



UNITED STATES DEPARTMENT OF LABOR

H-2A Temporary Labor Certification Program

2022 H-2A Final Rule

Stakeholder Webinar
October 27, 2022

Office of Foreign Labor Certification, Employment and Training Administration
Wage and Hour Division



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2022 H-2A Final Rule Overview

- Regulatory Action
- Filing and Processing
- Prevailing Wages
- Employer Assurances and Obligations
- Integrity and Enforcement, Surety Bonds



UNITED STATES DEPARTMENT OF LABOR

Protecting Workers and Program Integrity

▶ Reporting Violations of H-2 Labor Certifications

- File a complaint with the DOL Wage and Hour Division (WHD) by calling the toll-free helpline at **1-866-4US-WAGE (1-866-487-9243)**.
- Visit the WHD for more information at <http://www.dol.gov/agencies/whd>

▶ Reporting Violations of Discrimination Based on Immigration Status or Citizenship

- For questions about the anti-discrimination provisions of the INA, call the DOJ Immigrant and Employee Rights (IER) section using the toll-free helpline at **1-800-255-8155**.
- Visit the DOJ-IER to file a charge at <https://www.justice.gov/crt/filing-charge>

▶ Reporting Human Trafficking

- File a report with the National Human Trafficking Hotline (NHTH) by calling the toll-free helpline at **1-888-373-7888**.
- Visit the NHTH for more information at <https://humantraffickinghotline.org/>

▶ Reporting DOL Immigration Fraud or Program Abuse

- File a report with the DOL Office of Inspector General (OIG) by calling the helpline at **1-202-693-6999** or toll-free at **1-800-347-3756**.
- Visit the DOL-OIG to file a report at <https://www.oig.dol.gov/hotlinecontact.htm>



Regulatory Action



Regulatory Action

- In 2019, the Department published a Notice of Proposed Rulemaking proposing to comprehensively modernize and enhance the regulations governing the certification of temporary nonimmigrant agricultural employment and the enforcement of applicable obligations for employers of H-2A workers and workers in the United States similarly employed
- On October 12, 2022, the Department published a Final Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (“2022 H-2A final rule”) <https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-20506.pdf>
- The 2022 H-2A final rule addresses many aspects of the H-2A program but does not address the Adverse Effect Wage Rate ("AEWR") methodology
- The Department is addressing proposals for the AEWR methodology in a separate regulatory action



2022 H-2A Final Rule Overview

- Strengthens protections for agricultural workers
- Enhances enforcement to prevent fraud and abuse
- Simplifies and modernizes the H-2A application and temporary labor certification (“TLC”) process
- Modernizes the prevailing wage determination process
- Enhances the enforcement capabilities of the Office of Foreign Labor Certification (“OFLC”) and the Wage and Hour Division (“WHD”)



Effective Date

- The 2022 H-2A final rule is effective November 14, 2022
- A transition provision at 20 CFR 655.102 supports continuity of processing based on the *H-2A Application for Temporary Employment Certification* (Form ETA-9142A) filing date and the start date of work for the related job order (Form ETA-790/790A)

2010 H-2A final rule procedures apply if:

- The Form ETA-9142A was submitted before November 14, 2022; or
- The Form ETA-9142A was submitted on or after November 14, 2022, with a first date of need no later than February 12, 2023, *i.e.*, 90 days after the effective date of this final rule.

2022 H-2A final rule procedures apply if:

- The Form ETA-9142A was submitted on or after November 14, 2022, with a first date of need on or after February 13, 2023



Filing and Processing



Filing and Processing

- Mandatory electronic filing, with limited exceptions, with electronic signatures permitted when they meet Office of Management and Budget guidelines for valid electronic signatures
- Single point of entry for electronic filings (including job order) through the Department's centralized electronic system – Foreign Labor Application Gateway (FLAG) (<https://flag.dol.gov/>)
- Electronic communications through FLAG, including notices and requests sent to employers, approved job orders transmitted to appropriate State Workforce Agencies (SWAs) for interstate clearance and recruitment of U.S. workers, and TLC decisions sent directly to the Department of Homeland Security (“DHS”) on behalf of employers



Filing and Processing

- New standards permitting multiple individual employers to jointly employ full-time workers
- All applications are limited to one area of intended employment (AIE), absent an exception (e.g., custom combining, master applications)

Note: The final rule 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 reasonably return to their residence or employer-provided housing within the same workday

- The Certifying Officer (“CO”) may issue more than one Notice of Deficiency (“NOD”)
- A NOD cannot be appealed to the Board of Alien Labor Certification



Animal Shearing, Beekeeping, Custom Combining

- Regulatory standards and procedures replace sub-regulatory guidance for the employment of workers engaged in animal shearing, commercial beekeeping, and custom combining according to a planned itinerary across multiple AIEs and codify certain variances to normal H-2A standards and procedures to address unique occupational characteristics
- Revises some existing sub-regulatory standards and procedures, including:
 - Standards for mobile housing (distinct from that used in herding and production of livestock on the range);
 - Shearing employers are not permitted to lease mobile units from workers; and
 - Employers must provide all tools, even though some shearing workers may have their own, preferred tools



Prevailing Wages



Prevailing Wages

- New prevailing wage survey standards that replace the outdated ETA Handbook 385
- Expanded universe of State entities that may conduct prevailing wage surveys for use in the H-2A program (e.g., SWA or any other State agency, State college, or State university)
- SWA discretion and control over prevailing wage surveys:
 - The SWA determines whether to survey a crop activity or agricultural activity and, if applicable, distinct work task(s) within that activity (e.g., piece rate pay)
 - The SWA determines when to survey (i.e., data collection period)
 - The SWA determines the area to survey (e.g., sub-State area or region)
 - The SWA determines whether to conduct the survey itself or leverage another State entity's survey



