

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

BILLING CODE 4510-FP-P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA-2019-0007]

RIN 1205-AB89

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: Final Rule.

SUMMARY: The Department of Labor (Department or DOL) is amending 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 is amending its regulations to revise the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range agricultural occupations using 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 Statistics (OES) survey. This final rule improves the consistency and accuracy of the AEWRs based on the actual work being performed by H-2A workers, and establishes better stability and predictability for employers to comply with their wage obligations. These 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. While the Department intends to address all of the remaining proposals from the July 29, 2019 proposed

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

rule¹ in a subsequent, second final rule governing other aspects of the certification of agricultural labor or services to be performed by H-2A workers and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers, the Department focused this final rule on the immediate need for regulatory action to revise the methodology by which it determines the hourly AEWRs for non-range agricultural occupations before the end of the calendar year.

DATE: This final rule is effective **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 655, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, 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. Executive Summary

A. Purpose for the Regulatory Action

The Department has determined that this rulemaking is necessary to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while

¹ Proposed Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 FR 36,168 (July 26, 2019).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

maintaining the program’s strong protections for the U.S. workforce. This rulemaking also promotes and advances the goals of Executive Order (E.O.) 13788, Buy American and Hire American.² The “Hire American” directive of the E.O. articulates that it is a policy of the Executive Branch to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests.³ It directs federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers.⁴

Consistent with the E.O.’s principles and the goal of modernizing the H-2A program, this final rule amends the methodology by which the Department determines the hourly AEWRs for non-range agricultural occupations using wage data reported by the USDA FLS and the BLS OES survey. It also makes minor revisions related to the regulatory definition of the AEWR to conform to the methodology changes adopted in this final rule and to more clearly distinguish the hourly AEWRs applicable to non-range occupations from the monthly AEWR applicable to range occupations under 20 CFR 655.200–235.

As discussed in more detail below, the FLS has been the only comprehensive survey of wages paid by farmers and ranchers and has enabled the Department to establish minimum hourly rates of pay for H-2A job opportunities. However, the Department acknowledges the concerns expressed by many commenters about the unpredictability and volatility of the FLS wage data from year-to-year, which the Department believes is a sufficient reason to reconsider

² See E.O. 13,788 (Apr. 18, 2017), 82 FR 18,837 (Apr. 21, 2017).

³ *Id.* at sec. 2(b); see also DOL, *U.S. Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse* (June 6, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170606>.

⁴ E.O. 13,788, sec. 5.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

its sole reliance on annually produced wage data from the FLS as a means to establish the AEWRs, even were FLS wage data currently available or made available in the future. On the other hand, given the comprehensiveness and relevance of the FLS data, the Department has determined it is appropriate to use the 2020 AEWRs,⁵ which were based on the results of the FLS published in November 2019, as the starting point to establish AEWRs for most H-2A job opportunities during calendar years 2021 and 2022 and, subject to annual adjustments, in subsequent years. Accordingly, the Department will use this FLS data as baseline wage rates for field and livestock worker occupations and adjust the wages annually beginning in 2023 based on the change in the Employment Cost Index (ECI) for wages and salaries computed by the BLS. This two-year transition period during which the current wage rates will remain in effect provides employers with greater certainty and a reasonable amount of time to plan their labor needs and agricultural operations under the new wage baseline before new adjustments to the existing wage rates take effect. For all other occupations, the Department, as explained in Section II.B.5.b., will annually adjust and set the hourly AEWRs based on the statewide annual average hourly wage for the occupational classification, as reported by the OES survey. If the OES survey does not report a statewide annual average hourly wage for the occupation, the AEW shall be the national annual average hourly wage reported by the OES survey.⁶

In light of USDA's recent announcement regarding the FLS, the continued lack of any statutory or regulatory requirement that USDA conduct the FLS, and ongoing litigation over the announcement, the Department has also determined that the new hourly AEW methodology is

⁵ Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-Range Occupations*, 84 FR 69774 (Dec. 19, 2019).

⁶ See BLS OES, *Frequently Asked Questions* (Explaining the OES may not report a wage for an occupation in a specific area "for a number of reasons, including failure to meet BLS quality standards or the need to protect the confidentiality of our survey respondents."), https://www.bls.gov/oes/oes_ques.htm

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

also appropriate in order to promote greater certainty in the setting of AEWs in future years.

On September 30, 2020, USDA publicly announced its intent to cancel the planned October data collection for the Agricultural Labor Survey and resulting Farm Labor reports (better known as the FLS).⁷ Consequently, NASS may not release its November 2020 report containing the annual

⁷ *Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports by Suspending Data Collection for October 2020*, 85 FR 61,719 (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 Sept. 28, 2020); see also USDA, *USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), <https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php>.

In the public announcement suspending data collection and publication of the Farm Labor report in November, NASS noted that the public can access other sources for the data collected in the FLS. Specifically, NASS referred to the Agricultural Resources Management Survey (ARMS), Census of Agriculture (COA), American Community Survey (ACS), Quarterly Census of Employment and Wages (QCEW), National Economic Accounts (NEA), and the National Agricultural Workers Survey (NAWS) as examples of available data sources. While these are valuable resources for certain purposes, the Department did not propose using any of these surveys as a basis to set AEWs in the NPRM. Similarly, the Department did not receive public comments in response to the NPRM suggesting the Department use these sources to determine the AEWs. While these data sources may provide useful statistical data concerning the agricultural sector and farm labor, the Department does not consider these sources appropriate for setting the AEWs. The Department acknowledges that the ARMS provides broad data on farm expenditures, but it does not include the type of specific, detailed occupational and geographical wage data that has been or is supplied under the FLS or OES. See USDA NASS, *Farm Production Expenditures Methodology and Quality Measures* (July 31, 2020), available at https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Production_Expenditures/07_2020/fpxq0720.pdf. Similarly, the COA, which is conducted once every five years, also provides information on farm income and expenditures only broadly and does not include the detailed occupation-specific wage data necessary to develop AEWs that protect against adverse effect on wages of workers in the United States similarly employed. USDA, *Census of Agriculture*, <https://www.nass.usda.gov/AgCensus/> (last modified May 19, 2020). Relatedly, and as explained in the Department's 2010 H-2A Final Rule, ACS data would entail an unacceptable time lag of over a year for each published AEW and the data does not readily allow for calculation of hourly earnings. Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6,883, 6,899 (Feb. 12, 2010) (2010 Final Rule). The QCEW is limited to approximately 52 percent of the workers in agricultural industries and does not publish data for specific occupations;⁷ and, while the NEA provides an estimate of total wages and salaries in an area, those estimates are generally derived from the QCEW and, accordingly, suffer from the same limitations as the QCEW data itself. U.S. Dept. of Commerce, Bureau of Economic Analysis, *Local Area Personal Income Methods at II-1* (Nov. 2019), available at <https://www.bea.gov/system/files/methodologies/LAPI2018.pdf>; see also BLS, *QCEW Handbook of Methods* at 29 (May 7, 2020), available at <https://www.bls.gov/opub/hom/cew/pdf/cew.pdf>. These limitations make these two data sources less useful than the FLS data in establishing AEWs—even with the admitted limitations to the FLS data, which this Rule aims to address. Lastly, the Department notes that the NAWS is an inappropriate data source because it is neither conducted on a regular schedule, nor at the state level, and also surveys small numbers of workers. DOL Employment and Training Administration (ETA), *National Agricultural Workers Survey*, <https://www.dol.gov/agencies/eta/national-agricultural-workers-survey> (last visited Oct. 3, 2020). In contrast to the OES survey, the Department also cannot rely on these data sources to establish valid statewide average hourly rates of pay for the specific occupations outside of the field and livestock worker category, as is necessary to prevent adverse effect. Accordingly, the Department has determined that FLS data is the appropriate starting point for establishing the AEWs for most occupations using the H-2A program.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

