



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA-ETA-2021-0006]

RIN 1205-AC05

Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A

Nonimmigrants in Non-Range Occupations in the United States

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department or DOL) is proposing to amend its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status (H-2A workers). Specifically, the Department proposes to revise the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range occupations (i.e., all occupations other than herding and production of livestock on the range) using a combination of wage data reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey, formerly the Occupational Employment Statistics (OES) survey prior to March 31, 2021. For the vast majority of H-2A job opportunities represented by six occupations comprising the field and livestock worker (combined) wages reported by USDA, the proposed regulations will rely on the FLS to establish the AEWRs for these occupations in accordance with the methodology used by the Department for nearly all of the last 30 years. For all other occupations and to address circumstances in which the FLS does not report wage data for the field and livestock worker occupations, the Department proposes to use the OEWS survey to establish the AEWRs for each occupation. These proposed regulations are consistent with the Secretary of Labor's (Secretary)

statutory responsibility to certify that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. The Department believes the proposed methodology will strike a reasonable balance between the statute's competing goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments electronically by the following method:

Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and docket number ETA-2021-0006 in your comments. All comments received will become a matter of public record and will be posted without change to <https://www.regulations.gov>. Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

SUPPLEMENTARY INFORMATION

I. Background

A. Statutory and Regulatory Framework

The Immigration and Nationality Act (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), 1188.¹ Among other things, a prospective H-2A employer must first apply to the Secretary for a certification that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (2) the employment of the H-2A workers in such services or labor will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a “temporary labor certification”—unless both of the above referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers’ compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA’s Office of Foreign Labor Certification (OFLC).² In addition, the Secretary has delegated to the Wage and Hour Division (WHD) the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to ensure employer compliance with the terms and conditions of employment under the H-2A program.³

Since 1987, the Department has operated the H-2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to

¹ For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

² *See* Secretary’s Order 06-2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010); 20 CFR 655.101.

³ *See* Secretary’s Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

the certification and employment of workers under the H-2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501.

An employer seeking H-2A workers generally initiates the temporary labor certification process by filing an *H-2A Agricultural Clearance Order*, Form ETA-790/790A (job order), with the State Workforce Agency (SWA) in the area where it seeks to employ H-2A workers.⁴ In preparing the job order and to comply with its wage obligations under 20 CFR 655.122(l), the employer 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.⁵

With the exception of brief periods under the 2008 Final Rule⁶ and 2020 AEWR Final Rule,⁷ discussed in more detail below, the Department has established an AEWR using FLS data for each State in the multistate or single-State crop region to which the State belongs since 1987.⁸ Currently, pursuant to the 2010 Final Rule,⁹ the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's National Agricultural Statistics Service (NASS).¹⁰ The current methodology produces a single AEWR for all agricultural workers in a given State or region, without regard to occupational classification, and no AEWR in geographic areas not surveyed by NASS (e.g., Alaska). At the time of submitting

⁴ 20 CFR 655.121.

⁵ 20 CFR 655.120(a).

⁶ Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 FR 77110 (Dec. 18, 2008) (2008 Final Rule).

⁷ As discussed in subsequent sections of this preamble, a federal court in *United Farm Workers v. Dep't of Labor*, No. 20-cv-01690 (E.D. Cal. Dec. 23, 2020), enjoined the Department from further implementing the 2020 AEWR Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020) (2020 AEWR Final Rule) two days after its effective date of December 21, 2020.

⁸ The FLS collects data for workers directly hired by U.S. farms and ranches in each of 15 multistate labor regions, and the single-State regions of California, Florida, and Hawaii. The FLS does not collect data in other locations, for example, Alaska and Puerto Rico, where an employer may seek to employ H-2A workers.

⁹ As discussed more fully below, the Department has utilized the methodology set forth in the 2010 Final Rule since March 15, 2010, except for the two-day period of December 21-22, 2020.

¹⁰ Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6883 (Feb. 12, 2010) (2010 Final Rule); Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496 (Jun. 1, 1987) (1987 IFR).

the job order, the employer must agree to pay at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or state minimum wage rate, in effect at the time work is performed, whichever is highest, and pay that rate to workers for every hour or portion thereof worked during a pay period.¹¹

B. The Role of AEWRs in the H-2A Program

As explained in prior rulemakings, 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 no adverse effect on workers in the United States similarly employed. The AEWR is the rate that the Department has determined is necessary to ensure the employment of H-2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. Specifically, the AEWR is intended to guard against the potential for the entry of H-2A foreign workers to adversely affect the wages and working conditions of agricultural workers in the United States similarly employed. As the Department noted shortly after the creation of the modern H-2A program, a “basic Congressional premise for temporary foreign worker programs . . . is that the unregulated use of [nonimmigrant foreign workers] in agriculture would have an adverse impact on the wages of U.S. workers, absent protection.”¹² The potential for the employment of foreign workers to adversely affect the wages of U.S. workers is heightened in the H-2A program because the H-2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because employers’ access to a potentially unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease. The Department continues to believe that the use of an AEWR is necessary in order to effectuate its

¹¹ 20 CFR 655.120(l).

¹² Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20505 (Jun. 1, 1987).

statutory mandate of protecting agricultural workers in the United States similarly employed from the possibility of adverse effects on their wages and working conditions.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that “U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population . . . with few alternatives in the non-farm labor market.”¹³ As a result, “their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.”¹⁴ The AEWR provides “a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.”¹⁵

The use of an AEWR, separate from a prevailing wage for a particular crop or agricultural activity, “is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which the movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible).”¹⁶ The AEWR acts as “a prevailing wage concept defined over a broader geographic or occupational field.”¹⁷ The AEWR is generally based on data collected in a multistate agricultural region and an occupation broader than a particular crop activity or agricultural activity, while the prevailing wage is commonly determined based on a particular

¹³ Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 FR 45905, 45911 (Sep. 4, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 75 FR 6883, 6892-6893.

¹⁷ *Id.* at 6893.

crop activity or agricultural activity at the State or sub-State level. Therefore, the AEWR protects against localized wage depression that might occur in prevailing wage rates. The AEWR is complemented by the prevailing wage determination process, which serves a related, but distinct purpose. The prevailing wage, as determined under current Departmental guidance, provides an additional safeguard against wage depression that could arise in the performance of specific crop or agricultural activities within a regional or local geographic area.

Congress, however, did not “define adverse effect and left it in the Department’s discretion how to ensure that the [employment] of farmworkers met the statutory requirements.”¹⁸ Thus, the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.¹⁹ The INA “requires that the Department serve the interests of both farmworkers and growers—which are often in tension. That is why Congress left it to [the Department’s] judgment and expertise to strike the balance.”²⁰ There is no statutory requirement that the Department set the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose. The Department may also consider factors relating to the sound administration of the H-2A program in deciding how to set the AEWR. For the reasons discussed below, the Department is proposing an approach that is reasonable and strikes an appropriate balance under the INA.

C. Recent Rulemaking

As part of a comprehensive H-2A program notice of proposed rulemaking (2019 NPRM) published on July 26, 2019, the Department proposed to adjust the methodology used to establish the AEWRs in the H-2A program. That approach would have provided occupation-specific hourly AEWRs for non-range occupations²¹ (i.e., all occupations other than herding and production of livestock on the range) in each State using data reported by FLS for the

¹⁸ *AFL-CIO, et al. v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991).

¹⁹ *United Farmworkers v. Solis*, 697 F. Supp. 2d 5, 8-11 (D.D.C. 2010).

²⁰ *Dole*, 923 F.2d at 187.

²¹ Range occupations are subject to a monthly AEWR, as set forth in 20 CFR 655.211(c).

occupation, if available, or data reported by the OES (now OEWS) survey for the occupation in the State, if FLS data was not available.²² The Department explained that establishing AEWRs based on data more specific to the agricultural services or labor being performed under the Standard Occupational Classification (SOC) system would better protect against adverse effect on the wages of workers in the United States similarly employed. For example, the Department expressed concern that the AEW methodology under the 2010 Final Rule may have an adverse effect on the wages of workers in higher paid non-range occupations, such as supervisors of farmworkers and construction laborers, whose wages may be inappropriately lowered by use of a single hourly AEW based on the wages collected for occupations covering field and livestock workers.²³

The Department received thousands of comments on the proposed changes to the methodology for setting the AEWs in the 2019 NPRM. The commenters represented a wide range of stakeholders interested in the H-2A program, and the Department received comments both in support of and in opposition to the proposed changes to establish occupation-specific hourly AEWs for non-range occupations. A detailed discussion of the public comments as well as further background on the 2019 NPRM, specifically related to the hourly AEW determinations, is available in the Department's 2020 AEW Final Rule and will not be restated here.²⁴

On September 30, 2020, USDA publicly announced its intent to cancel the planned October data collection and November publication of the Agricultural Labor Survey (ALS) and Farm Labor reports (better known as the FLS).²⁵ The 2020 AEW Final Rule revised the AEW

²² See Proposed Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 FR 36168, 36171 (July 26, 2019) (2019 NPRM).

²³ *Id.* at 36180-36185.

²⁴ See 85 FR 70445, 70447-70465.

²⁵ *Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports by Suspending Data Collection for October 2020*, 85 FR 61719 (Sept. 30, 2020); USDA NASS, *Guide to NASS Surveys: Farm Labor Survey*, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor (last modified Dec. 10, 2020); see also USDA NASS, *USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), <https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php>.

methodology to account for public comments received on the 2019 NPRM proposals and the USDA announcement that NASS did not plan to release its November 2020 report containing the annual gross hourly wage rates for field and livestock workers (combined), which was necessary for the Department to establish and publish the hourly AEWRs for the next calendar year period on or before December 31, 2020, under the existing 2010 Final Rule methodology. In revising the AEWR methodology in the 2020 AEWR Final Rule, the Department acknowledged that USDA had suspended FLS data collection on at least two prior occasions, and the USDA decision to cancel the October data collection and release of the report planned for November 2020 was the subject of ongoing litigation.²⁶ Given the uncertainty regarding the future of the FLS and to ensure AEWRs for each State were published before the end of calendar year 2020, the Department published the 2020 AEWR Final Rule on November 5, 2020, with an effective date of December 21, 2020.

The 2020 AEWR Final Rule set the 2021 AEWR for field and livestock worker occupations at the 2020 AEWR rates, which were based on results from the FLS wage survey published in November 2019, and provided for those AEWRs to adjust annually, starting at the beginning of calendar year 2023, using the BLS Economic Cost Index (ECI), Wages and Salaries. For all other occupations, and for geographic areas not included in the FLS, the 2020 AEWR Final Rule set the 2021 AEWR at the statewide annual average hourly gross wage for the occupation reported by the OEWS survey or, where a statewide average hourly gross wage is not reported, the national average hourly gross wage for the occupation reported by the OEWS survey, to be adjusted annually based on the OEWS survey.

D. Need for New Rulemaking

On October 28, 2020, the U.S. District Court for the Eastern District of California in *United Farm Workers, et al. v. Perdue, et al.*, No. 20-cv-01452 (E.D. Cal. filed Oct. 13, 2020), preliminarily enjoined USDA from giving effect to its decision to suspend the October 2020 FLS

²⁶ 85 FR 70445, 70446.

data collection and cancel its November 2020 publication of the FLS.²⁷ Additionally, on December 23, 2020, in *United Farm Workers v. Dep't of Labor*, No. 20-cv-01690 (E.D. Cal. filed Nov. 30, 2020), the same court issued an order enjoining the Department from further implementing the 2020 AEW R Final Rule.²⁸ On January 12, 2021, the court issued a supplemental order requiring the Department to publish the AEW Rs for 2021 in the *Federal Register* on or before February 25, 2021, using the methodology set forth in the 2010 Final Rule, and to make those AEW Rs effective upon their publication.²⁹ After NASS completed its data collection, USDA published the FLS report on February 11, 2021.³⁰ Shortly thereafter, the Department published the 2021 AEW Rs on February 23, 2021, with an immediate effective date, pursuant to the court's January 12, 2021 supplemental order.³¹

In the litigation challenging the Department's 2020 AEW R Final Rule, the court recognized that the Department has broad discretion in determining the methodology for setting the AEW R so long as the Department's approach is sufficiently explained.³² However, the court ultimately granted the plaintiffs' Motion for Preliminary Injunction, concluding that the plaintiffs were likely to succeed on their claim that the Department failed to justify freezing wages for two years prior to indexing wages using the ECI.³³ According to the court, while the Department recognized "the importance of the AEW R reflecting the market rate" throughout the 2020 AEW R Final Rule,³⁴ it failed to adequately explain a departure from its longstanding use of the

²⁷ *United Farm Workers v. Perdue*, 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020); see also *United Farm Workers v. Perdue*, 2020 WL 6939021 (E.D. Cal. Nov. 25, 2020) (denying USDA's motion to modify or dissolve the injunction).

²⁸ Order Granting Plaintiffs' Motion for a Preliminary Injunction, *United Farm Workers, et al. v. U.S. Dep't of Labor, et al.*, No. 20-cv-1690 (E.D. Cal.), ECF No. 37.

²⁹ Supplemental Order Regarding Preliminary Injunctive Relief, *United Farm Workers, et al. v. U.S. Dep't of Labor, et al.*, No. 20-cv-1690 (E.D. Cal. Jan. 12, 2021), ECF No. 39.

³⁰ See USDA, Farm Labor Report (Feb. 11, 2021), <https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/f7624565c/9k420769j/fmla0221.pdf>; see also *Notice of Reinstatement of the Agricultural Labor Survey Previously Scheduled for October 2020*, 85 FR 79463 (Dec. 10, 2020).

³¹ See *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations*, 86 FR 10996 (Feb. 23, 2021).

³² Order Granting Plaintiffs' Motion for a Preliminary Injunction, *United Farm Workers, et al. v. U.S. Dep't of Labor, et al.*, No. 20-cv-1690 (E.D. Cal.), ECF No. 37 at 17 n.5.

³³ *Id.* at 17.

³⁴ *Id.*

FLS to set AEWRs for field and livestock workers “to ensure that U.S. ‘workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the guest workers.’”³⁵ The court rejected the Department’s explanation that the new AEWR methodology, as applied to the field and livestock workers, was justified, at least in part, by continued uncertainty about the long-term availability of the FLS, as demonstrated by USDA’s decision to suspend the October 2020 data collection. The court determined “the USDA’s FLS Suspension Notice should not factor into this equation, at least with regard to setting the 2021 AEWRs, because the [court] enjoined that decision and [new] FLS data should therefore be available in a timely fashion.”³⁶ Accordingly, the court ruled that “[d]espite claiming that it concluded ‘on balance’ that use of the FLS was ‘not appropriate in this context,’ the [Department] has not in fact addressed the impact that freezing” wages would have on field and livestock workers.³⁷

As the court noted, the Department has previously stated that the FLS “is the only annually available data source that actually uses information sourced directly from [farm employers],” and its “broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of the H-2A program.”³⁸ Given that USDA has resumed FLS data collection,³⁹ and plans to release the next annual data in November 2021,⁴⁰ and given the Department’s longstanding reliance on the FLS to establish the AEWR, the Department has

³⁵ *Id.* at 18 (quoting 85 FR 70445, 70453) (“However, the closest that the Final Rule gets to addressing the intentional departure from accurate market wages is its statement that ‘even if more recent, 2020 FLS wage data were available, relying on it to set 2021 AEWR[s] would only serve to perpetuate the very wage volatility that the Department seeks to ameliorate through this rule.’”).

