H-2A Final Rule
Side-by-Side Comparative Summary of Important Regulatory Changes
2010 H-2A Final Rule to 2022 H-2A Final Rule

Regulatory Provision[1]	**2010 Final Rule** Applies to Forms ETA-9142A filed before November 14, 2022, and Forms ETA-9142A filed on or after November 14, 2022, with employment starting no later than February 12, 2023	**2022 Final Rule** Applies to Forms ETA-9142A filed on or after November 14, 2022, with employment starting on or after February 13, 2023
Temporary Labor Certification Process 20 CFR 655.121(c), (e), (f) 20 CFR 655.130(c)	• Electronic filing is optional. Note: Although voluntary, almost all Forms ETA-790/790A, *H-2A Agricultural Clearance Order* ("job order") and Forms ETA-9142A, *H-2A Application for Temporary Employment Certification* ("H-2A application") are filed electronically through the Foreign Labor Application Gateway (FLAG) system (https://flag.dol.gov/), the centralized electronic system maintained by the Department. • Employers submit job orders to the State Workforce Agency ("SWA") and H-2A applications to the Department's Employment and Training Administration ("ETA"), Office of Foreign Labor Certification's ("OFLC") National Processing Center ("NPC"). • After the SWA reviews and approves a job order, the SWA begins intrastate clearance. • Upon receipt of the Certifying Officer's ("CO") H-2A application Notice of Acceptance, the SWA expands clearance to the interstate system, following the CO's instructions.	• Requires electronic filing, except in limited circumstances, and permits use of electronic signatures that meet Office of Management and Budget guidelines for valid electronic signatures. • Establishes the FLAG system as the single point of entry for electronic filing. As a result, employers will submit job orders (Forms ETA-790/790A), H-2A applications (Forms ETA-9142A), and supporting documentation through OFLC's FLAG system (https://flag.dol.gov/), the centralized electronic system maintained by the Department. • Permits the use of electronic methods for OFLC to send notices and requests to employers, circulate approved job orders to appropriate SWAs for interstate clearance and recruitment of U.S. workers, and issue certification information directly to the Department of Homeland Security. • Upon the CO's issuance of a Notice of Acceptance, the NPC transmits the approved job order to SWAs in other States for interstate clearance.
Geographic Scope and Definition of Area of Intended Employment 20 CFR 655.130(e) 20 CFR 655.103(b) 29 CFR 501.3(a)	• Limits H-2A Labor Contractor ("H-2ALC") applications to work within a single area of intended employment ("AIE"). • Allows master applications to include work in multiple AIEs, up to a maximum of two contiguous states.	• Clarifies that all applications are limited to one AIE, absent an exception (e.g., master applications, herding on the range, custom combining). • Clarifies that places of work after the workday begins (e.g., delivery locations) are not included in the AIE assessment provided that such travel is necessary to perform the duties and workers can

[1] Using citations from the 2022 final rule.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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	• Revision to the Department's regulations in 2015 codified sub-regulatory guidance that permitted applications for herding and production of livestock on the range to include work in multiple AIEs and/or States. • Sub-regulatory guidance for animal shearing, custom combining, and commercial beekeeping permit work in multiple AIEs and/or States as the work follows a planned itinerary.	reasonably return to their residence or employer-provided housing within the same workday.
Notice of Deficiency ("NOD") 20 CFR 655.141 20 CFR 655.171	• Permits the CO to issue a NOD within 7 calendar days of H-2A application receipt, identifying deficiencies that prevent certification. • Employers may appeal NODs.	• Continues to permit the CO to issue a NOD within 7 calendar days of H-2A application receipt, identifying deficiencies that prevent certification. • Codifies the ability of the CO to issue more than one NOD. • Removes the option to appeal a NOD. If the deficiency identified in a NOD is not resolved and the CO issues a final determination denying the H-2A application, the employer may appeal the final determination.
Joint Employment 20 CFR 655.103(b) 20 CFR 655.131	• Regulations permit agricultural associations to file master applications as joint employers with their employer-members. • Joint employment relationships for non-filers based on common law of agency • Does not address individual growers filing an application as joint employers.	• Explicitly codifies that entities that do not file applications but jointly employ workers under the common law of agency are also joint employers that may be held liable for violations. Entities that do file applications as joint employers are joint employers as a matter of law, regardless of the common law of agency. • Clarifies that agricultural associations that file as joint employers are always joint employers of those workers, regardless of whether the agricultural association qualifies as an employer under the common law. However, the employer-