gross hourly wage rates for field and livestock workers (combined) for each state or region based on quarterly wage data collected from employers during calendar year 2020. Under the Department's current AEW method, this annual report is used to establish and publish the hourly AEWs for the next calendar year period on or before December 31, 2020. USDA is not legally required to produce the annual Farm Labor reports. The Department has previously recognized that "USDA could terminate the survey at any time"⁸ and it has suspended collection on at least two prior occasions.⁹ USDA's decision to cancel the October data collection and the release of the report planned for November 2020 cycle is the subject of ongoing litigation.¹⁰ That litigation challenges whether USDA provided adequate reasons for its decision to suspend data collection and whether it considered important aspects of its decision, and the district court recently ordered USDA to proceed with the collection of FLS data for 2020. The litigation does not challenge, however, USDA's discretion—if adequately explained—to terminate the FLS at any time. Therefore, regardless of whether USDA ultimately is successful in the ongoing litigation, it will remain the case that no statute or regulation requires that USDA perform the FLS. The Department has determined that this uncertainty regarding the near-term and long-term future of the FLS also weighs in favor of the Department establishing now a revised methodology for determining the AEW, given its importance to the Department's administration of the temporary agricultural labor certification requirement.

The Department intends to address all of the remaining proposals from the July 29, 2019 proposed rule in a subsequent, second final rule governing other aspects of the certification of

⁸ 73 FR 77,110, 77,173 (Dec. 18, 2008).

⁹ 76 FR 28,730 (May 18, 2011); 72 FR 5675 (Feb. 7, 2007).

¹⁰ See *United Farm Workers v. Perdue*, No. 1:20-cv-01432-DAD-JLT (E.D. Cal. filed Oct. 13, 2020).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

agricultural labor or services to be performed by H-2A workers and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.¹¹ The Department has focused in this final rule on the immediate need for regulatory action to revise the methodology by which it determines the hourly AEWRs for non-range agricultural occupations before the end of the calendar year, so as to ensure AEWRs for each state are published this calendar year as required by 20 CFR 655.120.

This final rule is a deregulatory action under E.O. 13771 because the Department expects the unquantified cost savings of this final rule will outweigh the total annualized costs associated with rule familiarization. The costs of the final rule are attributed to the need for employers to familiarize themselves with the new regulations; consequently, this will impose a one-time cost in the first year. The Department estimates that the final rule will have an annualized cost of \$0.07 million and a total 10-year quantifiable cost of \$0.46 million at a discount rate of 7 percent. In addition, the final rule is expected to have annualized transfer payments of \$170.68 million and total 10-year transfer payments of \$1.68 billion at a discount rate of 7 percent. The Department also identified possible unquantifiable transfers associated with the final rule. The Department expects the final rule will provide qualitative benefits including better protection against adverse wage effects on an occupation basis. The Department believes that the final rule will have a significant economic impact on a substantial number of small entities. The Department used a total cost estimate of 3 percent of revenue as the threshold for significant impact to individual firms and a total of 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities. The Department estimates that

¹¹ 84 FR 36,168.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

small entities (not classified as H-2A labor contractors) will incur a one-time cost of \$53.57 to familiarize themselves with the rule.

B. Legal Authority

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), 1188.¹² Among other things, a prospective H-2A employer must first apply to the Secretary for a certification that:

- (A) 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
- (B) 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.

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).¹³ In addition,

¹² For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

¹³ *See* Secretary’s Order 06-2010 (Oct. 20, 2010), 75 FR 66,268 (Oct. 27, 2010); 20 CFR 655.101.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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 assure employer compliance with the terms and conditions of employment under the H-2A program.¹⁴

C. Current Regulatory Requirements

Since 1987, the Department has operated the H-2A temporary labor certification program under regulations promulgated pursuant to the INA. The Department's current regulations governing the H-2A program were published in 2010.¹⁵ The standards and procedures applicable to 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.¹⁶ 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 AEW, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage.¹⁷ Currently, the AEW is set by the Department and published annually as a single gross hourly rate for field and livestock workers (combined) from the FLS conducted by the USDA's NASS for each state or region and all occupational classifications. At the time of submitting the job order, the employer must agree to pay at least

¹⁴ See Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77,527 (Dec. 24, 2014).

¹⁵ Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6,883 (Feb. 12, 2010) (2010 Final Rule).

¹⁶ 20 CFR 655.121.

¹⁷ 20 CFR 655.120(a).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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.¹⁸

D. Background and Public Comments Received on the NPRM

On July 26, 2019, the Department published an NPRM requesting public comments on proposals to modernize and streamline the process by which OFLC reviews employers' job orders and the applications for temporary agricultural labor certifications.¹⁹ The Department currently sets the AEWR for all agricultural workers in non-range occupations at the gross hourly rate for field and livestock workers (combined) from the FLS for each state or region. As part of this regulatory action, the Department proposed to establish hourly AEWRs for non-range occupations²⁰ at the annual hourly gross rate for each agricultural occupation in the State or region, as reported by the FLS and the OES survey, so that each AEWR would be based on data more specific to the agricultural services or labor being performed under the Standard Occupational Classification (SOC) system and, as a result, would better protect against adverse effect on the wages of workers in the United States similarly employed.²¹

The NPRM invited written comments from the public on all aspects of the proposed amendments to the AEWR methodology regulations, including on the use of the FLS and OES survey to establish the AEWR, and any alternate methods or sources the Department might use to establish the AEWRs in the H-2A program.²² With respect to the use of the FLS to set

¹⁸ 20 CFR 655.122(l).