³⁶ *Id.*

³⁷ *Id.* (internal citations omitted).

³⁸ *Id.* at *4.

³⁹ USDA NASS, Farm Labor report, <https://usda.library.cornell.edu/concern/publications/x920fw89s?locale=en> (last modified May 26, 2021).

⁴⁰ *Id.*

decided it is appropriate to reassess its decision to no longer rely on annual FLS data for the vast majority of H-2A job opportunities.

Additionally, while the 2020 AEW Final Rule would have led to higher wages for certain higher skilled workers, the rule also acknowledged that the revised methodology “may result in the AEWs for field workers and livestock workers being set at slightly lower levels in future years than would be the case under the [2010 Rule’s] methodology.”⁴¹ The court’s order found that, given the Department’s statutory mandate to prevent adverse effects, it was likely that plaintiffs would succeed on their claim that the 2020 AEW Final Rule failed to provide adequate justification for a methodology that could lead to lower wages for field and livestock workers than the wages that would have been produced under the 2010 methodology.⁴² Although nominal wages for field and livestock were expected not to decline under the 2020 methodology, the Department acknowledged that the 2021 AEWs, set pursuant to the 2010 methodology and the FLS published in February 2021, will result in higher wages for the majority of H-2A workers in 2021. Consistent with the court’s decision, the Department believes adjustment of the methodology used to establish the required wage rate for the H-2A program will better enable the Department to meet its statutory obligation regarding adverse effect.

The Department has also reviewed the policy underlying the 2020 AEW Final Rule in light of its statutory mandate, and has determined that two major aspects of the 2020 AEW Final Rule do not adequately protect against adverse impact: (1) the imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS survey published in November 2019, and (2) the use of the BLS ECI, Wages and Salaries, to annually adjust AEWs for field and livestock workers annually thereafter. These policy decisions represent a significant departure from how minimum or prevailing wage determinations are issued to employers in other employment-based visa programs administered by the Department, and from how the

⁴¹ *Id.* at *14.

⁴² *Id.* at *14-15, 18.

Department has established the AEWR in the H-2A program for more than 30 years. The Department considers actual, current wage data to be the best source of information for determining prevailing wages, when an appropriate data source is available, and has consistently relied upon such information in determining minimum or prevailing wages in the other employment-based visa programs it administers. Using a methodology other than actual, current wage data increases the likelihood of permitting employers to pay wages that are not reflective of market wages, which undermines the Department's mandate to prevent an adverse effect on the wages of workers in the United States similarly employed.

However, as discussed above, the Department remains concerned that the use of a single AEWR for all workers in the H-2A program may adversely affect wages in certain occupations. Therefore, the Department proposes utilizing the bifurcated approach set forth in the 2020 rule that set a single AEWR based on the FLS for the vast majority of job opportunities used by employers in the H-2A program—occupational classifications for field workers and livestock workers—while shifting AEWR determinations to the OEWS survey for all other occupations for which the FLS does not adequately collect or consistently report wage data at a State or regional level (e.g., truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). Because these other, typically higher paid occupations are not reported in the FLS field and livestock workers (combined) category, an OEWS-based AEWR will better protect against adverse effect. Additionally, as AEWR determinations become more occupation specific, the Department also believes it is appropriate to require that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation to reduce the potential for employers to misclassify workers and establish greater consistency with prevailing wage determinations in the H-2B program.

Accordingly, the Department has determined these policies must be reconsidered and proposes revisions in this notice of proposed rulemaking (NPRM). The Department has determined that the proposals outlined below reflect an approach that allows the Department to

meet its statutory mandate to ensure that workers in the United States are provided an adequate level of wage protection in their employment. The Department took into account the regulations promulgated in 2010, as well as the significant revision of the AEWR provisions in the 2020 AEWR Final Rule, in order to arrive at the approach described below. The Department believes the methodology described below is reasonable and strikes an appropriate balance under the INA.

II. Proposed Changes to the AEWR Determination Methodology

A. Summary of Proposed Revisions

The Department proposes to use the definition of AEWR found in the 2020 AEWR Final Rule. Because that rule has been preliminarily enjoined, and there is uncertainty as to whether that rule will be vacated prior to the issuance of a final rule, the Department seeks comment on the proposal to define the AEWR as set forth in the 2020 AEWR Final Rule.

The 2010 Final Rule defined the AEWR as “[t]he annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.” In the 2019 NPRM, to be consistent with the Department’s proposal to adjust the AEWR methodology for non-range occupations, the Department proposed to revise the definition of AEWR to include both the FLS and OEWS survey as sources for determining the AEWR and to reference the new AEWR methodology provision at § 655.120(b). The revised definition in the 2020 AEWR Final Rule clarified that the term AEWR applies to both the hourly rate for non-range occupations, as set forth in § 655.120(b), and to the monthly rate for range occupations, as set forth in § 655.211(c). Second, rather than identifying particular data sources, the revised definition stated that the AEWR is the rate that the OFLC Administrator publishes in the *Federal Register* in accordance with the AEWR-setting methodology and procedural provisions at §§ 655.120(b) and 655.211(c). Finally, the Department made additional nonsubstantive technical revisions to § 655.103(b) in the 2020 AEWR Final Rule for clarity.

In § 655.120(b), for the vast majority of H-2A job opportunities represented by six occupations comprising the field and livestock worker (combined) category within the FLS, the Department proposes to utilize the AEWR methodology set forth in the 2010 Final Rule, which set a single AEWR using the annual average gross hourly wage for field and livestock workers (combined) for the State or region, as determined by the USDA's NASS FLS report, whenever such data is available. For this occupational grouping, the Department proposes to use OEWS wage data in limited circumstances. Specifically, the AEWR 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. For example, in Alaska and Puerto Rico, where the FLS is not currently conducted and, accordingly, NASS does not report wage data for field and livestock workers (combined), the Department proposes using OEWS wage data to determine the statewide (or statewide equivalent for the District of Columbia and U.S. territories)⁴³ AEWR for that combination of field and livestock worker occupations, using statewide data, if available, or nationwide data, if the OEWS survey does not report a statewide annual average gross hourly wage for those occupations. Finally, 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 AEWR.

For all other occupations, the Department proposes to use the methodology previously set forth in the 2020 AEWR Final Rule, under which the AEWR 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

⁴³ OEWS collects wage data from all fifty states as well as the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. See BLS, *Occupational Employment and Wage Statistics Overview*, https://www.bls.gov/oes/oes_emp.htm (last modified Mar. 31, 2021) ("The OEWS survey is a federal-state cooperative program between [BLS] and State Workforce Agencies (SWAs). BLS provides the procedures and technical support, draws the sample, and produces the survey materials, while the SWAs collect the data. SWAs from all fifty states, plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands participate in the survey. Occupational employment and wage rate estimates at the national level are produced by BLS using data from the fifty states and the District of Columbia.").

OEWS survey, if the OEWS survey does not report a statewide annual average gross hourly wage for the occupation.

As with the 2020 AEWL Final Rule, the Department proposes to require that if the job duties on the H-2A application (including the job order) do not fall within a single occupational classification, and the occupations involved are subject to different AEWLs, the Department will determine the applicable AEWL at the highest AEWL for the applicable occupational classifications.

Also as with the 2020 AEWL Final Rule, the Department proposes to require that the OFLC Administrator publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWL via a notice in the *Federal Register*. The Department will update the AEWLs through two separate announcements in the *Federal Register*, one for the AEWLs based on the FLS, and a second for the AEWLs based on the OEWS survey, due to the different time periods for release of these two wage surveys. As discussed below, if a job opportunity may be classified within more than one occupational classification or SOC code, making that job opportunity subject to both FLS- and OEWS-based AEWLs, the employer must pay the highest applicable wage as of the effective date of that AEWL.

B. The Department Proposes to Use the FLS to Establish the AEWL for Field and Livestock Worker Job Opportunities in Most Cases

The Department proposes to use the average gross hourly wage rate for the field and livestock workers (combined) category from the FLS for the State or region to determine the AEWL for field and livestock worker job opportunities, when that data is available.

1. Use of a Single Field and Livestock Workers (Combined) Occupational Category

The FLS field and livestock workers (combined) category encompasses the vast majority of temporary agricultural job opportunities offered in the H-2A program. According to NASS, wage data reported for this 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.”⁴⁴ The FLS field and livestock worker category reports aggregate wage data covering the following Standard Occupational Classification (SOC) titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093); Agricultural Equipment Operators (45-2091); Packers and Packagers, Hand (53-7064); Graders and Sorters, Agricultural Products (45-2041); and All Other Agricultural Workers (45-2099). Depending on the agricultural product reported by the employer, wage data collected under the All Other Agricultural Workers occupational classification are assigned to either the livestock worker or field worker major category of the FLS.

Determining AEWRs using a single gross hourly wage for this group of occupations, rather than occupation-specific AEWRs for each occupation encompassed in the field and livestock worker (combined) category, is consistent with the Department’s conclusion in the 2010 Final Rule that the skills of many farm laborers are “adaptable across a relatively wide range of crop or livestock activities and occupations” because these activities and occupations “involve skills that are readily learned in a very short time on the job, skills peak quickly, rather than increasing with long-term experience, and skills related to one crop or activity are readily transferred to other crops or activities.”⁴⁵ It also is consistent with the approach taken in the 2020 AEWR Final Rule in response to the significant number of comments⁴⁶ opposing the Department’s proposal in the 2019 NPRM to use an occupation-specific AEWR for occupations in this category, using the

⁴⁴ USDA NASS, *Crosswalk from the National Agricultural Statistics Services (NASS) Farm Labor Survey Occupations to the 2018 Standard Occupational Classification System*, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/farm-labor-soc-crosswalk (last visited Aug. 19, 2021).

⁴⁵ 75 FR 6883, 6899-6900.

⁴⁶ See 85 FR 70445, 70451-70458 (Addressing comments that occupation-specific field and livestock worker wages would reduce wages in common occupations, increase complexity and unpredictability, increase employer recordkeeping burdens and the Department’s administrative burden, and create artificial boundaries between similar occupations.).

FLS where available, and using the OEWS survey where the FLS does not report a wage for the occupation in the State or region.⁴⁷ In the 2020 AEWL Final Rule, the Department retained use of the FLS field and livestock workers (combined) category to determine the AEWL applicable to all field and livestock worker job opportunities in each State, rather than occupation-specific AEWLs for occupations encompassed by the FLS field and livestock workers (combined) category.

The Department proposes to continue using a single gross hourly AEWL applicable to all H-2A job opportunities covered by the occupations in the field and livestock category (combined) in each State, because this approach strikes a reasonable balance between the interests of employers and workers and ensures employment of foreign workers in the vast majority of H-2A job opportunities will not adversely affect agricultural workers in the United States similarly employed. Continuing to use this approach will provide continuity and a reasonable level of predictability and flexibility for employers using the H-2A program while reducing the complexities and business impacts associated with greater occupation-specific determinations, including combination of occupation determinations, on the AEWL applicable to an employer's job opportunity in the vast majority of cases. This approach also provides continuity and a reasonable level of predictability and protection to workers who may move between the occupations in the field and livestock category (combined). In addition, as each of the field and livestock occupations encompass a broad variety of duties, resulting in areas of overlap between the occupations, a worker's duties within a single workday may fall under multiple field and livestock occupations. The proposed approach helps both employers and workers by simplifying the process each uses to ensure that work is correctly compensated. Use of a single AEWL in

⁴⁷ The Department explained in that NPRM that it could use the FLS to establish an occupation-specific AEWL for many States and regions for SOCs 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), but an FLS-based AEWL could only be established in some States and regions for several other occupations, including SOCs 45-2041 (Graders and Sorters, Agricultural Products), 45-2091 (Agricultural Equipment Operators), 45-2099 (Agricultural Workers, All Other), 53-7064 (Packers and Packagers, Hand), 11-9013 (Farmers, Ranchers and Other Agricultural Managers), and 45-1011 (First-Line Supervisors of Farm Workers) based on NASS data. 84 FR at 36182.

each State applicable to this occupational grouping will minimize recordkeeping burdens, especially in cases where workers are needed to perform a variety of field and livestock duties, as employers will be required to pay such workers the same wage rate for all of those duties.

2. Use of FLS Data for Field and Livestock Workers (Combined)

The Department proposes to use the FLS field and livestock worker (combined) wage data as the primary source for determining the AEWRs for this grouping of six occupations for several reasons. As noted in prior rulemaking, the FLS is the best available information for determining the AEWRs because it is the only wage survey that collects data from farm and ranch employers.⁴⁸ Since 1987, the Department primarily has established an AEWR using the FLS for each State in the multistate or single-State crop region to which the State belongs. The Department continues to believe the FLS is the best available wage source for establishing AEWRs covering the vast majority of H-2A job opportunities, whenever such data is available.

In addition, the Department considers the broad geographic scope of the survey an advantage of the FLS. The FLS consistently collects sufficient data to generate a wage finding for field and livestock workers (combined) in each State or region surveyed, making it a reliable source of wage data year to year. As explained in the 2019 NPRM, the geographic scope of the FLS, covering California, Florida, and Hawaii, and 15 multistate groupings for other States, and the statewide and regional wages issued “provide[s] protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers.”⁴⁹ The broad geographic scope of the FLS is also “consistent with both the nature of agricultural employment and the statutory intent of the H-2A program,” reflecting the migratory pattern of employment of many farmworkers over a large region and Congress’s recognition of “this unique characteristic of the agricultural labor market with its statutory requirement that

⁴⁸ See, e.g., 84 FR 36168, 36180-36182. USDA NASS provides additional information about the procedures used to collect, analyze, estimate, and disseminate the Farm Labor Survey at https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor.