Prevailing Wages

- Formalized procedure for SWA submission and OFLC review and posting of prevailing wage rates
 - SWA conducts a survey or selects another State entity's survey that satisfies the 2022 H-2A final rule prevailing wage methodology criteria
 - SWA prepares and submits the survey with the new Form ETA-232, *Domestic Agricultural In-Season Wage Report*
 - OFLC reviews the submission and, if all prevailing wage methodology criteria are met, approves the prevailing wage finding
 - Upon approval of the prevailing wage finding, OFLC posts the prevailing wage rate(s) on its Agricultural Online Wage Library ("AOWL"), <https://www.dol.gov/agencies/eta/foreign-labor/wages/agriculture>
 - Once posted on AOWL, 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 Adjustments

- An employer must increase wage rate(s) during the work contract period, if the prevailing wage or AEWB applicable to the job opportunity increases and is the highest of the applicable wage sources and higher than the employer's wage offer
 - The employer must implement wage rate increases no later than the effective date of the adjustment
 - Notice of AEWB adjustments is provided through *Federal Register* notices as well as OFLC's website
 - Notice of prevailing wage findings or adjustments is provided on OFLC's website. Also, OFLC sends written notice directly to potentially impacted employers, based on OFLC data regarding active TLCs
- An employer is prohibited from reducing wage rate(s) during the work contract period below the certified rate, even if the prevailing wage or AEWB applicable to the job opportunity decreases during the work contract period
 - Statements in job orders regarding the potential for pay reduction if the prevailing wage or AEWB decrease during the work contract are not permitted. If included, the CO will issue a NOD.



Housing Standards



Rental and/or Public Accommodations

- Provides that rental and/or public accommodations secured to house workers must meet applicable local, State, or Federal standards addressing certain health or safety concerns:
 - Minimum square footage
 - Adequate storage for personal items
 - Sufficient and sanitary cooking and kitchen facilities
 - Heating, cooking and water heating equipment
 - Adequate and sanitary toilet, laundry, handwashing, and bathing facilities
 - Sufficient lighting
 - Refuse disposal

Meals





Meals

- Clarified in the preamble that:
 - kitchen facilities provided in lieu of meals must include clean space for food preparation, working cooking and refrigeration appliances, and dishwashing facilities.
 - Appliances provided must be sufficient to allow workers to safely prepare three meals per day, a requirement that is not met if the employer merely provides an electric hot plate, a microwave, or an outdoor community grill, or if workers are required to purchase cooking appliances or accessories, such as portable burners, charcoal, propane, or lighter fluid.
 - Public accommodations such as hotels or motels frequently do not have adequate cooking facilities to satisfy an employer's obligations under this section, and, in those instances, employers must provide three meals a day to workers to meet their obligations.



Meals (cont'd)

- Clarified in the preamble that:
 - The employer may only consider complimentary breakfast to meet its obligation to provide meals when the breakfast is readily accessible to the workers and is nutritionally adequate.
 - Meals must be provided in a timely and sanitary fashion. For example, prepared meals requiring refrigeration that are delivered hours before an anticipated mealtime would not meet the employer's meal obligation.
 - Meals must be calorically and nutritionally adequate. An employer's determination as to the adequacy of the meals must be reasonable—merely providing snacks such as chips or crackers, for example, would not meet an employer's meal obligations.
 - When convenient kitchen and cooking facilities are not provided, stipends are not an acceptable substitute for meals.



Joint Employment



Joint Employment

- 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.
- Two or more fixed-site employers may file as joint employers independent of an association, so long as no single joint employer obtains more than 34 hours of work in any workweek from all of the H-2A employees it employs.



Enforcement - Debarment



Enforcement - Debarment

- Agents and attorneys (and their successors in interest) may be debarred for their own misconduct, independent of the employer's violation(s)
 - Previously, agents and attorneys (and their successors in interest) could only be debarred for their participation in a debarable offense by the employer they represented
- H-2A applications filed during the period of debarment will be denied without review
- H-2A Labor Contractors (H-2ALCs) that fail to provide adequate surety bonds may be debarred



H-2ALC Surety Bonds

- Permits the electronic submission of surety bonds;
- Adopts a common bond form that includes standardized bond language;
- Updates required surety bond amounts based on changes to adverse effect wage rates (AEWR);
- Adjusts bond amounts for H-2ALCs employing 150 or more workers, with higher base bond amounts corresponding to each additional 50 workers.



H-2 Visa Programs *Upcoming Stakeholder Engagements*

▶ H-2A Agricultural Visa Program

Thursday, November 17 (2:00-3:30PM EST)

- OFLC will provide filing tips for submitting H-2A job orders and applications under the new 2022 H-2A Final Rule, including key changes to the Forms ETA-790/790A and 9142A.

▶ H-2B Nonagricultural Visa Program

Wednesday, December 7 (2:00-3:00PM EST)

- OFLC will provide filing tips for submitting H-2B applications, including common deficiencies, ahead of the 2023 January peak filing season.

Important Reminders!

- ✓ Webinars may be recorded
- ✓ Chat feature will be open to participants
- ✓ No case-specific inquiries or novel policy issues will be addressed
- ✓ Details on how to access webinars will be posted on the OFLC website at <https://www.dol.gov/agencies/eta/foreign-labor>



**Thank you for your
participation!**