¹⁹ 84 FR 36,168.

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

²¹ See 84 FR 36,168, 36,171.

²² *Id.* at 36,184.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

AEWRs, the Department specifically sought comment on circumstances where the FLS did not produce wages for all occupations or geographic areas, including, but not limited to (1) whether the Department should use the separate field worker and livestock worker classifications from the FLS to set AEWRs for workers in occupations included in those classifications if a wage based on the SOC from the FLS is not available; (2) whether the Department should index past wage rates for a given SOC using the Consumer Price Index (CPI) or ECI if a wage cannot be reported for an SOC in a state or region in a given year based on the FLS but a wage was available in a previous year; (3) whether the Department should use the FLS national wage rate to set the AEWR for an SOC if the FLS cannot produce a wage at the state or regional level; and (4) whether the Department should consider any other methodology that would promote consistency and reliability in wage rates from year to year.²³

The NPRM also explained the Department does not have direct control over the FLS and further recognized that USDA could elect to discontinue the survey at some point, and, in fact, USDA had done so in the past due to budget constraints.²⁴ Accordingly, the Department proposed and sought comment on the use of the OES survey in limited circumstances where the FLS does not produce data for a specific occupation or geographic area. Such proposals reflected the Department's concern that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid non-range agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR based on the wages of field and livestock workers

²³ *Id.* at 36,182.

²⁴ *Id.* at 36,183.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

(combined).²⁵ A 60-day comment period allowed for the public to review the proposed rule and provide comments through September 24, 2019.

The Department also received requests for an extension of the comment period for the NPRM. While the Department appreciates the issues raised concerning the public's opportunity to review the rule and comment, the Department decided not to extend the comment period because it determined that a 60-day comment period was sufficient to allow the public to review the proposed rule and provide comments. This conclusion is supported by both the volume of comments received, and the wide variety of stakeholders that submitted comments within the 60-day comment period.

The Department received a total of 83,532 public comments in docket number ETA-2019-007 in response to the NPRM.²⁶ Thousands of these comments specifically related to the proposed changes to the methodology for setting the AEWRS. The commenters represented a wide range of stakeholders interested in the H-2A program, including farmworkers, farm owners, agricultural and trade associations, federal elected officials, state officials, SWAs, recruiting companies, law firms, immigration and worker advocacy groups, labor unions, academic institutions, public policy organizations, and other industry associations interested in immigration related issues. The Department received comments both in support of and in opposition to the proposed amendments to the AEWRS methodology, which are discussed in greater detail below. These comments raised a variety of concerns, some general and some pertaining to specific provisions identified in the NPRM.

²⁵ *Id.* at 36,180-36,185.

²⁶ In addition, the Department received 128 comments in response to document WHD_FRDOC_0001-0070 prior to the comment submission deadline. These comments were incorporated into docket number ETA-2019-007, and each comment received a note on regulations.gov indicating that it was timely received.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The Department recognizes and appreciates the value of the comments, ideas, and suggestions from all commenters, and this final rule was developed only after review and careful consideration of all public comments timely received in response to the NPRM. The public may review all comments the Department received in the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number ETA-2019-007.

E. Implementation of this Final Rule

The methodology implemented under this final rule will apply only to the review of job orders filed with the SWA serving the area of intended employment, as set forth in 20 CFR 655.121, on or after the effective date of the regulation, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the OFLC National Processing Center (NPC) for emergency situations under 20 CFR 655.134. In order for employers to understand their wage obligations upon the effective date of this final rule, the Department has posted the AEWs applicable to each occupational classification and geographic area contemporaneously with the publication of this final rule on the OFLC website at <https://www.dol.gov/agencies/eta/foreign-labor/>.

When the OFLC Administrator publishes updates to the AEWs in future calendar years, as required by 20 CFR 655.120(b)(2), and the AEW is adjusted during a work contract period and is higher than the highest of the previous AEW, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining wage, the federal minimum wage rate, or the state minimum wage rate, the employer must pay that adjusted AEW upon the effective date of the new rate, as provided in the future *Federal Register* Notice. See 20 CFR 655.122(l).

II. Summary of Proposed Changes to the AEW Methodology and the Changes Adopted in This Final Rule

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

A. Revisions to 20 CFR 655.103(b), Definition of Adverse Effect Wage Rate

The current regulation provides that the hourly AEWR is set at the annual weighted average hourly wage for field and livestock workers (combined) based on the annual USDA's FLS. To be consistent with the Department's decision to adjust the current hourly AEWR methodology discussed in detail below, the Department is making non-substantive conforming changes to the definition of AEWR in 20 CFR 655.103(b). In addition, the Department is making a minor technical revision to the definition of AEWR to clarify that the term AEWR applies to both the hourly rate for non-range occupations, as set forth in section 655.120(b), and the monthly rate for range occupations, as set forth in section 655.211(c).

One commenter opposed "the change in the definition to include the term 'gross' after the term hourly," stating that the change was designed to ensure the Department did not utilize new data being collected by the USDA through revisions to the FLS. While the Department did not specifically propose to add the term "gross" to the definition of AEWR, it proposed to add the term "gross" after the term "hourly" in describing the wage rate from the FLS in 20 CFR 655.120(b), specifically because USDA was considering making changes to the FLS to report a "base" wage that would exclude certain types of incentive pay. As discussed in the NPRM, the Department stated that if it elected to use the new base wage as a source for the AEWR, it would first engage in new notice-and-comment rulemaking to adopt such a change. However, the USDA has announced it is canceling the planned October 2020 collection of wage data and will not publish the annual Farm Labor report in November 2020. Accordingly, any new data the USDA had planned to collect for that period is not available and the Department will not rely on this "base" wage data for purposes of the new AEWR methodology. Additionally, both the OES and the ECI collect and report data using straight-time, gross pay that include, for example,

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

commission payments, production bonuses, cost-of-living adjustments, piece rates, and other incentive-based pay.

B. Revisions to 20 CFR 655.120, Hourly AEW R Determinations

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 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 the 2010 Final Rule, the Department explained that it met this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEW R, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. In the NPRM, the Department proposed to modify the methodology by which the Department establishes the hourly AEW Rs.