⁴⁹ 84 FR 36168, 36182.

employers recruit for labor in multistate regions as part of their labor market before receiving a labor certification”⁵⁰ As the Department noted in the 2010 Final Rule, “[b]y providing a prevailing wage defined over a broader geographic area and over a broader occupational span (all field and livestock workers, rather than a narrow crop or job description), use of the FLS provides a check on the expansion of [the employment of] foreign labor . . . to prevent undermining job opportunities and wages for domestic farm workers” and “reflects the view that farm labor is mobile across relatively wide areas.”⁵¹ For similar reasons, the Department explained that the FLS-based AEW may serve “to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on . . . foreign labor on an ongoing basis.”⁵²

3. Use of OEWS Data for Field and Livestock Workers (Combined)

The Department proposes using the OEWS wage data to determine a statewide AEW for field and livestock workers in the event the FLS cannot report wages to establish a statewide AEW for the field and livestock workers (combined) category. By using the FLS report as the sole source for establishing AEWs under the 2010 final rule’s methodology, the Department cannot establish an AEW in all geographic locations where employers may seek to employ H-2A workers (e.g., Alaska or Puerto Rico) due to limitations in the FLS’s methodology and estimation procedures. In addition, as it has previously noted, the Department does not have direct control over the FLS, and USDA could elect to terminate the survey at some point in the future. USDA has announced its intention to suspend the survey on three occasions, including in 2020,⁵³ as noted above, and in 2007⁵⁴ and 2011⁵⁵ due to budget constraints. Thus, in order to ensure continuity in establishing statewide AEWs, to address situations where the FLS does not

⁵⁰ 75 FR 6883, 6899.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 85 FR 61719.

⁵⁴ *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports*, 72 FR 5675 (Feb. 7, 2007).

⁵⁵ *Notice of Intent to Suspend the Agricultural Labor Survey and Farm Labor Reports*, 76 FR 28730 (May 18, 2011).

currently report a wage,⁵⁶ to protect against the possibility of a future decision by USDA to suspend or discontinue collection of the FLS, and other potential circumstances in which FLS wage data may not be available to set an AEWR for the State or region at least once annually, the Department proposes to use a second source of occupational wage data—the OEWS survey—to determine the statewide AEWRs for this grouping of occupations in circumstances where FLS does not report a State or regional wage finding or is otherwise not available.

Although the Department generally prefers to establish AEWRs based on the FLS for this group of occupations for the reasons discussed above, the OEWS survey would become the best available source of wage data to establish AEWRs for field and livestock workers (combined) if the FLS is not available. OEWS survey data is the only other comprehensive and statistically valid set of wage data collected from employers engaged in agricultural activities, tailored to geographic areas and occupations common in the H-2A program, and is most consistent with the occupation-based wage collection of the FLS. 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,⁵⁷ so data reported by these types of establishments represents the best information available for purposes of establishing the AEWRs where FLS data is unavailable for the occupation. BLS has the capability of providing a single annual

⁵⁶ This situation is rare. The Department’s H-2A disclosure data for FY 2020 includes two applications submitted for job opportunities in Alaska and two for job opportunities in Puerto Rico, while disclosure data for FY 2019 includes three for job opportunities in Alaska and one in Puerto Rico.

⁵⁷ For example, the proportion of all H-2A worker positions certified by DOL for employment in non-range occupations with employers qualifying as H-2A Labor Contractors (i.e., farm labor contractors) has increased significantly from 33.1 percent in FY 2016 (54,787 positions out of 165,741 positions) to 42.3 percent in FY 2020 (116,472 positions out of 275,430 total positions).

average gross hourly wage for field and livestock workers (combined), in this grouping of occupations that mirrors the FLS, at the statewide level based on the OEWS survey data, which the Department will make accessible to the public online. Specifically, BLS can leverage its existing survey standards and estimation procedures to compute statewide and national average gross hourly wages across this grouping of occupations based on employer establishments across industries.⁵⁸

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 AEWR 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. Given the anticipated scenarios in which such a data gap may occur, the Department does not propose to use the FLS's national data to establish the AEWR for field and livestock workers (combined) in the event a statewide annual average hourly gross wage for those workers in a particular State is unavailable. Whenever the FLS has published, it consistently reports annual average hourly gross wage findings for field and livestock workers (combined) in 15 multistate and three single-State regions, covering 49 States. The Department anticipates that a national rate would be needed for field and livestock workers (combined) in these 49 States only in the unexpected event the FLS is broadly not available (e.g., due to suspension or termination of the entire survey). In addition, as discussed above, the FLS does not survey Alaska and other geographic areas in which employers may seek to employ H-2A workers. As a result, the FLS' national wage findings do not include wage data for workers in these geographic areas, whereas the OEWS survey consistently reports wage data for these geographic areas. For these reasons, the Department proposes to use the OEWS survey's national

⁵⁸ An overview of the OEWS survey methodology is available at https://www.bls.gov/oes/current/oes_tec.htm. A more detailed explanation of the survey standards and estimation procedures is available at <https://www.bls.gov/opub/hom/oeWS/pdf/oeWS.pdf>.

annual average hourly gross wage for field and livestock workers (combined) as the AEW, if 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.

B. The Department Proposes to Use the OEWS Survey to Establish Occupation-Specific AEWs for All Other Job Opportunities

For job opportunities that do not fall within the FLS field and livestock workers (combined) category, the Department proposes adopting the OEWS-based, occupation-specific AEW methodology explained in the 2020 AEW Final Rule. Under this methodology, the AEW for all occupations other than field and livestock workers will be the statewide annual average hourly wage for the occupational classification, as reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC, the AEW for that State will be the national annual average hourly wage for the SOC, as reported by the OEWS survey.

The Department is proposing to utilize the OEWS-based methodology for these occupations for the reasons explained below and in the 2020 AEW Final Rule.⁵⁹ In part, while the FLS is the most accurate and comprehensive wage source to determine the AEWs for field and livestock workers, as noted above, the OEWS survey is a more accurate data source for other agricultural occupations, such as supervisors, that the FLS does not adequately or consistently survey. In addition, the OEWS survey includes occupations that are more often contracted-for services than farmer-employed (e.g., construction, equipment operators supporting farm production), which makes the OEWS data collection from farm labor contractors a better data source for determining AEWs and protecting against adverse effect for these occupations.

Since 2014, the FLS has collected data by SOC—the same taxonomy that is used for the OEWS survey. However, it does not currently report wage data by SOC. Instead, the FLS aggregates and reports data in four major FLS occupational categories: field workers, livestock

⁵⁹ 85 FR 70445, 70453, 70458-70459.

workers, field and livestock workers (combined), and all hired workers. In collaboration with the Department and the OMB, USDA established and implemented a crosswalk from the major FLS categories to the SOC categories.⁶⁰ Although the FLS collects data on the wages of supervisors, the FLS has not been able to report a statistically valid wage result for the major FLS category of supervisors.⁶¹ As a result, the wages of supervisors are currently only reported in the “all hired workers” category and are not included in the “field and livestock workers (combined)” category that the Department uses to establish the AEW. The FLS also collects data on “other workers,”⁶² though the FLS has not been able to report a statistically valid wage result for this FLS category, and, as a result, wages for “other workers” are reported only in the “all hired workers” category and are not included in the wages reported in the “field and livestock workers (combined)” category. Because the FLS does not consistently report data in all States or regions for each SOC outside of the field and livestock workers category, use of the FLS to determine wages for these occupations would require frequent use of the OEWS survey or another wage source, varying sources from year to year, and resulting in a much higher degree of year-to-year variability in the AEW than if the OEWS survey is used at the outset for job opportunities not included in the field and livestock workers (combined) category, and this lack of variability will provide greater year-over-year certainty to both workers and employers.

The OEWS survey is a reliable and comprehensive wage survey that consistently produces annual average wages for nearly all SOC outside of the field and livestock workers occupational category. The OEWS survey is among the largest ongoing statistical survey programs of the Federal Government, producing wage estimates for over 800 occupations, and it is used as the

⁶⁰ See *Crosswalk from the National Agricultural Statistics Service (NASS) Farm Labor Survey (FLS) Occupations to the 2018 Standard Occupational Classification (SOC) System*, available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/farm-labor-soc-crosswalk (last visited Aug. 19, 2021).

⁶¹ Included within the major FLS category of supervisors are Farmers, Ranchers, and Other Agricultural Managers (SOC 11-9013); and First-Line Supervisors of Farm Workers (SOC 45-1011).

⁶² Included in the “other workers” category are Agricultural Inspectors (SOC 45-2011), Animal Breeders (45-2021), Pest Control Workers (37-2021), and any other agricultural worker not fitting into the categories above, including mechanics, shop workers, truck drivers, accountants, bookkeepers, and office workers who fall within a variety of SOCs and have a wide variety of job duties. Contract and custom workers are excluded from the FLS sample population.

primary wage source for prevailing wage determinations in the H-2B temporary non-agricultural labor certification program, as well as other nonimmigrant and immigrant programs. The OEWS program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employment in the United States.⁶³ Every 6 months, the oldest data from the 3-year cycle is removed from the sample, and new data is added. The wages reported in the older data are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OEWS survey is primarily conducted by mail, with follow up by phone to nonrespondents or if needed to clarify data.⁶⁴ The OEWS average⁶⁵ hourly wage reported includes all straight-time, gross pay, exclusive of premium pay, but including piece rate pay.

Similarly to state or regional FLS-based AEWRs for field and livestock workers, the use of an OEWS-based statewide AEWR addresses the Department's concern that the potential for localized wage depression is more pronounced in the H-2A program than in the H-2B program due to both the economic position of agricultural workers and the fact that the H-2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.⁶⁶ Thus, a statewide wage is more likely to protect against wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level. In the limited circumstances in which there is no statewide wage, use of the national annual average hourly wage reported for the particular SOC will ensure an AEWR determination can be made each year without the need for any adjustment method. In addition, and as with the FLS, the OEWS survey also reports a wage that covers activities above a crop activity level,

⁶³ See BLS, *Occupational Employment and Wage Statistics Frequently Asked Questions*, https://www.bls.gov/oes/oes_ques.htm (last modified Aug. 13, 2021).

⁶⁴ *Id.*

⁶⁵ The OEWS uses the term “mean.” However, for purposes of this regulation the Department uses the term “average” because the two terms are synonymous, and the Department has traditionally used the term “average” in setting the AEWR from the FLS.

⁶⁶ See, e.g., 75 FR 6883, 6895.

which, as discussed above, is where wage depression from an influx of foreign workers could be most acute.

Shifting AEWR determinations to the OEWS survey for those occupations for which the FLS does not report statistically reliable wage data at a State or regional level also addresses the Department's concern that use of the combined field and livestock worker FLS data to determine the AEWR for all occupations may have an adverse effect on the wages of workers in higher paid agricultural occupations, including truck drivers, farm supervisors and managers, construction workers, and many occupations primarily in contract employment, because OEWS data will provide an occupation-specific wage that does not include data for lower wage occupations and because OEWS data includes farm labor contractor wage data. For example, a worker performing construction labor on a farm under the H-2A program in Ohio must currently be paid at least the AEWR of \$15.31 per hour because the worker's wage is determined based on the field and livestock workers (combined) wage, which reflects neither wages paid to agricultural workers engaged in duties typically performed by a construction worker nor wages of workers who perform contract work, which an agricultural construction laborer in the H-2A program is likely to perform. In contrast, if the same construction worker performed identical job duties at a location other than a farm and, therefore, fell under the H-2B program, the required prevailing wage rate based on OEWS data would be approximately \$22.73 per hour.⁶⁷ This same variance is seen across other non-field and livestock occupations for which H-2A workers are used. For example, the OEWS mean wage in Ohio for first-line supervisors (SOC 45-1011) in 2020 was \$27.83, in contrast to the AEWR of \$15.31. Given the disparity in wages between the FLS and OEWS survey for these occupations, using the FLS to establish the AEWR for non-field and livestock occupations may cause an adverse effect on the wages of workers in the United States similarly employed, contrary to the Department's statutory mandate. An OEWS-

⁶⁷ This is the current statewide OEWS wage for the category of Construction Laborer, SOC 47-2061, in Ohio. Under the H-2B program, a local wage for that occupation would be used if available.

based AEW based on an occupational classification that accounts for significantly different job duties, but remains broader than a particular crop activity or agricultural activity in a local area, will thus not only provide greater predictability but also better protect workers in the United States in occupations other than field and livestock occupations.

C. The Department Proposes to Assign the Highest AEW for All SOC's Applicable to Job Opportunities Covering Multiple SOC's

The Department proposes to require that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation, when those occupations are subject to different AEWs, as proposed in the 2019 NPRM and adopted in the 2020 AEW Final Rule.

This requirement would address scenarios in which the combination of duties an employer requires involves different AEWs. The Department best protects against adverse effect by setting the AEW applicable to the job opportunity at the highest of the applicable AEWs. Under this proposal, if the job duties on the H-2A application (including the job order) do not fall within the field and livestock worker (combined) occupational grouping, the Department will determine the applicable AEW based on the highest AEW for all applicable occupational classifications. In the event an employer's job opportunity requires the performance of duties encompassed by two or more distinct occupational classifications subject to different AEWs (e.g., a field and livestock worker (combined) occupation and an SOC occupation not encompassed in the field and livestock worker (combined) occupational group, or two SOC occupations both of which are not encompassed in the field and livestock worker (combined) occupational group), the Department will assign the highest AEW among all applicable occupational classifications to reduce the potential for job misclassification by the employer and effectuate the purpose of the AEW (i.e., prevent adverse effect to the wages of workers in the United States similarly employed).

The proposal, discussed above, to determine a single statewide AEW for all job

opportunities in the field and livestock workers (combined) occupational grouping will minimize use of this provision because a job opportunity involving a combination of occupations that are all encompassed within the field and livestock workers (combined) will be subject to a single AEW, regardless of which of the particular SOC codes applicable to the field and livestock workers (combined) occupational category may be involved. For example, a job opportunity involving duties properly classified under SOC 45-2091 (Agricultural Equipment Operators) and duties properly classified under SOC 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals) would be subject only to the field and livestock workers (combined) AEW and the provision regarding combination of occupations with different AEWs would not be relevant, as a single AEW applies to the job opportunity.

Under this proposal, the SWA will continue to review job orders—and SOC codes therein—in the first instance and determine the appropriate SOC code for the job opportunity when it reviews an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. The SWA will enter the SOC code assigned to the employer's job opportunity in Section I, Items 4 and 5, of the Form ETA-790, *Agricultural Clearance Order*. After the employer files its *H-2A Application for Temporary Employment Certification*, the OFLC Certifying Officer (CO) will review the employer's application and job order, including SOC coding. The CO may determine a different SOC coding is necessary, for example, based on additional information received during processing. The CO evaluates each job opportunity on a case-by-case basis, considering the totality of the information in an H-2A application and job order, to determine the appropriate SOC code. In making a determination, the CO compares the duties of the employer's job opportunity with SOC definitions and tasks that are listed in the Department's Occupational Information Network (O*NET). Where similar tasks appear in more than one SOC code (e.g., driving or maintenance and repair of farm equipment), the CO considers other factual information in the employer's application and job order. For example, for job opportunities involving driving duties, the CO will look at factors such as the type of

equipment involved (e.g., pickup trucks, custom combine machinery, or semi tractor-trailer trucks; makes and models of machines to be used), the location where the work will be performed (e.g., on a farm or off), and the qualifications and requirements for the job opportunity in order to determine the most appropriate SOC code to assign to the employer's job opportunity.