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		members are joint employers only when employing the workers as defined under common law principles. • Codifies existing practice of individual growers filing as joint employers (independent of an agricultural association), and provides: o These employers jointly employ the H-2A workers throughout the work contract period; o No individual grower may obtain more than 34 hours of work in any workweek from all of the H-2A workers jointly employed, limiting the use of the provision to growers needing part time work. • Fixed-site employers must contact U.S. workers they jointly employed in the previous season, including those jointly employed (under the common law of agency) with an H-2A Labor Contractor ("H-2ALC") or farm labor contractor.
Special Regulatory Provisions for Occupations Involving Animal Shearing, Beekeeping, Custom Combining 20 CFR 655.300 – 655.304	• The Department uses sub-regulatory guidance (TEGLs) to process H-2A applications for animal shearing, commercial beekeeping, and custom combining occupations that involved work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple States. • Employers may use mobile units to house animal shearing and custom combining workers. The TEGLs applied the same mobile housing standards for these occupations as for herding and production of livestock on the range.	• Codifies, with some revisions, certain variances to normal H-2A standards and procedures to address the unique occupational characteristics of animal shearing, commercial beekeeping, and custom combining work that involves work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple contiguous states. • Revisions to existing sub-regulatory procedures include: o Codifying standards for mobile housing (distinct from that used in herding and production of livestock on the range);

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		○ Eliminating the practice of some shearing employers to lease mobile units from workers; and ○ Requiring employers to provide all tools, even though some shearing workers may have—and use—their own, preferred tools.
Surety Bonds (a filing requirement for H-2ALCs)		
Surety Bonds for H-2ALCs 20 CFR 655.132 29 CFR 501.9	• H-2ALCs must submit an original surety bond to the NPC. • The CO cannot issue a certification unless/until the CO receives the original surety bond. • Regulation establishes fixed bond amounts ranging from $5,000 to $75,000 based on the number of workers sought. ○ The required bond amount for 100 workers or more is the same, regardless of the number of workers over 100. • The bond amounts are fixed; they have not changed since 2010.	• Streamlines H-2ALC bond requirement by implementing a bond form with standardized language and permitting the electronic execution and delivery of surety bonds. • Extends and simplifies period in which WHD can bring claims against a bond from "no less than 2 years" to 3 years. • Adjusts bond amounts to reflect wage growth and crew size, using a national "average AEWR" figure and providing a method for calculating bond amounts for 100+ workers in 50-worker increments. • New definition of "average AEWR" for use in calculating bond amounts.
Wages		
Prevailing Wage Survey Requirements 20 CFR 655.120(c)	• No regulatory methodology. • SWAs rely on sub-regulatory guidance in ETA's Handbook 385, which was last updated in 1981.	• Modernizes and codifies prevailing wage methodology standards to permit more prevailing wage findings (e.g., revising the determination of the unit of pay; revising standards to allow prevailing wage findings for crop or agricultural activities or distinct work tasks that have small worker population sizes).

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		• Permits SWAs to leverage surveys conducted by other state entities that meet prevailing wage methodology standards. • Continues SWA discretion and control over prevailing wage surveys, including whether to survey a crop activity or agricultural activity and, if applicable, distinct work task(s) within that activity (e.g., piece rate pay); when to survey (i.e., data collection period); the area to survey (e.g., sub-State area or region). • Formalizes the procedure for SWA submission of prevailing wage surveys, and OFLC review, approval, and posting of prevailing wage rates. • Formalizes the validity period of prevailing wage determinations in the H-2A program. Once posted on Agricultural Online Wage Library ("AOWL") https://www.dol.gov/agencies/eta/foreign-labor/wages/agriculture, a prevailing wage rate remains valid for 1 year, unless replaced with an adjusted prevailing wage rate. If not replaced, the prevailing wage rate will be removed from AOWL after 1 year.
Wage Source Adjustments During the Contract Period 20 CFR 655.120(b), (c)	• Requires an employer to increase wage rates during the work contract period, if the Adverse Effect Wage Rate ("AEWR") or prevailing wage applicable to the job opportunity increases and is the highest of the applicable wage sources and higher than the employer's wage offer. • The Department's *Federal Register* notices announcing AEWR adjustments have included a 14-day window for an employer to adjust payroll to a new, higher rate.	• Continues to require an employer to increase wage rates during the work contract period, if the AEWR or prevailing wage applicable to the job opportunity increases and is the highest of the applicable wage sources and higher than the employer's wage offer. • The effective date for adjusted AEWRs will be identified in the *Federal Register* notice that announces the AEWR adjustment and, for prevailing wages, in AOWL, and written notice to