Specifically, the Department proposed to establish hourly AEW Rs for each agricultural occupation not subject to the monthly AEW R applicable to range occupations set forth pursuant to 20 CFR 655.211(c), as identified by the FLS and the OES survey, so that each AEW R was based on data more specific to the agricultural occupation of workers in the United States similarly employed and, as a result, would better protect against adverse effect on the wages of workers in the United States similarly employed. Accordingly, the Department proposed to revise its methodology so that the AEW R for a particular agricultural occupation would be based on the annual average hourly gross wage for that agricultural occupation in the state or region reported by the FLS when the FLS is able to report such a wage. If the FLS did not report a wage

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

for an agricultural occupation in a state or region, the Department proposed to set the AEW at the statewide annual average hourly wage for the SOC code from the OES survey conducted by BLS. If both the FLS could not produce an annual average hourly gross wage for that agricultural occupation in the state or region and the OES could not produce a statewide annual average hourly wage for the SOC, then the Department proposed to set the AEW based on the national wage for the occupational classification from these sources.

As part of its proposal to change to an occupation-specific hourly AEW, the Department proposed that if the job duties on the H-2A application (including job order) did not fall within a single occupational classification, the Certifying Officer (CO) would determine the applicable AEW at the highest AEW for the applicable occupational classifications. The intent of this proposal was to reduce the potential for employers to misclassify workers and impose a lower recordkeeping burden than if the Department permitted employers to pay different AEWs for job duties falling within different occupational classifications on a single H-2A application. This approach is also consistent with how the Department assigns prevailing wage rates for jobs that cover multiple occupational classifications in the H-2B program.

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

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The Department received comments on all aspects of the proposed revisions to the AEWR methodology. After consideration of all comments concerning the proposed revisions to the AEWR methodology, and in light of continuing uncertainty regarding the ongoing immediate availability of FLS data, the Department retains the AEWR concept in this final rule with additional changes to the methodology, as discussed below.

1. The Need for an AEWR in the H-2A Program

As explained above, and in prior rulemaking, requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation under section 218(a)(1) of the INA, 8 U.S.C. § 1188(a)(1), to certify no adverse effect on workers in the United States similarly employed.

Many commenters representing employers and trade associations expressed the view that the Department has failed to explain why an AEWR is required to avoid wage depression, and supported removing the concept of the AEWR from the H-2A regulations entirely. For example, four farm bureau organizations asserted that because “American unemployment [is] below 4%, and the agriculture industry [is] continuing to experience extreme labor shortages . . . the concept of an adverse effect wage rate is not applicable to the H-2A program, and other wage setting methods should be implemented.” Another commenter asserted that the “AEWR is an artificial machination of the current H-2A regulations . . . and a mandate without any tether to reality.”

The Department understands the comments but declines to eliminate the AEWR. The Department is required by statute to ensure that the employment of H-2A foreign workers does not adversely affect the wages and working conditions of workers in the United States similarly employed. 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 workers in the United States

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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.”²⁷ 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 importation of foreign workers are particularly acute because access to an 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 AEW is necessary in order to effectuate its statutory mandate of protecting workers in the United States similarly employed from the possibility of adverse effects on their wages and working conditions. 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 workers in the United States similarly employed.

Addressing the potential adverse effect that employment of temporary foreign workers may have on the wages of 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. The Department still holds the view that “U.S. agricultural workers need protection from the potential adverse effects of the use of

²⁷ Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20,496, 20,505 (June 1, 1987).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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.”²⁸ As a result, “their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited.”²⁹ The AEWR provides a floor below which wages of U.S. and foreign workers 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.”³⁰

The use of an AEWR, separate from a prevailing wage for a particular crop activity 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).”³¹ The AEWR acts as “a prevailing wage concept defined over a broader geographic or occupational field.”³² Because the AEWR is generally based on data collected in a multi-state 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 crop activity or agricultural activity at the state or sub-state level, 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

²⁸ Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 FR 45,905, 45,911 (Sept. 4, 2009).

²⁹ *Id.*

³⁰ *Id.*

³¹ 75 FR 6,883, 6,892-6,893.

³² *Id.* at 6,892.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

distinct purpose. The prevailing wage, as determined under current Departmental guidance, provides an additional safeguard against wage depression in local areas and agricultural activities.

However, Congress did not “define adverse effect and left it in the Department’s discretion how to ensure that the importation of farmworkers met the statutory requirements,”³³ and the Department has discretion to determine the methodological approach that it believes best allows it to meet its statutory mandate.³⁴ 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 DOL’s judgment and expertise to strike the balance.”³⁵ There is no statutory requirement that the Department set the AEWWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose. The Department may also consider issues of uniformity, predictability, and other factors relating to the sound administration of the H-2A program in deciding how to set the AEWWR. For the reasons discussed below, the Department has adopted an approach that it believes is reasonable and strikes an appropriate balance under the INA.

2. Evidence of Current Wage Depression Is Not Needed

Several comments submitted by employers and associations asserted that the Department should not or is not authorized by statute to require payment of an AEWWR if it has not first determined that the employment of H-2A workers has adversely effected the wages of workers in the United States similarly employed in the area of employment. Some commenters believed that the shortage of U.S. workers is adequate evidence that no adverse effect exists. One commenter

³³ *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991).

³⁴ *United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010).

³⁵ *Dole*, 923 F.2d at 187.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

asserted that “if there is a lack of a sufficient domestic workforce to complete the farm work required, the presence of foreign guest labor cannot, by definition, ‘adversely affect’ the inadequate supply of domestic labor.” Some of these commenters urged the Department to include language in this final rule that would commit the Department to conducting adverse effect determinations annually.

In response to these comments and irrespective of evidence regarding the existence of adverse effect, the Department believes that the statutory responsibility to workers in the United States “will be discharged best by the adoption of an AEW in order to protect against the possibility that the anticipated expansion of the H-2A program will itself create wage depression or stagnation.”³⁶ In addressing similar comments in prior rulemaking, the Department explained that the AEW is not predicated on the existence of wage depression in the agricultural sector and has noted that it is not statutorily required to identify existing wage suppression prior to establishing and requiring employers to pay an AEW.³⁷ In 1989, the Department retained the AEW despite finding that evidence regarding generalized wage depression in agricultural was inconclusive.³⁸ In reaffirming its commitment to the AEW in the 2010 rule, the Department explained that “regardless of any past adverse effect that the use of low-skilled foreign labor may or may not have had on the wages” of workers in the United States similarly employed, “the Department considers the forward-looking need to protect U.S. workers whose low skills make

³⁶ 75 FR 6,883, 6,895; *see also* Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology*, 54 FR 28,037 (July 5, 1989).