Generally, a job opportunity corresponds with a single SOC code if all of the duties fall within a single occupation and the qualifications, requirements, and other factors are consistent with that occupation. For example, a job opportunity for workers to solely perform hand harvesting activities would match with a single occupation, SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), absent factors indicating other SOC codes (e.g., a required machinery repair certification). In the event the job opportunity cannot be classified within a single SOC, the CO will assign a combination of occupations—more than one SOC code—to the employer's job opportunity. As noted above, the Department anticipates that the majority of H-2A job opportunities will be classifiable in one of the SOC occupations associated with the FLS field workers and livestock workers (combined) category, or a combination of those SOC codes, since the H-2A program requires that job opportunities constitute agricultural labor or services, as defined by the Fair Labor Standards Act and Internal Revenue Code. Jobs classified within one of these codes or a combination of these codes will receive the AEWR applicable to field and livestock workers (combined). If different AEWRs apply to the SOC codes, the CO will use the highest AEWR of the applicable AEWRs.

As explained in the 2020 AEWR Final Rule, 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 field and livestock worker (combined) FLS-based AEW. In contrast, a job opportunity for workers to drive semi tractor-trailer trucks to and from specified destinations within an 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 OEWS-based, occupation-specific AEW. 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 field and livestock worker (combined) FLS-based AEW applicable to SOC 45-2091 or the OEWS-based, occupation-specific AEW applicable to SOC 53-3032, whichever is a higher rate per hour.

As noted in the 2019 NPRM and 2020 AEW Final Rule, determining the appropriate occupational classification is an important component of the Department's decision to move to occupation-specific wages for job opportunities not classifiable within the field and livestock (combined) occupational grouping. Use of the highest applicable wage in these cases reduces the potential for employers to misclassify workers than if the Department permitted employers to pay different AEWs for job duties falling within different occupational classifications on a single *Application for Temporary Employment Certification*. This proposal also reduces an employer's recordkeeping burdens with respect to wages. Under the proposal, for example, employers who currently file a single *Application for Temporary Employment Certification* covering multiple workers and a wide variety of duties might instead choose to file separate *Applications for Temporary Employment Certification* and limit the duties of the job opportunities in each *Application for Temporary Employment Certification* to a single occupational classification. The employer would then pay a separate wage rate based on the

duties of each job opportunity included in the separate *Applications for Temporary Employment Certification*, which reduces the potential for misclassification and lowers recordkeeping burdens, as employers would only need to track the highest wage among distinct occupational classifications, if applicable. This policy is also consistent with the way the Department determines prevailing wage rates for jobs that cover multiple SOCs in other employment-based visa programs.

D. The Department Proposes to Publish FLS-based AEWRs and OEWS-Based AEWRs Coinciding with Those Surveys' Publication Schedules

As with the 2020 AEWR Rule, the Department proposes to require that the OFLC Administrator publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR as a notice in the *Federal Register*. The Department proposes to make the updated AEWRs effective through two announcements in the *Federal Register*, one for the AEWRs based on the FLS (i.e., effective on or about January 1), and a second for the AEWRs based on the OEWS survey (i.e., effective on or about July 1), due to the different time periods for release of these two wage surveys.

The Department anticipates that only one of the two AEWR adjustment notifications may impact an employer's wage obligations during the work contract period. Given the Department's proposal to determine the AEWR for the majority of H-2A job opportunities using the field and livestock worker (combined) wage reported by FLS, most H-2A certifications would be subject only to the FLS-based AEWR adjustment in January. Further, due to the seasonal nature of temporary agricultural labor or services, many H-2A employment periods begin and end between FLS-based AEWR adjustments. Only in the circumstance in which a job opportunity constitutes a combination of occupations that involves both an FLS-based AEWR and an OEWS-based AEWR would two AEWR adjustment notices potentially impact an employer's wage obligations.

E. The Department's Decision Not to Use ECI-Adjusted AEWRs

In proposing to annually adjust the AEWRs based on the annual publication of new FLS and OEWS data, the Department is proposing not to use the ECI to adjust AEWRs as the 2020 AEWR Final Rule had done, and is not contemplating use of a similar index for several reasons. First, the FLS—the Department’s preferred wage source for establishing the AEWR for field and livestock workers—is again available, eliminating the Department’s primary impetus for electing to use the ECI to adjust AEWRs in future years under the 2020 AEWR Final Rule. Second, the Department proposes to leverage OEWS survey data for this group of occupations instead of using of the ECI, as OEWS data is more consistent with the FLS data category used to set the AEWRs. As noted above, BLS now will provide the Department wage data for field and livestock workers (combined), based on the OEWS survey, to determine the AEWR for these occupations in each State or region where the FLS is not available or does not report wage data for workers in a particular geographic area. In those cases where the FLS is not available, the Department believes that using the OEWS survey rather than the ECI best allows the Department to prevent adverse effect as required under the INA because the OEWS survey provides data more specifically tailored to geographic areas and occupations common in the H-2A program and is more consistent with the FLS. In particular, though the ECI provides a stable measure of annual increases in the wages of private sector workers generally, the ECI does not report the annual change in wages of field and livestock workers specifically, and does not provide wage data for agricultural workers in particular geographic areas. Both the FLS and OEWS survey provide data more specifically tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources more effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes wage data from farm labor contractors, who increasingly provide labor or services to growers both in the predominant field and livestock workers (combined) occupational group and in occupations that are less common in the H-2A program.

While the Department remains sensitive to concerns of employers regarding increases in the FLS-based AEWRs, the Department believes, for the reasons discussed above, that the approach proposed in this rulemaking best allows the Department to fulfill its statutory mandate. The concerns about AEWR increases also appear overstated when considering long-term historical trends in agricultural worker wages and the agricultural labor market. Long-term data on growth in the AEWRs shows that with the exception of the AEWRs for Hawaii, Oregon, and Washington, growth in the AEWRs from 2010 through 2019 was lower than growth from 2000 to 2010 and substantially lower in many States. Considering top user States as examples, the total AEWR increase from 2010 through 2019 compared to 2000 through 2010 was lower in four of the five top States.⁶⁸

Moreover, despite higher-than-average wage increases in some recent years, farmworkers remain among the lowest paid workers in the United States. The USDA Economic Research Service (ERS) recently reported that the gap between farmworker and non-farmworker wages is “slowly shrinking, but still substantial,” noting that the average farmworker wage in 1990 “was just over half the average real wage in the nonfarm economy for private-sector nonsupervisory occupations,” but rose to 60% of the non-farmworker wage by 2019, indicating the wage gap decreased by less than 10% over three decades.⁶⁹ The ERS data also indicates that labor costs as a share of total gross farm income has not risen significantly over the past two decades, with the ERS concluding that “[a]lthough farm wages are rising in nominal and real terms, the impact of these rising costs on farmers’ incomes has been offset by rising productivity and/or output prices,” and adding that “labor costs as a share of gross cash income do not show an upward trend for the industry as a whole over the past 20 years.”⁷⁰

⁶⁸ 3.95% lower in California, 3.07% lower in Florida, 8.34% lower in Georgia, 6.07% lower in North Carolina, and 6.07% higher in Washington, based on an average of annual changes in the AEWR over the past two decades.

⁶⁹ USDA Economic Research Services, *Farm Labor*, <https://www.ers.usda.gov/topics/farm-economy/farm-labor> (last modified Aug. 18, 2021).

⁷⁰ *Id.* (The ERS found that for all farms, “labor costs (including contract labor, and cash fringe benefit costs) averaged 10.4 percent of gross cash income during 2016-18, compared with 10.7 percent for 1996-98.” At the commodity level, the ERS found that “[l]abor cost shares have fallen slightly over the past 20 years for the more labor-intensive fruit and vegetable sectors . . .”).

AEWR increases above historical averages in recent years also are consistent with a growing agricultural labor shortage that is evidenced by an exponential increase in use of the H-2A program since 2015, USDA data, and recurrent statements by employers and associations that it is increasingly difficult to find U.S. workers for their job opportunities.⁷¹ As the Department has explained in prior rulemaking, basic “economic theory holds that, under conditions of an emerging labor shortage . . . [wage] adjustments would occur over time and the observed wage would increase by an amount sufficient to attract more workers until supply and demand were met in equilibrium.”⁷² However, “labor shortages that would normally drive wages up may become distorted by the availability of foreign workers”⁷³ The AEWR methodology in the 2010 Final Rule and the similar FLS-based methodology proposed here provide a wage floor distinct from the local prevailing wage and are intended to “comput[e] an AEWR to approximate the equilibrium wage that would result absent an influx of temporary foreign workers . . . serv[ing] to put incumbent farm workers in the position they would have been in but for the H-2A program.”⁷⁴

III. Request for Comments

The Department invites comments on all aspects of the proposed AEWR methodology. Because the 2020 AEWR Final Rule has been preliminarily enjoined, and there is uncertainty as to whether that rule will be vacated prior to the issuance of a final rule, the Department seeks comment on all proposals to mirror provisions found in the 2020 rule. In addition, the Department is interested in comments on the use of the FLS and OEWS survey and the conditions under which each survey should be used to establish the AEWR. For example, the

⁷¹ See, e.g., Steven Zhaniser et al., *Rising Wages Point to a Tighter Farm Labor Market in the United States*, AMBER WAVES (Feb 15, 2019), <https://www.ers.usda.gov/amber-waves/2019/february/rising-wages-point-to-a-tighter-farm-labor-market-in-the-united-states> (noting that rising real (inflation-adjusted) farm wages in the past four years is a “prominent indicator of a tighter farm labor market” and that “greater employment of nonimmigrant, foreign-born farmworkers through the H-2A” program is another indicator).

⁷² 75 FR 6883, 6891; see also Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 FR 24146, 24159-24160 (Apr. 29, 2015) (noting that “if employers experience a shortage of available workers in a particular region or occupation, compensation should rise as needed to attract workers”).

⁷³ 80 FR 24146, 24158-24159.

⁷⁴ 75 FR 6883, 6891.

Department is interested in comments on the continued use of a single statewide hourly AEWR for field and livestock worker occupations (combined), rather than occupation-specific statewide AEWRs for each occupation comprising the field and livestock workers (combined) category covered by the FLS. In addition, the Department is interested in comments on use of the OEWS survey to establish the AEWR for field and livestock worker occupations (combined) in the absence of the FLS or where the FLS does not report a wage finding for these occupations in a particular geographic area, as well as the use of the OEWS to establish AEWRs for all job opportunities that do not fall within the FLS field and livestock workers (combined) category. Commenters may address the existence or role of the AEWR, but the Department encourages commenters to focus on the methodology used to determine the AEWR. The Department is not considering eliminating the AEWR or changing the AEWR's role in determinations of an employer's required minimum wage rate in the H-2A program, for reasons explained at length in prior rulemakings, including in the 2020 AEWR Final Rule and 2010 Final Rule.

IV. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy

issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OIRA reviewed this proposed rule and has determined that it is a significant – but not economically significant – regulatory action under E.O. 12866..

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section VI.A.1 describes the need for the proposed rule, and section VI.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section VI.A.3 explains how the provisions of the proposed rule will result in quantifiable costs and transfers and presents the calculations the Department used to estimate them. In addition, section VI.A.3 describes the unquantified costs of the proposed rule, a description of qualitative benefits, and presents an analysis of distributional impacts of the rule. Section VI.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfers of the proposed rule. Finally, section VI.A.5 describes the regulatory alternatives that were considered during the development of the proposed rule.

Summary of the Analysis

The Department estimates that the proposed rule will result in costs and transfers. As shown in Exhibit 1, the proposed rule is expected to have an annualized cost of \$0.064 million and a

total 10-year quantifiable cost of \$0.45 million at a discount rate of 7 percent.⁷⁵ The proposed rule is estimated to result in annual transfers from H-2A employers to H-2A employees of \$30.17 million and total 10-year transfers of \$211.87 million at a discount rate of 7 percent.⁷⁶

Exhibit 1: Estimated Monetized Costs and Transfers of the Proposed Rule (2020 \$millions)		
	Costs	Transfers
Undiscounted 10-Year Total	\$0.45	\$295.00
10-Year Total with a Discount Rate of 3%	\$0.45	\$254.20
10-Year Total with a Discount Rate of 7%	\$0.45	\$211.87
10-Year Average	\$0.45	\$29.50
Annualized at a Discount Rate of 3%	\$0.53	\$29.80
Annualized with at a Discount Rate of 7%	\$0.064	\$30.17

The total cost of the proposed rule is associated with rule familiarization. Transfers are the results of changes to the AEWR methodology and, more specifically, in H-2A job opportunities where the FLS does not adequately collect or consistently report wage data at a State or regional level. See the costs and transfers subsections of section VI.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some costs and benefits of the proposed rule. The Department describes them qualitatively in section VI.A.3 (Subject-by-Subject Analysis) and seek input from the public to help us to reasonably quantify them in the final rule.

1. Need for Regulation

As discussed above, court-issued injunctions prevented USDA from suspending FLS data collection for calendar year 2020 and prevented the Department from further implementing the 2020 AEWR Final Rule on December 23, 2020, resulting in a return to the 2010 Final Rule AEWR methodology. Under the 2010 Final Rule, the FLS wage data is used to determine the AEWRs for all H-2A job opportunities. However, the Department remains concerned that the

⁷⁵ The proposed rule will have an annualized cost of \$0.18 million and a total 10-year cost of \$1.54 million at a discount rate of 3 percent in 2020 dollars.

⁷⁶ The proposed rule will have annualized transfer payments from H-2A employers to H-2A employees of \$29.80 million and a total 10-year transfer payments of \$254.20 million at a discount rate of 3 percent in 2020 dollars.

use of a single AEW for all job opportunities in the H-2A program may adversely affect the wages of workers in the United States similarly employed in certain occupations where the FLS does not adequately collect or consistently report wage data at a State or regional level.

Therefore, the Department proposes using the bifurcated approach set forth in the 2020 AEW Final Rule that set a single AEW based on the FLS for the vast majority of job opportunities used by employers in the H-2A program—six occupational classifications covering field workers and livestock workers—while shifting AEW determinations to the OEWS survey for all other occupations for which the FLS does not adequately collect or consistently report wage data at a State or regional level (e.g., truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). As AEW determinations become more occupation specific, the Department believes it is appropriate to continue requiring that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupational classification to reduce the potential for employers to misclassify workers and establish greater consistency with prevailing wage determinations in the H-2B program.

