Aquacultural Animals) and SOC code 53-3032 (Heavy and Tractor-Trailer Truck Drivers)—because operating such equipment (*i.e.*,

semi-trucks) is not covered in SOC code 45-2093, but it is covered in SOC code 53-3032, while livestock care is covered in SOC code 45-2093, but is not covered in SOC code 53-3032.

Example 3: Absent additional job details that might indicate otherwise, an H-2A job opportunity that requires workers to manually harvest crops in a field or orchard, perform other crop cultivation duties, and move the truck that holds the harvested crop from one place in the field or orchard to another and to storage or a pick-up point on the farm would be assigned only SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), as the list of tasks for this SOC code in O*NET includes duties driving trucks loaded with agricultural products on the farm.

Example 4: If in the job opportunity in Example 3, the “truck” was a heavy or more specialized piece of agricultural equipment than the basic example suggests (*e.g.*, a harvesting machine that gathers and holds the crop during harvest), SOC code 45-2091 (Agricultural Equipment Operators) would be assigned in addition to SOC code 45-2092, because operating heavy agricultural machinery is not covered in SOC code 45-2092, but it is covered in SOC code 45-2091, while manual harvesting is covered in SOC code 45-2092, but is not covered in SOC code 45-2091.

Reminder: Even if the SWA and CO assign a combination of SOC codes, if all of the SOC codes assigned are encompassed by the field and livestock workers (combined) occupational grouping, only one statewide hourly AEW determination applies to the employer’s job opportunity—the AEW determination using FLS data when reported. For example, in Example 4, two SOC codes were assigned to the job opportunity (*i.e.*, 45-2091 and 45-2092), which are both encompassed by the field and livestock workers (combined) occupational grouping. Thus, only the AEW determined under 20 CFR 655.120(b)(1)(i) and adjustments during the work contract period, if any, govern the employer’s wage obligations. In contrast, in Example 2, only one of the two SOC codes (*i.e.*, 45-2093) is encompassed by the field and livestock workers (combined) occupational grouping. Consequently, the SOC code with the higher AEW during SWA and OFLC NPC review (and adjustments to either of the applicable AEWs during the work contract period, if any) govern the employer’s wage obligations.

6. 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 for occupations performing construction work that qualifies under the H-2A program?

The appropriate SOC code and corresponding AEW will depend on the nature of the job opportunity and the duties to be performed by workers. Generally, construction related job opportunities will be classifiable within an SOC code not associated with the field and livestock workers (combined) category, such as SOC code 47-2061, Construction Laborers, and will be subject to the OEWS-based AEW determined in accordance with 20 CFR 655.120(b)(1)(ii). For example, a job opportunity that requires workers to construct livestock

buildings would fall outside of the field and livestock worker (combined) occupational grouping and would be subject to an OEWS-based AEW. R.

7. Will I be obligated to adjust the approved wage rate if the Department publishes a higher AEW. R. during the contract period?

Yes. The final rule changes the methodology used to determine the AEW. Rs, but otherwise does not change the employer's wage obligations under the Department's regulations, including the duty to pay a higher AEW. R. if one is published during the period of employment. All employers in the H-2A program are required to offer, recruit at, and pay the highest applicable wage rate. The Department will continue to require an H-2A employer to adjust to a higher wage at any time between the date on which it submits its job order and/or signs a work contract (whichever is earlier) until the end of the contract period. If the Department publishes a new AEW. R. applicable to the employer's job opportunity and the new AEW. R. is higher than the approved wage rate listed on the employer's job order and/or work contract, the employer will be required to adjust the offered wage to the higher AEW. R.

For example, if the OFLC Administrator publishes an adjusted AEW. R. for the field and livestock workers (combined) occupational grouping, which includes SOC code 45-2092, and that wage is higher than the wage rate listed on an employer's job order and/or work contract for a job opportunity classified using SOC code 45-2092, the employer will be required to increase the offered wage so that the wage rate offered and paid to H-2A workers and workers in corresponding employment is at least equal to the new, higher AEW. R.

Likewise, if the OFLC Administrator publishes an adjusted AEW. R. for the SOC code 53-3032 (Heavy and Tractor-Trailer Truck Drivers), and that wage is higher than the wage rate listed on the employer's job order and/or work contract for a job opportunity classified using SOC code 53-3032, the employer will be required to increase the offered wage so that the wage rate offered and paid to H-2A workers and workers in corresponding employment is at least equal to the newer and higher AEW. R.

In the event an employer's job opportunity was classified as a combination of occupations (e.g., both SOC code 45-2092 and SOC code 53-3032) and the OFLC Administrator publishes an adjusted AEW. R. for either SOC code 45-2092 or 53-3032 and that wage is higher than the wage rate listed on the employer's job order and/or work contract, the employer will be required to increase the wage offered so that the wage offered and paid to H-2A workers and workers in corresponding employment is at least equal to the newer and higher AEW. R.

Important Note: OFLC encourages employers to monitor each of the wage sources that impact their H-2A wage obligation from the time of job order submission (or signing a work contract) until the last date an H-2A worker or worker in corresponding employment is employed under the H-2A job order to ensure that they are in compliance with the obligation to offer, advertise, and pay workers a wage rate that is at least equal to the highest rate among the sources at all times. See 20 CFR 655.120(a) and 655.122(l).

8. If OFLC publishes an adjusted hourly AEW update during the work contract period and the new rate is lower than the certified rate, does the employer's wage obligation to workers decrease?

No. An employer is obligated to pay H-2A workers and workers in corresponding employment at least the certified wage rate throughout the work contract period.

Important Note: The Department's H-2A regulations prohibit contract terms that would decrease the wage paid in the event an adjusted AEW or prevailing wage rate is lower than the offered rate. *See* 20 CFR 655.120(b)(4) and (c)(4).