³⁷ *See* 54 FR 28,037, 28,046-47 (explaining that the INA “only requires that the AEW prevent future adverse effect from the use of foreign workers, not compensate for past effect”); *see also Dole*, 923 F.2d at 187 (noting that there is no “statutory requirement to adjust for past wage depression” and that where “the data [on adverse effect] is inconclusive,” the Department need only “identify the considerations it found persuasive in making its decision” to revise the AEW methodology).

³⁸ *See* 54 FR 28,037.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation.”³⁹ In addition, a lack of empirical evidence concerning adverse effect would not itself support the conclusion that an AEW is unnecessary, but instead “may be evidence that the imposition of the AEW heretofore has been successful in shielding domestic farm workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers.”⁴⁰

Moreover, the Department could not commit to annual adverse effect determinations because the Department is not aware of any reliable method available to make such a determination and no commenter suggested a method the Department could use to determine the existence of adverse effect. Such a method would need to demonstrate not only that the employment of foreign workers adversely affected the wages of workers in the United States in each particular locality and each particular occupation or agricultural activity, but also that the employment of H-2A workers was the cause of this adverse effect, as opposed to the employment of unauthorized workers, for example.

3. The Department Proposed to Determine the AEWs Based on Occupation-Specific Data That Better Reflects the Wage of Workers in the United States Similarly Employed

The FLS, conducted by USDA’s NASS, has aggregated and reported data in the major FLS occupational categories of field workers, livestock workers, field and livestock workers (combined), and all hired workers. The Department currently sets the AEW at the gross hourly rate for field and livestock workers (combined) from the FLS for each state or region. This has produced a single AEW for all agricultural workers in a given state or region, such that

³⁹ 75 FR 6,883, 6,893.

⁴⁰ *Id.*

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

supervisors, agricultural inspectors, graders and sorters of animal products, agricultural equipment operators, construction laborers, and crop laborers were assigned the same AEW. In the NPRM, the Department proposed a revised hourly AEW methodology that would produce more tailored, occupation-based AEWs designed to better protect against adverse effect on workers in the United States similarly employed. Under the proposed methodology, the AEW for a particular agricultural occupation would have been based on the annual average hourly gross wage for that agricultural occupation in the state or region reported by the FLS; the statewide annual average hourly wage for the SOC from the OES survey conducted by BLS, if the FLS did not report a statewide or regional average wage for the occupation; or the FLS or OES national annual average wage for the occupation, if both the FLS and OES did not produce an average wage for the occupation in the state or region.

As expressed in the NPRM, the primary impetus for the proposed change was the Department's concern that the current AEW methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as construction laborers and supervisors of farmworkers on farms or ranches. Although the FLS collected data on the wages of supervisors, the wages of supervisors have been reported only in the all hired workers category and have not been included in the field and livestock workers (combined) category that the Department currently uses to establish the AEW. Similarly, 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. Thus, the wages for these workers may be inappropriately lowered by an AEW established from the wages of field and livestock workers (combined). In short, the Department expressed concern that using FLS wage data for field and livestock workers (combined) to establish the AEW for all agricultural occupations could

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

produce a wage rate that is not sufficiently tailored to the wage necessary to protect against adverse effect on workers in the United States similarly employed.

The Department invited comments on all aspects of the proposed AEW methodolgy. In particular, the Department solicited comments on the use of the FLS and OES survey; the conditions under which each survey should be used to establish the AEW, including the proposal to calculate the AEWs without FLS data in circumstances where such data was unavailable; and the proposal to depart from relying on the field and livestock workers (combined) wage from the FLS to instead establish AEWs based on occupational classifications. The Department also invited comments on any alternative methodologies or wage sources the Department might use to establish the AEWs in the H-2A program. More specifically, the Department requested comments on whether there are alternate methods or sources that it should use to set the AEW, such as indexing past wage rates using the CPI or ECI and any other methodology that would promote consistency and reliability in wage rates from year to year.

4. General Comments Related to the Department's Proposed AEW Methodology

The Department received many comments from employers, agents, agricultural associations, farm bureaus, worker advocacy organizations, labor unions, individuals, state agencies, state and federal elected officials, business advocacy organizations, and academic and public policy institutions. Many employers, associations, farm bureaus, and agents opposed the AEW methodology in the 2010 Final Rule and agreed that a new AEW methodology is necessary, most often due to concerns that the 2010 Final Rule methodology produced unsustainable wage increases for various reasons discussed below. An association stated that the current methodology makes planning and budgeting difficult because employers do not know what the

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

AEWRs will be until they are published in the *Federal Register* late in the year. Another association expressed concern that regional AEWRs under the 2010 Final Rule “fluctuate wildly,” and stated that “[t]he total wage expenditure” for a “farm in the Cornbelt I region increased 8% from 2016 to 2017 and then decreased by 1% from 2017 to 2018.” Many of these commenters also asserted that the current AEWR methodology has resulted in significant wage inflation and unsustainable annual increases in the AEWR.

Some commenters, including an association and an SWA, unequivocally supported the Department’s proposed AEWR methodology as a way to retain the FLS, while ensuring accurate wages for all occupations through the use of the occupation-specific FLS data and supplementation of the FLS with the OES. Broadly, however, the overwhelming majority of commenters opposed the proposed methodology for a variety of reasons, including that it would be complex and difficult to administer, impose significant employee monitoring and recordkeeping burdens, produce unsustainably high AEWRs for some occupations and reduce AEWRs for others, and result in unpredictable AEWRs that vary from year to year and state to state, increased misclassification of job opportunities, and payment of inaccurate wages.

Many employers, associations, and farm bureaus expressed concerns that the proposed AEWR methodology would result in wage increases that would be unsustainable for employers in industries where labor costs constitute the most significant outlay—industries in which one association asserted employers increasingly “revert to hiring undocumented workers” because they are unable to afford H-2A wages under the 2010 Final Rule. Citing an analysis published in the UC Davis Rural Migration Blog, a business advocacy organization expressed concern that the proposed occupation-specific methodology would cause the AEWR to increase by greater than 50 percent in some cases, including an increase of up to 68 percent for Front-Line

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Supervisors in California, based on a comparison of the 2018 AEW R determined by the FLS field and livestock worker data and the proposed AEW R based on OES data for First-Line Supervisors.⁴¹

In contrast, most worker advocacy organizations, as well as several labor unions, SWAs, elected officials, and an international recruiting company, expressed concern the proposal would lower wages for many or most workers, while increasing uncertainty regarding farmworker wages. Many commenters, including immigration and worker advocacy organizations, expressed concern that the proposal would “perpetuate a basic problem in the H-2A program where guestworkers, who generally lack bargaining power to negotiate for higher wages due to their temporary status, become concentrated in a sector because the system allows employers to reject as ‘unavailable’ for work those U.S. workers who seek jobs but are unwilling to accept the H-2A wage rate.” The commenters asserted that the Department’s proposal would cause wages to stagnate and become depressed in real economic terms.