The Department has also determined that two major aspects of the 2020 AEW Final Rule are inconsistent with the Department’s statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect: (1) the imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS published in November 2019, and (2) using the BLS ECI solely to adjust AEWs annually thereafter. Accordingly, the Department has determined these policies must be reconsidered and proposes revisions in this NPRM that better meet the statute’s twin goals to ensure that employers can access legal agricultural labor while maintaining an adequate level of wage protection for workers in the United States similarly employed.

2. Analysis Considerations

The Department estimated the costs and transfers of the proposed rule relative to the existing baseline (*i.e.*, the current practices for complying, at a minimum, with the H-2A program as

currently codified at 20 CFR part 655, subpart B). This existing baseline is consistent with the 2010 Final Rule because the 2020 AEWB Final Rule has been preliminarily enjoined by a federal district court, as explained above, and there is uncertainty as to whether the 2020 AEWB Final Rule will be vacated prior to the issuance of this final rule.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (*i.e.*, costs and transfers that accrue to entities affected). The analysis covers 10 years (from 2022 through 2031) to ensure it captures major costs and transfers that accrue over time. The Department expresses all quantifiable impacts in 2020 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A-4.

Exhibit 2 presents the number of affected entities that are expected to be impacted by the proposed rule. The average number of affected entities is calculated using OFLC H-2A labor certification data from 2016 through 2020. The Department provides this estimate and uses it to estimate the costs of the proposed rule.

Exhibit 2: Number of Affected Entities by Type (FY 2016-2020 Average)	
Entity Type	Number
Annual Unique H-2A Applicants	8,204

Growth Rate

The Department estimated growth rates for applications processed and certified H-2A workers based on fiscal year (FY) 2012-2020 H-2A program data, presented in Exhibit 3.

Exhibit 3: Historical H-2A Program Data		
Fiscal Year	Applications Certified	Workers Certified
2012	5,278	85,248
2013	5,706	98,814
2014	6,476	116,689
2015	7,194	139,725
2016	8,297	165,741
2017	9,797	199,924
2018	11,319	242,853
2019	12,626	258,446
2020	13,552	275,430

The geometric growth rate for certified H-2A workers using the program data in Exhibit 3 is calculated as 15.8 percent. This growth rate, applied to the analysis timeframe of 2022 to 2031, would result in more H-2A certified workers than projected employment of workers in the relevant H-2A SOC codes by BLS.⁷⁷ Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012-2020 H-2A program data to forecast workers and applications, and estimated geometric growth rates based on the forecasted data. The Department conducted multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.⁷⁸ Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and applications through 2031. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model. This resulted in an estimated growth rate of 3.1 percent for H-2A applications and 5.6 percent for H-2A certified workers. The estimated growth rates for applications (3.1 percent) and workers (5.6 percent) were applied to the estimated costs and transfers of the proposed rule to forecast participation in the H-2A program.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in section VI.A.3 (Subject-by-Subject Analysis).

Compensation Rates

In section VI.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 4 presents the hourly compensation rates for the occupational categories expected to experience a

⁷⁷ Comparing BLS 2029 projections for combined agricultural workers with a 15.8 percent growth rate of H-2A workers yields estimated H-2A workers that are about 107 percent greater than BLS 2029 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at <https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm>.

⁷⁸ The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector Human Resources Specialists (SOC code 13-1071).⁷⁹ Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (e.g., health and retirement benefits). We use an overhead rate of 17 percent⁸⁰ and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.⁸¹ We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

Exhibit 4: Compensation Rates (2020 dollars)					
Position	Grade Level	Base Hourly Wage Rate (a)	Loaded Wage Factor (b)	Overhead Costs (c)	Hourly Compensation Rate d= a + b + c
<i>Private Sector Employees</i>					
HR Specialist	N/A	\$33.38	\$14.02 (\$33.38 x 0.42)	\$5.67 (\$33.38 x 0.17)	\$53.08

3. Subject-by-Subject Analysis

The Department's analysis below covers the rule familiarization costs, unquantifiable costs, transfers, and qualitative benefits of the proposed rule. In accordance with Circular A-4, the Department considers transfers as payments from one group to another that do not affect total resources available to society. This proposed rule includes the cost of rule familiarization and transfers associated with the AEWR wage structure from the proposed rule. The Department also described efficiency impacts, payroll and other transition costs, and the distributional impacts that could result from the proposed rule.

⁷⁹ BLS, *May 2020 National Occupational Employment and Wage Estimates: 13-1071 – Human Resources Specialist*, <https://www.bls.gov/oes/current/oes131071.htm> (last modified Mar. 31, 2021).

⁸⁰ See CODY RICE, U.S. ENVIRONMENTAL PROTECTION AGENCY, WAGE RATES FOR ECONOMIC ANALYSES OF THE TOXICS RELEASE INVENTORY PROGRAM (June 10, 2002), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

⁸¹ See *Employer Costs for Employee Compensation*, <https://www.bls.gov/news.release/ecec.toc.htm> (last modified Sept. 16, 2021). This shows the ratio of total compensation to wages and salaries for all private industry workers.

Costs

The following section describes the costs of the proposed rule.

Quantifiable Costs

Rule Familiarization

When the proposed rule takes effect, H-2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H-2A applications (3.1 percent) to the average number of annual unique H-2A applicants from FY2016 to FY2020 (8,204) to determine the number of unique recurring H-2A applicants impacted in the first year the rule is in effect. The number of unique H-2A applicants (8,459) was multiplied by the estimated amount of time required to review the rule (1 hour).⁸² This number was then multiplied by the hourly compensation rate of Human Resources Specialists (\$53.08 per hour). This calculation results in a one-time undiscounted cost of \$448,973 in the first year after the proposed rule takes effect. In each subsequent year new unique employers (2,199) requesting H-2A certifications will need to review the rule. The growth rate of H-2A applications (3.1 percent) was applied to the number of new unique employer to determine the annual number of new unique H-2A applicants impacted in the remaining years of the analysis. This results in an average annual undiscounted cost of \$140,589 in years 2-10 of the analysis. The one-time and continuing costs yield a total average annual undiscounted cost of \$171,428. The annualized cost over the 10-year period is \$52,633,180,190 and \$63,924,192,560 at discount rates of 3 and 7 percent, respectively.

Unquantifiable Costs

a. Efficiency Impacts

⁸² This estimate reflects the nature of the proposed rule. As a rulemaking to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

The proposed wage methodology is designed to achieve the statute's twin goals of providing employers with an adequate legal supply of agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. The AEWR provides a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment. In the case of perfect competition, if the proposed rule results in a wage floor above competitive market wages, it will produce some deadweight loss (DWL). In the case of market power, if the proposed rule reduces a wage floor below competitive market wages, it may produce some DWL if employers exercise market power, but otherwise will not. Setting minimum wage rates has implications on economic efficiency that are complicated and difficult to assess because, in certain combinations of SOC codes and geographies, the gross average hourly wage rates used to determine the AEWRs annually for each State under this proposed rule may act as a wage floor that is above competitive market equilibrium wages for certain job opportunities whereas in others imperfect competition may suppress domestic labor markets at quantities below the competitive market equilibrium.

These two impacts are dependent on local labor market conditions, the nature of the agricultural work to be performed and wage payment structure (*i.e.*, fixed hourly pay versus combination of hourly and piece-rate pay), the relation of the AEWR to the regional OEWS wage, as well as the shape and components (*i.e.*, makeup of nonimmigrant foreign and domestic workers) of the combined temporary agricultural employment labor supply curve in the local or regional labor market.

The Department is unable to quantify these efficiency impacts because it does not have data on all local labor market conditions for all occupations, data on foreign labor supply curves, and how these interact with employer demand. The Department seeks public comment on the DWL or other labor market inefficiencies resulting from the proposed rule. The efficiency impact of

the proposed rule is limited only to the 2 percent of H-2A workers whose wages the proposed rule will affect, while there would be no change to the DWL for the other 98 percent of H-2A workers.⁸³ Therefore, the DWL resulting from the proposed rule is likely very small. Because the market equilibrium wages for construction workers, supervisors/managers of farmworkers, and logging equipment operators are above current baseline AEWRs, the proposed rule may create some efficiency gain (or decrease in the DWL) for jobs within the 2 percent when it raises the wage floor from the current baseline AEWRs toward competitive equilibrium wages if employers currently exercise market power to prevent wages from being bid up to competitive equilibrium rates. On the other hand, there may be instances in which the new wage floor (depending on the job and geographic area) could be above the market equilibrium wage; this would result in efficiency loss (or increase in the DWL). A DWL occurs when a market operates at less than or more than the market equilibrium output. The AEWL sets compensation in some cases above the equilibrium level and in other cases may set wage levels that allow employers with market power to suppress wage rates below the competitive equilibrium, resulting in a labor shortage. When the AEWL is set above market equilibrium, the higher cost of labor can lead to a decrease in the total number of labor hours purchased in the local labor market. On the contrary, when the AEWL is set below competitive equilibrium and employers have market power, employers may pay below-competitive-equilibrium wage rates, decreasing the total number of worker labor hours purchased in the local labor market. DWL is a function of the difference between the compensation the employers are willing to pay for the hours lost and the compensation employees are willing to take for those hours. In short, DWL is the total loss in economic surplus resulting from a “wedge” between the employer’s willingness to pay for, and

⁸³ Under this proposed rule the Department would use the AEWL methodology set forth in the 2010 Final Rule (i.e., setting the annual AEWLs using the gross average hourly wage rate for field and livestock workers (combined)) for the occupations (45-2041, 45-2091, 45-2092, 45-2093, 53-7064, 45-2099) which comprise 98 percent of H-2A workers.

the employees' willingness to accept work arising from the intervention (in this case the AEWR).

The Department is unable to quantify the DWL without data on the equilibrium wage arising from each locality and occupational code's labor demand and combined immigrant foreign worker and domestic U.S. worker labor supply curves. The below paragraphs qualitatively discuss changes in the AEWR wages that may result in some DWL. In the analysis of wage transfers, only 2 percent of workers would be employed in H-2A job opportunities where the AEWR will change under the proposed rule from the current baseline. For the 98 percent of workers employed in H-2A job opportunities under the six occupational classifications covering field workers and livestock workers reported by the FLS with no change to wages, the proposed rule does not change the DWL and existing labor market efficiencies or inefficiencies from the current baseline.

In some cases the baseline AEWR creates a DWL by setting a minimum wage above the market equilibrium, because the hourly wage represents an annual weighted average across six occupational classifications covering a State or multistate region. Under the proposed rule when the AEWR is annually adjusted, the DWL may increase when the AEWR covering the State or multistate region also increases and remains above market equilibrium. Under the proposed rule this may occur for some, but not all, occupations covering field and livestock workers where the AEWR is determined using the annual weighted statewide gross hourly wage based on the OEWS survey. The OEWS survey does not collect wages for fixed-site farms and ranches but does include data for establishments that support farm production activities (*i.e.*, farm labor contractors) and are engaged in similar agricultural labor or services. Additionally, the types of agricultural establishments included in the OEWS survey, such as farm labor contractors, represent an increasing share of workers certified by the Department on H-2A applications. The OEWS wage for occupations associated with these establishments is unlikely to reflect any wage suppression created by nonimmigrant foreign workers' willingness to work at lower wages than

domestic U.S. workers. Therefore, an AEWR determined for a State based on OEWS wage data may be higher than the baseline AEWR that is based on the FLS and market equilibrium wage for temporary agricultural employment. Therefore, for most SOC code and area combinations, the AEWRs under this proposed rule AEWR, set at the OEWS wage, will serve as a wage floor and may create a DWL in the labor market, as illustrated by Figure 1.

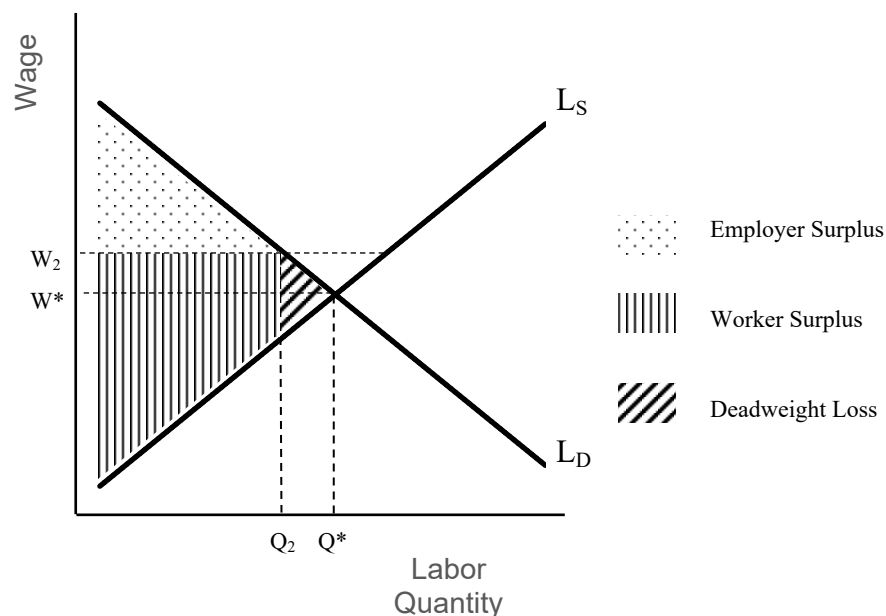


Figure 1: Given a combined nonimmigrant foreign worker and domestic U.S. worker supply curve (L_s) with equilibrium wage W^* less than the AEWR set at the OEWS wage (W_2), there will be a DWL in the labor market for that SOC code and area combination.

When employers have market power in the labor market and the AEWR is set below the domestic competitive market equilibrium wage, then there may be a DWL in the associated U.S. labor market. In the H-2A program there are some combinations of occupations and geographic areas where this can occur. For example, workers in higher paid occupations and occupations that are typically performed off farm yet qualify under the H-2A program (*e.g.*, logging operations) have a baseline wage set by the FLS that is substantially below the U.S. market equilibrium according to OEWS data covering the State. Under the proposed rule the AEWR will be increased for these occupations to the State-level OEWS.⁸⁴ In addition, workers in occupations that continue to have an AEWR set by the FLS, but in areas where FLS data for a

⁸⁴ For example, Mobile Heavy Equipment Mechanics, Except Engine (49-3042, in ME) has a 2021 AEWR of \$14.99 and under the proposed rule would have an OEWS wage of \$22.85.

given year cannot be reported, will have the AEWR set by a weighted average OEWS wage for field and livestock worker occupations which may be below market wage rates for a specific SOC code and geographic area combination.⁸⁵ In these examples, some U.S. employers that do not compete with other employers for workers may set wage rates below competitive equilibrium at a wage level that balances the revenue gains from an additional worker against the cost of raising wages for all employees to attract that marginal worker. Some U.S. and foreign workers who would be willing to work at competitive equilibrium wages may not be willing to work at a lower wage. In these cases, a DWL is produced in the U.S. labor market, but under the proposed rule that DWL is reduced because of the higher AEWR (*see* [Figure 2](#)).