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	• The Department posts prevailing wage rate(s) on AOWL. Also, OFLC sends written notice directly to potentially impacted employers, based on OFLC data regarding active H-2A certifications.	employers. Adjustment is required as of the effective date of the new rate. • Explicitly prohibits an employer from reducing wage rates during the work contract period below the certified rate, even if the AEWR or prevailing wage applicable to the job opportunity decreases during the work contract period. The employer must continue to pay the certified rate. Note: Statements in job orders regarding the potential for pay reduction if the prevailing wage or AEWR decrease during the work contract are not permitted. If included, the CO will issue a NOD.
Housing and Meals		
Employer-Provided Housing: Inspection, Certification 20 CFR 655.122(d)	• Pre-occupancy inspection required for employer-provided housing for *each* H-2A application filed. • Some SWAs enter into a memorandum of understanding with another agency related to housing inspections.	• No change. Retains the 2010 rule provision that requires a pre-occupancy inspection for employer-provided housing for *each* H-2A application filed. • Codifies existing practice of allowing SWAs to rely on other agencies to conduct pre-occupancy housing inspections.
Rental/Public Accommodations: Health and Safety Standards, Documentation 20 CFR 655.122(d)	• Where any local or state standards exist, only those standards apply. Federal standards apply only where there are no local or state standards applicable to rental/public accommodations. • Where federal standards are applicable, includes all Occupational Safety and Health Administration's ("OSHA") temporary labor camp standards to rental/public accommodations. • Does not address documentation requirements for establishing that rental or public accommodations meet applicable housing standards.	• Revises standards for rental or public accommodations consistent with the statute, to ensure that such housing complies with OSHA health and safety standards where local and state standards do not address certain health or safety concerns. See WHD Fact Sheet 26G for details, available at https://www.dol.gov/agencies/whd/agriculture/h2a. • Clarifies documentation for rental or public accommodations.

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		○ The employer must provide OFLC a written statement attesting that the accommodations are compliant with the applicable housing health and safety standards and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). ○ If applicable local or state rental or public accommodation standards require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. • Preamble explains that WHD interprets the term *rental or public accommodations* as applicable only to hotels, motels and similar accommodations that are available to the general public to rent for relatively short-term stays.
Meals, Kitchen Facilities 20 CFR 655.122(g)	• Requires employers to provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities. • Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meal. Meal charges are governed by 20 CFR 655.173.	• No changes to regulatory text. Preamble clarifies what constitutes provision of meals, when employer may take credit for meals provided by hotels/public accommodations, and sanitary requirements for meals and kitchen facilities. See WHD Fact Sheet 26D for details, available at https://www.dol.gov/agencies/whd/agriculture/h2a.
Higher Meal Charge Requests 20 CFR 655.173	• Outlines the process for an employer to petition the CO for authorization to charge workers more than the standard meal charge.	• Revisions address situations in which an employer's higher meal charge petition is based on its use of a third party to provide meals to workers (*e.g.*, hiring a food truck to prepare and deliver meals or engaging restaurants near the housing or place of employment to provide meals)

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Transportation and Subsistence		
Inbound/Outbound Transportation and Subsistence 20 CFR 655.122(h)	• The beginning and end points for inbound and outbound are the "place from which the worker has come to work for the employer," which means the place of recruitment, which is often the worker's home.	• No change. Retains the 2010 rule provision that the beginning and end points for inbound and outbound are the "place from which the worker has come to work for the employer," which means, the place of recruitment, which is often the worker's home. • Preamble clarifies that the employer must also provide or pay for all reasonable subsistence costs from time of arrival for visa processing until time of arrival at place of employment.
Debarment		
Debarment 20 CFR 655.182 29 CFR 501.20	• Allows for the debarment of employers based on their own misconduct, and agents or attorneys who participate in the employer's misconduct. • Prohibits certification of applications filed by debarred individuals or entities, or their successors in interest.	• Allows for the debarment of agents and attorneys based on their own misconduct (rather than solely for participation in the employer's misconduct). • Clarifies that neither a debarred employer nor a successor in interest to a debarred employer may file an H-2A application. • Includes conforming revisions to the definition of "successor in interest" at § 655.103(b). • Permits denial without review of an H-2A application filed by a debarred individual or entity, or a successor in interest to that individual or entity. • Clarifies the liability of joint employers with regard to debarment. *See* preamble to § 655.131(b). • Explicitly permits debarment of H-2ALCs that fail to provide adequate surety bonds.