Some SWAs acknowledged that disaggregation of wages would result in a higher wage for less common occupations like supervisors and agricultural equipment operators, but also expressed concern that disaggregation would reduce the wages of both H-2A workers and workers in the United States similarly employed in lower skilled farm laborer jobs that constitute the majority of H-2A job opportunities. One worker advocacy organization that opposed the Department’s proposal generally supported a narrow use of the proposed occupation-specific AEW Rs for particular occupations, noting that H-2A employers have increasingly utilized the program for occupations that should be paid a higher wage. This commenter also noted that job

⁴¹ Rural Migration News, *The H-2A Program and AEW Rs: FLS and OES* (Sep. 9, 2019), <https://migration.ucdavis.edu/rmn/blog/post/?id=2337>.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

orders increasingly include several different types of jobs for which U.S. workers are paid different wage rates and thought that SOC-based AEWs and use of the highest rate among applicable SOCs were necessary to ensure accurate wages.

Several worker advocacy organizations noted that occupation-specific AEWs would be lower than the current FLS-based AEW established using the combined field and livestock worker wage data and many asserted this would be inconsistent with the Department's statutory obligation to ensure employment of H-2A workers will not adversely affect the wages of workers in the United States similarly employed. For example, a worker advocacy organization comment included a chart that indicated the proposed occupation-specific FLS and OES AEWs would result in wage reductions in many states for workers in SOCs 45-2041 and 45-2092 ranging from \$.03 to \$2.50 per hour. A forestry worker advocacy organization expressed concern that a "change from using the mean of wages of workers 'similarly employed' to hourly wages of SOCs will result in more volatility in wages from year to year as well as reductions in AEWs" and would result in "downward pressure on wages of U.S. workers and foreign temporary workers in the reforestation and pine straw industries."

5. The Department will Base AEWs on Data Using 2019 FLS Wages for the Most Common SOCs and Occupation-Specific OES Wages for All Other SOCs

After careful consideration of the comments received, and the Department's own judgment as to what will best contribute to the sound administration of the H-2A program, the Department has decided to revise the hourly AEW determination methodology in a way that will be more predictable, less volatile, and easier to understand, while also ensuring protection of U.S. workers' wages and accurate AEWs for job opportunities in higher-skilled occupations. This

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

approach is also appropriate in light of uncertainty about the immediate availability of FLS wage data.

First, the Department will use the 2020 AEWRs, which were based on results from the FLS wage survey conducted by USDA's NASS and published in November 2019, as the baseline AEWR for the overwhelming majority of H-2A job opportunities going forward. As explained further below, adjustments to AEWRs for these workers will be made annually, starting at the beginning of calendar year 2023, based on the BLS ECI, Wages and Salaries—the same index the Department currently uses to adjust the monthly AEWRs for job opportunities in herding or the production of livestock on the range. Second, for all other occupations, the Department will determine the AEWRs as the annual statewide average hourly gross wage for the occupation in the state or region based on the OES survey or, where a statewide average hourly gross wage is not reported, the national average hourly gross wage for the occupation based on the OES survey. As discussed below, use of the OES survey will allow the Department to consistently establish occupation-specific AEWRs for these higher-skilled job opportunities to better protect against adverse effect on workers in the United States similarly employed.

The Department has determined that this revised methodology best addresses commenters' concerns regarding the unpredictability and volatility of the AEWRs in recent years. The AEWRs have increased significantly compared to the rate of inflation or the rate at which compensation has increased for workers more generally in the U.S. economy. Large and unpredictable wage fluctuations can cause financial hardship to more labor-intensive agricultural operations, make it more difficult for them to plan, and ultimately discourage domestic agricultural production, which may result in fewer U.S. farmworker jobs. Furthermore, unlike other employment-based immigration programs, changes to the AEWRs—no matter how large—

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

have a far greater impact on H-2A employers who have a regulatory obligation to pay the updated AEW, if it remains the highest applicable wage, to all H-2A workers and workers in the United States similarly employed during any current work contract as well as future work contracts.

For related reasons, the Department has decided to begin ECI-based adjustments to the AEW in 2023. This provides for a period during which employers can rely on the current, 2020 AEWs as they familiarize themselves with the new wage methodology, understand its likely impact on wages in future years, and plan accordingly. Providing for more immediate adjustments to current wages based on a wholly new methodology would, in the Department's judgment, potentially exacerbate the very concerns it seeks to address about wage predictability and long term business planning that it seeks to address through the adoption of ECI-based wage adjustments. Similarly, even if more recent, 2020 FLS wage data were available, relying on it to set 2021 AEWs would only serve to perpetuate the very wage volatility that the Department seeks to ameliorate through this rule. The 2020 AEWs therefore provide appropriate wage rates for the immediate future, and a reasonable starting point from which future, ECI-based adjustments will be made.

The Department also believes this methodology addresses other commenter concerns about unnecessary complexity and potential for significant wage reductions under the proposed occupation-specific OES-based AEWs, and strikes a reasonable balance between the statute's competing goals of providing employers with an adequate legal supply of agricultural labor while protecting the wages and working conditions of workers in the United States similarly employed. The Department understands that unpredictable changes in the AEW can result in harm to U.S. workers by encouraging some employers to reduce employment opportunities and

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

work hours and still others to hire undocumented foreign workers willing to accept employment at much lower wages and without the additional legal protections and benefits, including transportation, meals, and housing, that employers must provided to H-2A workers.

The methodology focuses on determining AEWRs using 2019 FLS data for job opportunities predominantly used by employers in the H-2A program—occupational classifications for field workers and livestock workers—while shifting AEWR determinations to the OES survey for all other occupations for which the FLS did not 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). Moreover, use of occupation-specific OES wages for job opportunities not covered by the FLS addresses the Department’s concern that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as construction laborers and supervisors of farmworkers on farms or ranches. The wages for these workers may be inappropriately lowered by an AEWR established using FLS wage data derived from the wages of field and livestock workers (combined) because data from this FLS category does not include wages paid to construction laborers or supervisors of farmworkers, among other occupations.