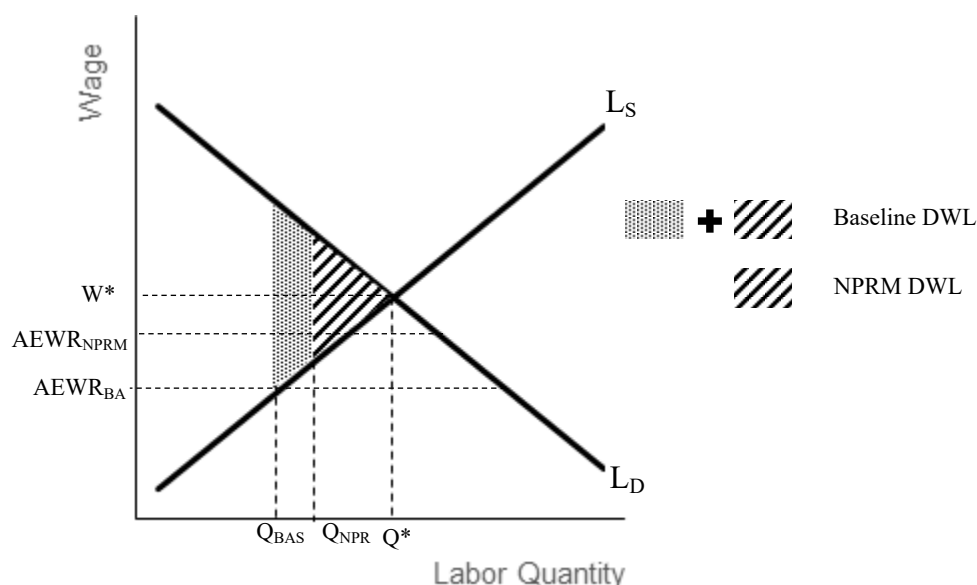


Figure 2: For some SOC code and area combinations the proposed rule may reduce DWL in the U.S. labor market. Under the baseline the wage set at $AEWR_{BASE}$ allows for the legal hiring of foreign workers below the competitive labor market equilibrium wage rate (W^*). In a competitive market, employers will bid up wages to W^* . If employers do not compete with other employers for workers, they may be able to keep wages below W^* even though it creates a labor shortage. With a large supply of workers who lack bargaining power willing to work at the $AEWR_{BASE}$ wage rate, but others unwilling, the total number of workers willing to work at that wage rate is Q_{BASE} , which is below the competitive equilibrium quantity of workers Q^* . This results in the Baseline DWL. Under the proposed rule the wage set at $AEWR_{NPRM}$ is increased, closer to the competitive labor market equilibrium wage rate (W^*). More workers (Q_{NPRM}) are willing to work at this rate and the DWL in the U.S. labor market decreases to the NPRM DWL.

When labor markets are competitive, an AEWR set below the U.S.-only labor market equilibrium wage rate in absence of foreign labor, but above the market equilibrium, with both domestic and foreign labor, results in DWL for the United States because it reduces domestic

⁸⁵ For example, Agricultural Workers, All Other (45-2099, in SOC) has a 2021 AEWR of \$11.81. If the FLS data was unavailable it would have a weighted average OEWS wage of \$14.18 and the OEWS wage for that specific occupation is \$16.51. Thus, the weighted average OEWS wage would be below the actual market wage for that occupation.

employer surplus more than it increases domestic worker surplus. In a competitive labor market with no AEWR, there will be no DWL. Figure 3 illustrates this in a simplified case where domestic and foreign agricultural workers are perfect substitutes, and an infinite supply of foreign agricultural workers are willing to work at wage rate W_{FOREIGN} below the U.S.-worker-only market equilibrium wage rate $W_{\text{US-ONLY}}$. The competitive market equilibrium will equal W_{FOREIGN} and domestic employers will hire a combination of $Q_{\text{EFFICIENT_US}}$ domestic workers and $(Q_{\text{EFFICIENT_TOTAL}} - Q_{\text{EFFICIENT_US}})$ foreign workers. U.S. DWL will be zero because U.S. total surplus (U.S. employer surplus + U.S. worker surplus) is maximized.

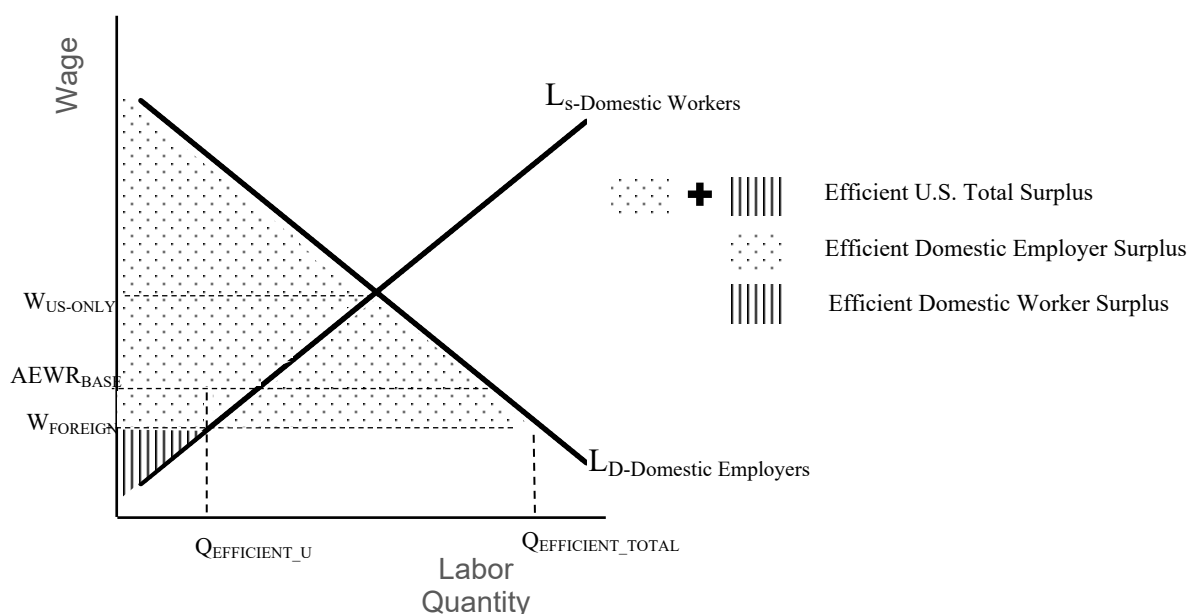


Figure 3: Under the efficient competitive equilibrium with no AEWR, assuming domestic and foreign labor are perfect substitutes and foreign labor is infinitely supplied at wage W_{FOREIGN} , U.S. employers will hire $Q_{\text{CE_TOTAL}}$ number of workers at the labor market competitive equilibrium wage rate (W_{FOREIGN}) below the equilibrium wage rate $W_{\text{US-ONLY}}$ if no foreign workers were allowed. With a large supply of foreign workers willing to work at W_{FOREIGN} , U.S. employers will not need to raise the wage rate any further to attract more workers. The number of U.S. workers willing to work at that wage rate is $Q_{\text{CE_US}}$. This results in the Efficient Domestic Worker Surplus, the Efficient Domestic Employer Surplus, and the Efficient U.S. Total Surplus. Because any change in quantity of labor would decrease total surplus, total surplus is maximized and DWL is zero.

Setting an AEWR above the competitive labor market equilibrium wage creates a DWL.

Working from the same assumptions as Figure 3, Figure 4 illustrates that setting $\text{AEWR}_{\text{BASE}}$ above the competitive equilibrium wage W_{FOREIGN} reduces the total number of workers employers are willing to hire from $Q_{\text{EFFICIENT_TOTAL}}$ to $Q_{\text{AEWR_TOTAL}}$. Because employers now hire fewer workers at a higher wage rate, domestic employer surplus falls. At the higher wage, the number of domestic workers willing and hired to work increases from $Q_{\text{EFFICIENT_US}}$ to $Q_{\text{AEWR_US}}$,

increasing domestic worker surplus. Total surplus falls, generating DWL, because the increase in domestic worker surplus is only a fraction of the decrease in domestic employer surplus. Figure 4 depicts U.S. DWL as the amount that the decrease in domestic employer surplus exceeds the increase in domestic worker surplus. Global DWL is smaller than this if we consider the welfare impacts to foreign workers from increasing their wages. Increasing the AEWL under the proposed rule will extend all these impacts; that is, increase DWL, decrease domestic employer surplus, and increase domestic worker surplus.

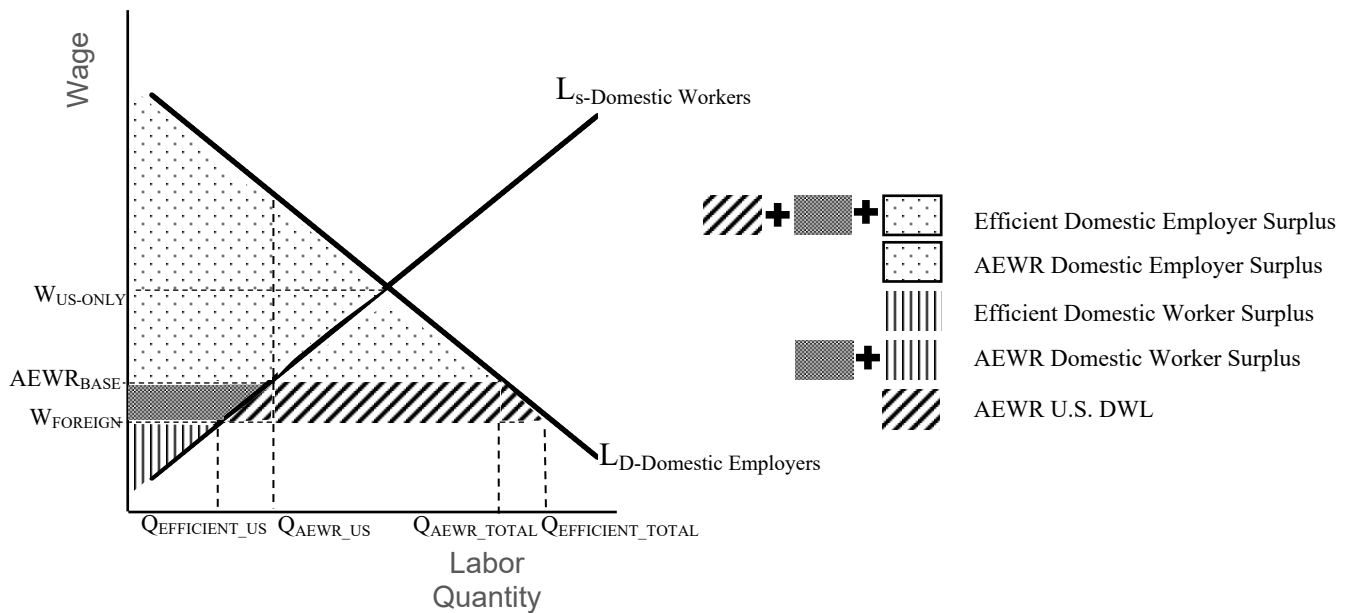


Figure 4: Under the baseline the wage set at $AEWL_{BASE}$ allows for the legal hiring of foreign workers below a U.S.-only labor market equilibrium wage rate ($W_{US-ONLY}$). With a large supply of foreign workers willing to work at the $AEWL_{BASE}$ wage rate the number of U.S. workers willing to work at that wage rate is Q_{BASE} . This results in the AEWL Domestic Worker Surplus, the AEWL Domestic Employer Surplus, and the AEWL U.S. DWL.

b. Payroll and Other Transition Costs

The proposed rule will result in new AEWL wage rates for some SOC code and geographic area combinations compared to the baseline. Companies employing H-2A workers will need to update payrolls to account for the new AEWL wage rates. The Department does not quantify this cost and expects it to be *de minimis* because employers already need to update payrolls when AEWL wage rates are released annually. Therefore, they already have the capabilities and processes to quickly, and at *de minimis* cost, update payrolls when AEWL wage rates change.

The proposed rule may also result in other transition costs to some employers for recruitment and training if they hire U.S. workers for the jobs that are performed by H-2A workers. The Department is not able to quantify the transition costs and seeks public input on the potential transition expenses such as recruitment and training.

Transfers

The following section describes the transfers of the proposed rule related to the revisions to the wage structure. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H-2A workers. H-2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.⁸⁶ Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H-2A worker is admissible only if the Secretary of Labor determines that “there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.” In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring the employer 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. As discussed below,

⁸⁶ Walmsley, Winters, and Ahmed report the remittances to labor income for migrants from Mexico (the primary source of H-2A workers) at nearly 20%. The ratio ranges from close to 5% for migrants from China to close to 70% for migrants from India. These remittances can provide substantial financial assistance for migrant workers’ families in their home countries. TERRIE L. WALMSLEY ET AL., GLOBAL TRADE ANALYSIS PROJECT, MEASURING THE IMPACT OF THE MOVEMENT OF LABOR USING A MODEL OF BILATERAL MIGRATION FLOWS (Nov. 2007), *available at* <https://www.gtap.agecon.purdue.edu/resources/download/4635.pdf>. *See also* Dilip Ratha, *Remittances: Funds for the Folks Back Home*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm> (last updated Feb. 24, 2020); DANIEL COSTA & PHILIP MARTIN, ECONOMIC POLICY INSTITUTE, TEMPORARY LABOR MIGRATION PROGRAMS (Aug. 1, 2018), *available at* <https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/>.

the Department's proposed rule maintains this general wage-setting structure but proposes to modify the methodology by which it establishes the AEWRs.

Currently, pursuant to the 2010 Final Rule, the AEWR for each State or region is published annually as a single average hourly gross wage that is set using the field and livestock workers (combined) data from the FLS, which is conducted by the USDA's NASS. This methodology produces a single AEWR for all agricultural workers in a State or region, without regard to occupational classification, and no AEWR in geographic areas not surveyed by NASS (*e.g.*, Alaska). As discussed in depth in the preamble, the Department is concerned that this methodology may have an adverse effect on the wages of workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of the FLS field and livestock workers (combined) occupational category, which does not include those workers.

Under this proposed rule the Department would modify the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. Both the FLS and OEWS survey provide data tailored to U.S. agricultural workers and the States and regions where these workers are employed, making these sources effective in ensuring that the temporary employment of foreign workers in field and livestock job opportunities will not adversely affect the wages of workers in the United States similarly employed. In addition, OEWS data includes 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.

As explained above, 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 both in the predominant field and livestock workers (combined) occupational group and in occupations that are less common in the H-2A

program. While the labor demanded from H-2ALCs (i.e., farm labor contractors) using the H-2A program for employment in non-range occupations has significantly increased in recent years, they only represented approximately 16 percent of all certified H-2A applications in FY 2020.⁸⁷ Individual employers and agricultural associations filing for one or more individual association members, which generally hire workers directly for employment, constituted approximately 84 percent of all of H-2A applications.⁸⁸ Using the FLS, which surveys directly hired agricultural workers, to set AEWRs therefore is more accurate and reasonable because, in addition to being a comprehensive source of farmworker wage data, it also surveys the agricultural employers which make up a significant majority of H-2A applications.

Under this proposed rule the Department would use the AEWR methodology set forth in the 2010 Final Rule, *i.e.*, setting the annual AEWRs using the gross average hourly wage rate for field and livestock workers (combined) in the State or region, as reported by the FLS, when that data is available, for the following SOC codes:

- 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
- 45-2099 - Agricultural Workers, All Other

If the annual gross average hourly wage in the State or region is not reported by the FLS, the Department proposes to set the annual AEWR for these occupations (45-2041, 45-2091, 45-2092, 45-2093, 53-7064, 45-2099) using the statewide gross average hourly wage rate reported by the OEWS survey. If the annual statewide gross average hourly wage is not reported by the OEWS survey, the Department proposes to set the AEWR for these occupations by using the

⁸⁷ Based on an analysis of H-2A labor certification data for FY 2020, the Department issued 12,491 temporary labor certifications covering 272,610 worker positions for non-range employment. Of this total, the Department certified 2,052 H-2A applications covering 116,479 worker positions submitted by, or on behalf of, H-2ALCs; 1,669 H-2A applications covering 34,236 worker positions submitted by agricultural associations by, or on behalf of, one of more individual association members; and 8,770 H-2A applications covering 121,895 worker positions submitted by individual employers (i.e., fixed-site agricultural businesses). *See* ETA, *Performance Data*, <https://www.dol.gov/agencies/eta/foreign-labor/performance> (last visited Sept. 29, 2021).

⁸⁸ *Id.*

annual national gross average hourly wage as reported by the OEWS survey. To produce an equivalent AEWR for field and livestock worker job opportunities using the OEWS survey under the proposed rule, BLS will compute an annual weighted average hourly wage using the establishment data reported for these occupations at the State and national level.

For all other SOC codes the Department proposes to annually set the AEWR for agricultural services or labor based on the statewide annual average hourly wage reported by the OEWS survey. If the OEWS survey does not report a statewide annual average hourly wage for the SOC code, the Department proposes to set the AEWR based on the national/annual average hourly wage reported by the OEWS survey.

To estimate wage impacts the Department uses FY 2020 through FY 2021 OFLC certification data. To include the most recent H-2A certification data (i.e., FY 2021) the Department simulated Q4 data based on FY 2016-2020 data, to produce a full year of certification data.⁸⁹ For the most common SOC codes (45-2091; 45-2092; and 45-2093), the Department calculated the average certification growth rate from FY 2016 to FY 2020 by SOC and State, and then determined the average annual growth rate. In some cases, due to small numbers of certifications in certain States for a specific SOC in each year, the growth rates were unreasonably high or low (greater than 80% or less than -80% growth). In such cases, the Department applied the national growth rate for the applicable SOC. Next, the Department calculated the number of certifications that had work in the fourth quarter of 2020 by State, and SOC, and applied the applicable growth rate to Q4 to estimate FY 2021 quarter 4 certifications. For all other SOC codes, the Department took the average of the number of certifications for each SOC and State from FY 2016 to FY 2020. The Department also needed to estimate the period of need, number of workers per certification, and number of hours per certifications. For the three most common SOC codes, the Department calculated, by State and SOC code, the number of certifications that had work in one or two calendar years, and the average number of days that occurred in each year. For all other

⁸⁹ FY 2021 certification data only consists of three quarters of data as of the date of analysis for this proposed rule.

SOC codes, the Department used the national average from FY 2016 to FY 2020 of the percentage of certifications with work in one or two calendar years, and the number of days in each year. For number of workers per certifications and number of hours, the average number of workers for each SOC code and State from FY 2016 to FY 2020 was applied. Total wages were then calculated using the simulated Q4 certifications and these estimated FY 2021 Q4 wage impacts were summed with the FY 2021 Q1 to Q3 wage impacts to create an estimate of total wages for the entirety of FY 2021.

To produce a combined field and livestock AEW R using the OEWS, BLS provided the Department with the weighted average hourly wage for 45-2041, 45-2091, 45-2092, 45-2093, 53-7064, 45-2099 occupations at the State and national level using the OEWS May 2020 survey. The OEWS May 2020 wages are applicable to work occurring between July 1, 2021 and June 30, 2022. The FY 2020 and FY 2021 certification data includes work occurring as early as October of 2019. To determine the appropriate weighted average hourly wage for these six occupations between October of 2019 and the start of the OEWS May 2020 period, July 1, 2021, the Department estimated the weighted average hourly wage for OEWS May 2018 and OEWS May 2019 datasets. Using public OEWS survey data, the Department calculated the average annual percent change for wages in these six SOC codes between OEWS May 2018 and OEWS May 2019 and between OEWS May 2019 and OEWS May 2020. To determine the weighted average hourly wage for the six SOC codes in OEWS May 2019, the Department used the percentage growth in the wages to adjust the BLS weighted average hourly wage.⁹⁰

The Department calculated the impact on wages that would occur from the implementation of the revised AEW R methodology. For each H-2A certification in FY 2020 through FY 2021, the Department calculated total wages under the current AEW R baseline, *i.e.*, pursuant to the 2010

⁹⁰ The Department divided the BLS calculated weighed average hourly wage rate in OEWS May 2020 by 1 + the average percent change. Similarly, the OEWS May 2018 weighted average hourly wage was determined by dividing the OEWS May 2019 weighted average hourly wage by 1+ the average percent change. The Department completed these calculations at the State and national level.

Final Rule, and total wages under the proposed AEWB methodology. Then, the Department determined the annual wage impact in calendar year (CY) 2020 and CY 2021 by subtracting the AEWB baseline wage from the NPRM wage. The Department summed the wage impacts in each CY, converted the wage impact to 2020 dollars using the Employment Cost Index (ECI)⁹¹ and took the average impact of CY 2020 and CY 2021.⁹² Wage impacts for 2022 to 2031 were estimated by applying the H-2A workers growth rate (5.6 percent) to account for the fact that the number of H-2A workers affected (and the total wage impact) will grow annually at 5.6 percent. Because the proposed rule wage-setting methodology would not retroactively impact workers and OEWS wages in the May 2021 OEWS will not be applicable until July of 2022, the wage impact in 2022 is divided by 2 to account for the fact that only half the year of wages would be impacted.⁹³

The Department provides two examples illustrating the above wage calculation methodology for H-2A certifications. Exhibits 5 and 6 illustrate how total wages are calculated for the proposed rule and baseline. The Department multiplied the number of certified workers by the number of hours worked each day, the number of days in a year that the employees worked, and the annual average hourly gross State AEWB wage for SOC codes set by the AEWB. In the example provided in Exhibit 5, for agricultural equipment operators (SOC 45-2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse) the FLS AEWB wage is not available in Alaska and Puerto Rico, so the AEWB is set by the weighted average OEWS wage. For SOC codes set by the OEWS survey, the annual average hourly gross wage from the state-level OEWS-based wage for the appropriate SOC code and worksite state is used, or the national OEWS-based wage is used if the State-level wage is not available.

⁹¹ BLS, *Employment Cost Index Archived News Releases*, <https://www.bls.gov/bls/news-release/eci.htm> (last modified July 30, 2021).

⁹² While there were working days and therefore wage impacts in CY 2019 and CY 2022 in the FY 2020 and FY 2021 certification data, the Department did not include wage impacts in CY 2019 and CY 2022 in the average annual impact calculations because a full CY of work is not captured in the FY 2020 and FY 2021 certification data for CY 2019 and CY 2022.

⁹³ The Department assumes in the economic analysis of the proposed rule that the final rule will not become effective until the second half of the year 2022.

Exhibit 5: AEWB Wage Under the Proposed Rule (Example Case)									
SOC Code	NPRM	Number of Certified Workers (a)	Basic Number of Hours (b)	Number of Days Worked in 2020 (c)	Number of Days Worked in 2021 (d)	Wage 2020 (e)	Wage 2021 (f)	Total AEWB Wages 2020 (a*(b/5)*c*e)	Total AEWB Wages 2021 (a*(b/5)*d*f)
	Wage Source								
45-2092	FLS AEWB (unavailable); weighted average OEWS	14	40	152	10	\$15.15	\$16.78	\$257,913.60	\$18,793.60
13-1074	OEWS	10	35	280	50	\$25.45	\$29.84	\$498,820.00	\$104,440.00

After the total wages for the proposed rule were determined, the wage calculation under the baseline AEWB was calculated. The number of workers certified is multiplied by the number of hours worked each day, the number of days in a year that the employees worked, and the AEWB baseline for the year(s) in which the work occurred (Exhibit 6 provides an example of the calculation of the AEWB baseline for the same case as in Exhibit 5). In the example provided in Exhibit 6 for SOC code 45-2092, the AEWB baseline wage is not available, so the baseline wage is set by the public OEWS State wage.

Exhibit 6: AEWB Wage Under the Baseline (Example Case)									
SOC Code	Baseline Wage Source	Number of Certified Workers (a)	Basic Number of Hours (b)	Number of Days Worked in 2020 (c)	Number of Days Worked in 2021 (d)	Wage 2020 (e)	Wage 2021 (f)	Total AEWB Wages 2020 (a*(b/5)*c*e)	Total AEWB Wages 2021 (a*(b/5)*d*f)
45-2092	FLS AEWB (unavailable); OEWS State	14	40	152	10	\$15.54	\$15.72	\$264,552.96	\$17,606.40
13-1074	FLS AEWB	10	35	280	50	\$14.58	\$15.37	\$285,768.00	\$53,795.00

The changes in wages constitute a transfer from H-2A employers to H-2A employees for SOC codes set by the OEWS survey. For SOC codes set by the FLS AEWB there is no wage impact, unless the worksite location is in Alaska or Puerto Rico where no AEWB currently exists

because the FLS does not collect wage data covering these geographic areas.⁹⁴ To account for the growth rate in H-2A workers the total transfers in each year are increased annually by the estimated growth rate of H-2A workers (5.6 percent).⁹⁵ The results are average annual undiscounted transfers of \$29.50 million. The total transfer over the 10-year period is estimated at \$295.00 million undiscounted, or \$254.20 million and \$211.87 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is \$29.80 million and \$30.17 million at discount rates of 3 and 7 percent, respectively.

The estimated transfers are likely on the high end of potential transfers. The Department does not make any adjustment to account for H-2A certifications that are made but do not end up in jobs with realized wages. In FY 2020, according to State Department data, there were 213,394 H-2A visas issued.⁹⁶ In FY 2020 there were 275,430 workers associated with H-2A certifications. The Department is unable to verify the specific H-2A certifications that do not end up in materialized jobs and so cannot adjust wage transfers to account for differences in regional, and by-SOC code, job materialization. Overall, the data on H-2A visas compared to workers associated with H-2A certifications indicates that about 80 percent of certified positions have associated H-2A visas. The remaining 20 percent could be jobs that did not materialize or were filled by U.S. workers.

The increase (or decrease) in the wage rates for H-2A workers also represents a wage transfer from employers to corresponding workers performing similar work for the employer, not just the H-2A workers employed under the work contract. The higher (or lower) wages paid to H-2A workers associated with the proposed rule's methodology for determining the AEWs will also

⁹⁴ There is no FLS wage available for Alaska or Puerto Rico. Because of that, wages under the baseline are set by the public OEWS State data. Under the proposed rule, for SOC codes that have worksite locations in Alaska or Puerto Rico, the hourly wage would be set by the weighted average hourly wage rate calculated by BLS. Therefore, those certifications may have a wage impact under the proposed rule.

⁹⁵ Total transfers in each year are increased with the following formula to account for an annual increase in the underlying population of H-2A workers: $\text{Transfer} \times (1.056^{(\text{Current year} - \text{Base year})})$.

⁹⁶ U.S. Department of State, *Nonimmigrant Visas Issued by Classification, Fiscal Years 2016-2020*, available at <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf>.

result in wage changes to corresponding workers. However, the Department does not collect or possess sufficient information about the number of corresponding workers affected and their wage payment structures to reasonably measure the transfers to corresponding workers. Employers are not required to provide the Department, on any application or report, the estimated or actual total number of workers in corresponding employment. Although each employer, as a condition of being granted a temporary labor certification, must provide the Department with a report of its initial recruitment efforts for U.S. workers, including the name and contact information of each U.S. worker who applied or was referred to the job, such information typically reflects only a very small portion of the total recruitment period, which runs through 50 percent of the certified work contract period, and does not account for any other workers who may be considered in corresponding employment and already working for the employer. And finally, the Department is also not able to estimate how much of the wage transfer stays in the U.S. economy. It is likely that a substantial portion of the wage transfer is from U.S. employers to the home economy of H-2A workers. Nonimmigrant foreign H-2A workers may spend wages earned in the U.S., spend the money outside of the U.S., send the money outside of the U.S., or some combination. The Department invites comments regarding how these wage transfer impacts can be calculated.

Qualitative Benefits

The proposed rule makes an important update to the AEWR to ensure that it protects U.S. workers in occupations where the existing wage methodology may adversely affect wages in certain occupations where the FLS does not adequately collect or consistently report wage data at a State or regional level (*e.g.*, truck drivers, farm supervisors and managers, construction workers, and many occupations in contract employment). U.S. workers in these occupations would benefit from the protections afforded them by an AEWR determined using a more accurate data source.

The AEW is the rate that the Department has determined is necessary to ensure the employment of H-2A foreign workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed. A more accurate AEW for workers in occupations where the FLS is inadequate will guard against the potential for the entry of H-2A foreign workers to adversely affect the wages and working conditions of workers in the United States similarly employed in these occupations. The potential for the employment of foreign workers to adversely affect the wages of U.S. workers is heightened in the H-2A program because the H-2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs. Consequently, concerns about wage depression from the employment of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and occupation could cause the prevailing wage of workers in the United States similarly employed to stagnate or decrease.

Addressing the potential adverse effect that the employment of temporary foreign workers may have on the wages of agricultural workers in the United States similarly employed is particularly important because U.S. agricultural workers are, in many cases, especially susceptible to adverse effects caused by the employment of temporary foreign workers. As discussed in prior rulemakings, the Department continues to hold the view that “U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary workers, because they generally comprise an especially vulnerable population whose low educational attainment, low skills, low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market.”⁹⁷ As a result, “their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.”⁹⁸ The AEW provides “a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to

⁹⁷ Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 FR 45905, 45911 (Sep. 4, 2009).