The Department recognizes that the revised methodology may result in some AEWR increases in those occupations for which the Department will use the OES survey, depending upon geographic location and agricultural occupation. While wages may change, the Department believes these changes are the result of the Department’s use of more accurate occupational data that better reflect the actual wage paid, and thus the wage needed to protect against adverse effect.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

In addition, to further address concerns about predictability and clarity, the Department revised paragraph (b)(1) of section 655.120 to add a transition provision. Although the new AEW methodological in this final rule will be implemented on the effective date of this rule, the SWA and CO will review job orders and *Applications for Temporary Employment Certification* under 20 CFR 655.121 and 655.140 using the AEW methodology in effect at the time the job order or *Application for Temporary Employment Certification* was filed. As a result, employers who have already received a temporary agricultural labor certification, or who have submitted a job order or *Application for Temporary Employment Certification* before the effective date of this final rule, will not be subject to wage obligations under the new AEW methodology until the OFLC Administrator publishes the next AEW adjustment applicable to the employer's job opportunity. In contrast, employers who submit a job order on or after the effective date of this final rule are subject to the new AEW methodology for the job order and the related *Application for Temporary Employment Certification*. The Department has posted the AEWs applicable to each occupational classification and geographic area contemporaneously with the publication of this final rule on the OFLC website at <https://www.dol.gov/agencies/eta/foreign-labor/>.

As provided in paragraph (b)(2) of section 655.120, the Department will publish notice of AEW adjustments in the *Federal Register*. As the majority of H-2A applications under the revised methodology will involve AEWs subject only to the FLS-based AEW, commenters' concerns about the publication schedule for AEW notices have been resolved as these job opportunities will be subject only to one annual ECI-based adjustment and the ECI generally increases at a stable and predictable rate. The Department will publish the ECI adjustments for field and livestock worker AEWs annually with an effective date on or about January 1, based

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

on the ECI publication cycle. Similarly, occupations other than those included in the FLS field workers and livestock workers (combined) category and all occupations in Alaska⁴² will be subject only to the OES-based AEW and only that AEW's adjustment cycle. The Department will publish OES-based AEW adjustments annually with an effective date on or about July 1, based on the OES publication cycle. As explained below, only in the rare circumstance in which a job opportunity constitutes a combination of an FLS-based AEW occupation and an OES-based AEW occupation and the employer's certification period includes an FLS-based AEW adjustment or an OES-based AEW adjustment, and that adjustment changes which of the applicable AEWs is higher, would an employer see a change in the AEW applicable to a particular certification.

The Department acknowledges the concerns of some commenters that fluctuating wages can be harmful to workers, and their concerns that changes to the methodology could result in stagnating or decreasing wages for farmworkers. The Department also recognizes the possibility that the revised methodology in this final rule 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 current methodology. However, as noted, the benefits of relying on the ECI to provide more stable and predictable wage increases are substantial, and, in the Department's judgment, ultimately benefit both employers and workers. Further, by setting the 2020 AEW as the starting point from which future ECI adjustments will occur, the Department is ensuring that workers' wages will not be lower than their 2020 wages and will then adjust according to the

⁴² There is no 2020 FLS-based AEW for Alaska because the FLS does not collect data covering Alaska.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

ECI. The Department believes that this approach effectively balances concerns about wage volatility and adverse effects on workers. It also has the related virtue of ease of use.

Further, the data for the current methodology may no longer be available to the Department.. Even if the data were available, or were to become available in subsequent years, the Department sees tremendous benefit in moving to a new source of data that is unlikely to be discontinued and therefore does not suffer from the attendant uncertainty. The Department also believes that its new methodology meets the statutory requirement to protect workers in the United States similarly employed to H-2A workers from adverse wage effects. After a two-year transition period where the AEWs are held constant, the methodology is likely to result in steady, predictable wage increases for farmworkers. While other methods could result in higher or lower AEWs in any given year, the Department believes the methodology in this final rule will ensure the employment of H-2A workers does not adversely affect the wages of workers in the United States similarly employed by providing annual changes in wages consistent with the changes in wages and salaries in the broader economy, as explained further below.. This is especially so given that the Department is using a different methodology to more accurately calculate than before the wages of certain more highly skilled farmworkers, for which the Department has reason to believe the AEWs have artificially depressed wages.

a. Use of ECI-adjusted FLS Wage Data for Field and Livestock Workers

The most common concern the Department received from employers, agents, associations, and business advocacy organizations was that the proposed methodology would be too complex and that the number of wage sources and potential wage rates would significantly increase wage volatility and uncertainty for employers. For example, one association stated it could not evaluate the potential impact of the proposal because, according to its estimates, the proposed

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

methodology would result in at least 400,000 potential wage rates, based on a combination of 13 occupational categories and five potential wage sources (state/national FLS or OES and the prevailing wage).

Citing the Rural Migration Blog noted earlier, some associations and a business advocacy organization stated that under the proposed rule, wages may fluctuate significantly between years for some states and occupations, such as a 15 percent change in the AEW for Graders and Sorters in Florida between 2017 and 2018. Similarly, a dairy association expressed concern regarding the year-to-year wage fluctuation for farmworkers tending to animals, asserting that in New York there would have been a 26 percent decrease from the 2016 AEW based on the OES state data for SOC 45-2093 to the 2017 AEW based on the regional FLS data. A farm bureau expressed concern that AEWs would change at different times of the year based on the data source used and asserted this would further increase unpredictability and the potential for wage fluctuations in the same year, considering the employer will remain obligated to pay a higher wage if one is published during the contract period.

A commenter from academia supported the Department's decision to rely primarily on the FLS and further recommended that, instead of using the OES survey when FLS data was unavailable, the Department should use the more general FLS field and livestock worker (combined) data because the FLS-based AEW would be based on "more accurate data inputs" and would "maintain a consistent data source from year to year, potentially alleviating some of the wage volatility the Department cites as a concern." The commenter also recommended the Department "use the Employment Cost Index to calculate the appropriate AEW based on prior years" if the FLS is suspended and FLS data is unavailable, in order to "promote accuracy and consistency between seasons." Finally, as discussed further in section II.B.6 below, several

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

commenters suggested alternative methods to determine the AEWR, most of which did not involve reliance on OES or FLS data.

Many commenters, including employers, associations, state farm bureaus, and a business advocacy organization, also asserted that the proposed occupational disaggregation would be unworkable because agricultural job opportunities often or by their nature require the performance of a variety of tasks that can fit into a number of occupational classifications. Many of these commenters expressed concern that occupational classifications would be unpredictable due to the number of potential wage sources and this would be unsustainable because employers would be unable to plan for labor input costs, which constitutes the highest expense for many employers. Some commenters asserted that the variety of tasks associated with agricultural jobs, combined with the variety of occupations and wage rates that could be assigned under the proposed rule, would result in unpredictable wage rates from year to year and ensure acceleration of wage rates.