⁹⁸ *Id.*

negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.”⁹⁹

Distributional Impact Analysis

E.O. 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, seeks to advance equity in agency actions and programs. The term equity is defined as consistent and systematic fair, just, and impartial treatment of individuals, including individuals who belong to underserved communities, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islands, and other persons of color, as well as members of religious minorities, lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons, persons with disabilities, persons who live in rural areas, and persons otherwise adversely affected by persistent poverty or inequality.

To assess the impact of the proposed rule on equity the Department used Current Population Survey (CPS) data from BLS¹⁰⁰ to determine the ethnic and racial makeup of the most common SOC codes in the H-2A program. CPS only included data for three races, White, Black or African American, and Asian, and one ethnicity, Hispanic or Latino. The results of this analysis for the top ten H-2A SOC codes that experience wage impacts (SOC codes other than 45-2041, 45-2091, 45-2092, 45-2093, 53-7064, 45-2099) is presented in Exhibit 7. These top 10 SOC codes¹⁰¹ account for over 90 percent of all the workers in the FY 2021 certification data that experience wage impacts (certifications with wages set by the OEWS).

Exhibit 7: Racial/Ethnic Distribution of the Top 10 H-2A SOC Codes by Number of Workers with Wage Impacts						
SOC Code	Description	% of employed people				# of FY 2021 Q1-Q3 H-2A Workers
		White	Black or African American	Asian	Hispanic or Latino	
45-0000	Farming, fishing, and forestry occupations	90%	4%	2%	43%	**

⁹⁹ *Id.*

¹⁰⁰ BLS, Labor Force Statistics from the Current Population Survey, *Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex*, <https://www.bls.gov/cps/tables.htm> (last modified May 14, 2021).

¹⁰¹ Farm Labor Contractors are within the Top 10 impacted H-2A SOC codes, but because Farm Labor Contractor are employers it is excluded from Exhibit 7.

Exhibit 7: Racial/Ethnic Distribution of the Top 10 H-2A SOC Codes by Number of Workers with Wage Impacts						
47-2061	Construction Laborers	87%	8%	1%	46%	2,107
53-3032	Heavy and Tractor-Trailer Truck Drivers	77%	17%	3%	23%	526
45-1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers	90%	5%	3%	28%	328
47-3012	Helpers—Carpenters	Not available	Not available	Not available	Not available	104
45-4022	Logging Equipment Operators	Not available	Not available	Not available	Not available	57
49-3041	Farm Equipment Mechanics and Service Technicians	94%	4%	1%	19%	55
47-2031	Carpenters	88%	7%	2%	36%	30
47-3019	Helpers, Construction Trades, All Other	Not available	Not available	Not available	Not available	18
47-2051	Cement Masons and Concrete Finishers	83%	8%	1%	53%	16

*Not available indicates that racial/ethnic data for that SOC code was not reported in the CPS data.

**45-2000 is included as a reference for the racial/ethnic distribution of agricultural workers generally.

Note: Estimates for the above race groups (White, Black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and transfers of the proposed rule over the 10-year analysis period. The Department estimates the annualized costs of the proposed rule at \$0.19 million and the annualized transfers (from H-2A employers to employees) at \$30.17 million, at a discount rate of 7 percent.

Exhibit 8: Estimated Monetized Costs and Transfers of the Proposed Rule (2020 \$millions)		
Year	Costs	Transfers
2022	\$0.00	\$11.86
2023	\$0.00	\$25.05
2024	\$0.00	\$26.45
2025	\$0.00	\$27.93
2026	\$0.00	\$29.50
2027	\$0.00	\$31.15
2028	\$0.00	\$32.90
2029	\$0.00	\$34.74
2030	\$0.00	\$36.68
2031	\$0.00	\$38.74

Exhibit 8: Estimated Monetized Costs and Transfers of the Proposed Rule (2020 \$millions)		
Year	Costs	Transfers
Undiscounted 10-Year Total	\$0.45	\$295.00
10-Year Total with a Discount Rate of 3%	\$0.45	\$254.20
10-Year Total with a Discount Rate of 7%	\$0.45	\$211.87
10-Year Average	\$0.045	\$29.50
Annualized with a Discount Rate of 3%	\$0.053	\$29.80
Annualized with a Discount Rate of 7%	\$0.064	\$30.17

5. *Regulatory Alternatives*

The Department considered two alternatives to the proposal of using the FLS-based field and livestock worker (combined) average gross hourly wage, where USDA reports such as wage, as the sole source for establishing the AEWR in job opportunities classified under one of the following SOC:

- 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
- 45-2099 - Agricultural Workers, All Other

For each alternative, job opportunities classified under any other SOC will have the AEWR set using the same methodology in the proposed rule: the AEWR for each occupation would be the statewide annual average hourly gross wage for that occupation as reported by the OEWS survey. If the statewide wage is not available, the AEWR would be set by the national annual average hourly wage for that occupation as reported by the OEWS survey.

Under the first regulatory alternative, the Department considered setting the AEWR for job opportunities classified under SOC 45-2041, 45-2091, 45-2092, 45-2093, 53-7064, and 45-2099, using the *highest* of the annual average hourly gross wage reported by the FLS or the weighted average hourly gross wage provided by the OEWS for these same occupations for the

State or region. If a statewide annual average hourly gross wage in the State is not reported in the FLS or the OEWS survey, the AEWR for the occupation shall be determined using the national annual average hourly gross wage as reported by the FLS or the OEWS survey.

The total impact of the first regulatory alternative was calculated using the methodology described to calculate proposed wage impacts using FY 2020 to FY 2021 certification data. The Department estimated average annual undiscounted transfers of \$103.30 million. The total transfer over the 10-year period was estimated at \$1.03 billion undiscounted, or \$890.12 million and \$741.88 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was \$104.35 million and \$105.63 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative, the Department would set the AEWR using only the OEWS average hourly wage for the SOC and State (i.e., use of FLS-based wages in establishing AEWRs under the H-2A program would be discontinued). When OEWS State data is not available, the Department would set the AEWR at the OEWS national average hourly wage for the SOC under this alternative. This alternative reflects the transfers that would occur if, for example, the USDA survey was discontinued or suspended and, as a result, the Department would set the AEWRs for each State using the OEWS data. For SOC codes 45-2041, 45-2091, 45-2092, 45-2093, 53-7064, 45-2099, the weighted average hourly wage provided by BLS at the State and national level is applied. The Department again used the same method to calculate the total impact of the regulatory alternative and found that unlike the proposed rule and first regulatory alternative, the second regulatory alternative would result in transfers from H-2A employees to employers. The Department estimated average annual undiscounted transfers of \$72.30 million. The total transfer over the 10-year period was estimated at \$723.03 million undiscounted, or \$623.03 million and \$519.28 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was \$73.04 million and \$73.93 million at discount rates of 3 and 7 percent, respectively.

Exhibit 9 summarizes the estimated transfers associated with the three considered revised wage structures over the 10-year analysis period. Transfers under the proposal and the first regulatory alternative are transfers from H-2A employers to H-2A employees and transfers under the second alternative are transfers from H-2A employees to H-2A employers.

Exhibit 9: Estimated Monetized Transfers and Costs of the Proposed Rule (2020 \$Millions)			
	Proposed Rule (Transfers from Employers to Employees)	Regulatory Alternative 1 (Transfers from Employers to Employees)	Regulatory Alternative 2 (Transfers from Employees to Employers)
Total 10- Year Transfer	\$295	\$1,033	\$723
Total with 3% Discount	\$254	\$890	\$623
Total with 7% Discount	\$212	\$742	\$519
Annualized Undiscounted Transfer	\$30	\$103	\$72
Annualized Transfer with 3% Discount	\$30	\$104	\$73
Annualized Transfer with 7% Discount	\$30	\$106	\$74

The Department prefers the chosen approach of the proposed rule because it allows specific OEWS wages for workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms while maintaining the use of FLS data for occupations with the majority of H-2A workers. As the Department has stated previously, the FLS, which surveys directly hired agricultural workers, is the best source of wage data to set AEWRs for the vast majority of H-2A occupations. This is in part because the FLS is a more comprehensive source of farmworker wage data than the OEWS survey. The chosen approach also minimizes transfers compared to the two alternatives, and ensures greater stability in the wage obligations of employers by determining AEWRs, including annual adjustments, using the data source that best reflects the wages of workers in the United States similarly employed.

B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement

Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121 (March 29, 1996), hereafter jointly referred to as the RFA, initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The Department certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. The Department presents the basis for this conclusion in the analysis below.

Definition of Small Entity

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of August 19, 2019, to classify entities as small.¹⁰² SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than \$7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small defined as less than \$550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as

¹⁰² SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), <https://www.sba.gov/document/support--table-size-standards>.

the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.¹⁰³

Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H-2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H-2A disclosure data as well as their annual revenues. The Department determined the number of unique employers in the FY 2020 and FY 2021 certification data based on the employer name and city. The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H-2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were small (80.5 percent).¹⁰⁴ These unique small entities had an average of 11 employees and average annual revenue of approximately \$3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle. The Department's analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,085 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 10 shows the number of unique H-2A small entities employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

Exhibit 10: Number of H-2A Small Employers by NAICS Code			
6-Digit NAICS	Description	Number of Employers	Percent
111998	All Other Miscellaneous Crop Farming	611	31%
444220	Nursery, Garden Center, and Farm Supply Stores	162	8%
561730	Landscaping Services	134	7%
445230	Fruit and Vegetable Markets	127	6%

¹⁰³ See <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act> for details.

¹⁰⁴ SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), <https://www.sba.gov/document/support--table-size-standards>.

424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4%
111339	Other Noncitrus Fruit Farming	78	4%
112990	All Other Animal Production	57	3%
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	3%
424910	Farm Supplies Merchant Wholesalers	41	2%
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2%

Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.*, the 2010 Final Rule: *Temporary Agricultural Employment of H-2A Aliens in the United States*; TEGL 17-06, Change 1; TEGL 33-10, and TEGL 16-06, Change 1) to this proposed rule. We estimated the costs of (a) time to read and review the proposed rule and (b) wage costs. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that small entities not classified as H-2ALCs, 1,946 unique small entities,¹⁰⁵ would incur a one-time cost of \$53.08 to familiarize themselves with the rule.¹⁰⁶

In addition to the cost of rule familiarization above, each small entity will have an increase in the wage costs due to the revisions to the wage structure. To estimate the wage impact for each small entity we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity the Department calculated total wage impacts of the proposed rule in CY 2020 and CY 2021. The Department estimates the total annualized cost at a discount rate of 7 percent is \$4,347 on average.

The Department determined the proportion of each small entity's total revenue that would be impacted by the costs of the proposed rule to determine if the proposed rule would have a significant and substantial impact on small entities. The cost impacts included estimated first year costs and the wage impact introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a

¹⁰⁵ The 1,946 unique small entities exclude all labor contractors.

¹⁰⁶ $\$33.38 + \$33.38(0.46) + \$33.38(0.17) = \53.08 .

total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact.¹⁰⁷ This threshold is also consistent with that sometimes used by other agencies.¹⁰⁸

Exhibit 11 provides a breakdown of small entities by the proportion of revenue affected by the costs of the proposed rule. Of the 2,085 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, 1.3 percent of employers had more than 3 percent of their total revenue impacted in the first year. Based on the findings presented in Exhibit 11, the proposed rule does not have a significant economic impact on a substantial number of small H-2A employers.

Exhibit 11: Cost Impacts as a Proportion of Total Revenue for Small Entities						
Proportion of Revenue Impacted	2020, by NAICS Code					
	111998	444220	561730	445230	All Other	Total
< 1%	601 (98.4%)	162 (100.0%)	132 (98.5%)	126 (99.2%)	1033 (98.3%)	2054 (98.5%)
1% - 2%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3 (0.3%)	3 (0.1%)
2% - 3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
3% - 4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (0.2%)	2 (0.1%)
4% - 5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
> 5%	10 (1.6%)	0 (0.0%)	2 (1.5%)	1 (0.8%)	11 (1.0%)	24 (1.2%)
Total >3%	10 (1.6%)	0 (0.0%)	2 (1.5%)	1 (0.8%)	14 (1.3%)	27 (1.3%)
Proportion of Revenue Impacted	2021, by NAICS Code					
	111998	444220	561730	445230	All Other	Total
< 1%	606 (99.2%)	162 (100.0%)	131 (97.8%)	125 (98.4%)	1025 (97.5%)	2049 (98.3%)
1% - 2%	0 (0.0%)	0 (0.0%)	1 (0.7%)	0 (0.0%)	5 (0.5%)	6 (0.3%)
2% - 3%	1 (0.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (0.2%)	3 (0.1%)
3% - 4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
4% - 5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	1 (0.0%)
> 5%	4 (0.7%)	0 (0.0%)	2 (1.5%)	2 (1.6%)	17 (1.6%)	25 (1.2%)
Total >3%	4 (0.7%)	0 (0.0%)	2 (1.5%)	2 (1.6%)	19 (1.8%)	27 (1.3%)

¹⁰⁷ See, e.g., NPRM, *Increasing the Minimum Wage for Federal Contractors*, 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex*, 81 FR 39108 (June 15, 2016).

¹⁰⁸ See, e.g., Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II*, 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This proposed rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is approximately \$168 million based on the Consumer Price Index for All Urban Consumers.¹⁰⁹

This proposed rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of Title II of

¹⁰⁹ See BLS, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items, By Month*, <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited Aug. 19, 2021).

Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = $[(\text{Average monthly CPI-U for 2019} - \text{Average monthly CPI-U for 1995}) / (\text{Average monthly CPI-U for 1995})] * 100 = [(255.657 - 152.383) / 152.383] * 100 = (103.274 / 152.383) * 100 = 0.6777 * 100 = 67.77 \text{ percent} = 68 \text{ percent (rounded)}$. Calculation of inflation-adjusted value: \$100 million in 1995 dollars * 1.68 = \$168 million in 2019 dollars.

the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

E. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

G. Regulatory Flexibility Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This proposed rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons stated in the preamble, the Department of Labor proposes to amend 20 CFR part 655 as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

2. Amend § 655.103(b) by revising the definition of *Adverse effect wage rate* to read as follows:

§ 655.103 Overview of this subpart and definition of terms.

* * * * *

(b) * * *

Adverse effect wage rate (AEWR). The wage rate published by the OFLC Administrator in the *Federal Register* for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

* * * * *

3. Amend § 655.120 by revising paragraphs (b)(1)(i) through (iii) and (b)(5) to read as follows:

§ 655.120 Offered wage rate.

* * * * *

(b)(1) * * *

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the occupations shall be the statewide annual average hourly gross wage in the State as reported by the Occupational Employment and Wage Statistics (OEWS) survey; or

(C) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for the occupations shall be the national annual average hourly gross wage as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEWR for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEWR for each occupation shall be the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after **[60 DAYS AFTER PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER]**, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134. For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

* * * * *

(5) If the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable occupations.

* * * * *

Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

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