Several commenters asserted the proposal would require employers to “become human resources experts.” Two federal elected officials, as well as some employers and associations, believed the proposal would impose significant monitoring and recordkeeping burdens on employers, requiring them to monitor and maintain records of all duties performed at all times to ensure compliance with wage obligations. The elected officials asserted the proposal would “make classification of work into a highly contentious issue,” leading to litigation and disputes over occupation and wage assignments, and would require employers to develop familiarity with all potentially applicable occupational classifications.

After consideration of comments, the Department has determined that use of the 2019 FLS wage data for field and livestock workers, adjusted annually by the percent change in the ECI,

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

most reasonably addresses commenters’ concerns regarding the complexity in the Department’s proposal, as well as the volatility and unpredictability in the AEWRs, both recently and over the past several years, for the majority of H-2A occupations. The methodology is also consistent with the Department’s broad statutory mandate to balance the competing goals of the statute to provide an adequate labor supply and to protect the wages and working conditions of workers in the United States similarly employed.⁴³

The FLS field workers and livestock workers (combined) category includes workers who “plant, tend, pack, and harvest field crops, fruits, vegetables, nursery and greenhouse crops, or other crops” or “tend livestock, milk cows, or care for poultry,” including those who “operate farm machinery while engaged in these activities.”⁴⁴ The current SOC codes and titles associated with these workers, and which will be subject to this wage setting approach, are: 45-2041 - Graders and Sorters, Agricultural Products; 45-2091 - Agricultural Equipment Operators; 45-2092 - Farmworkers and Laborers, Crop, Nursery, and Greenhouse; 45-2093 - Farmworkers, Farm, Ranch, and Aquacultural Animals; 53-7064 - Packers and Packagers, Hand; and 45-2099 - Agricultural Workers, All Other. Accordingly, through calendar year 2022, *H-2A Applications for Temporary Employment Certification* seeking workers to perform duties encompassed by one or more of these SOCs will continue to be subject to the 2020 AEWRs, which were based on the average annual gross hourly wage rate for field and livestock workers (combined) as reported for

⁴³ See *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977); see also *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991); *United Farmworkers of Am. v. Chao*, 227 F. Supp. 2d 102, 108 (D.D.C. 2002) (“In adopting an AEWR policy, DOL must balance the competing goals of the statute—providing an adequate labor supply to growers and protecting the jobs of domestic farmworkers.”).

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

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

the state or region by the USDA FLS in November 2019, provided that the FLS reported a wage rate for the geographic area where the work will be performed. In areas where the November 2019 USDA FLS data did not report a wage rate, the AEWWR will be the statewide annual average hourly gross wage for the occupation, if one is reported by the OES survey; or, the OES national annual average hourly gross wage, if the OES survey does not report a statewide wage.⁴⁵ Beginning calendar year 2023, and annually thereafter, these FLS-based AEWWRs will be adjusted by the percentage change in the BLS ECI, Wages and Salaries for private sector workers, for the preceding 12 month period.

- i. Using the ECI to Annually Adjust the FLS Wage Data for Field and Livestock Workers, Beginning in 2023 After a Two-Year Transition Period, is Reasonable and More Appropriate than Shifting to the OES Survey for these Particular Occupations*

In light of the substantial number of commenters concerned about the complexity of the proposed methodology, the unpredictable and often significant annual increases of FLS-based AEWWRs, and the need to protect workers against adverse wage effects while also taking into account the need for a stable supply of legal labor, the Department has determined that the most reasonable AEWWR determination methodology for field and livestock workers, particularly given uncertainty about the future of the FLS, is to use the recent combined FLS wage data as a starting point and use of the ECI to index for future years. This approach is consistent with an alternative suggested in the NPRM and recommended by a commenter from academia (as well as the current means by which the monthly AEWWR is adjusted for range occupations).

⁴⁵ For example, there is no 20120 FLS-based AEWWR for Alaska because the FLS does not collect data covering Alaska.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The ECI is a “measure of the change in the price of labor, defined as compensation per employee hour worked” based on data collected on “hourly straight-time wage rate[s]” defined as “total earnings before payroll deductions,”⁴⁶ that provides an accurate measure of annual increases in wages across the private sector and “is particularly well suited as a vehicle to adjust wage rates to keep pace with what is paid by other employers.”⁴⁷ ECI-based adjustments to the AEWRs for these occupations will ensure field and livestock worker wages continue to rise apace with wages in the broader U.S. economy in a consistent and predictable manner.⁴⁸ While the Department also suggested the CPI as an alternative data source, the Department has chosen the ECI rather than the CPI to adjust the FLS-based AEWRs because the Department views the CPI as less relevant to wage adjustments than the ECI, which measures changes in wages, rather than consumer prices. The Department believes indexing the AEWRs to the ECI will produce steadily increasing AEWRs for field and livestock workers that fulfill the statutory requirement to prevent adverse effect on the wages of workers in the United States similarly employed, while providing consistency and predictability to the agricultural economy.

The Department understands the common concern of a large number of employers, associations, and agents that OES-based AEWRs would, in some cases, result in dramatic wage

⁴⁶ See, e.g., John W. Ruser, *The Employment Cost Index: What Is It?*, Monthly Labor Review (Sept. 2001), available at <https://www.bls.gov/opub/mlr/2001/09/art1full.pdf>.

⁴⁷ *How to Use the Employment Cost Index for Escalation*, BLS, available at <https://www.bls.gov/ect/escalator.htm>

⁴⁸ This approach is consistent with the approach used to establish the AEWR for range occupations. See 20 C.F.R. § 655.211(c); 80 FR 62,958, 62,995 (Oct. 16, 2015) (“In order to prevent wage stagnation from again occurring, we have determined that the new base wage rate should be subject to an adjustment methodology. We agree with those commenters who recommended that we use the ECI for wages and salaries to address the potential for future wage stagnation. Our primary concern in setting the adjustment methodology for these occupations is to confirm that the wages for these occupations will continue to rise apace with wages across the U.S. economy. Although the Department has previously used the Consumer Price Index for All Urban Consumers (CPI-U) in other circumstances where adjustment for inflation is warranted, we conclude that it is reasonable to use the ECI for these occupations, given that housing and food must be provided by the employer under this Final Rule, making the cost of consumer goods less relevant than under circumstances in which workers are paying these costs themselves”).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

increases, wage variability from year to year, or both, and further acknowledges the concerns of many commenters that the current FLS-based AEWRs have fluctuated widely from year to year and that employers have been subject to annual increases as high as 22 percent in some states.⁴⁹

In setting the AEWR, the Department must balance the interests of workers and employers.

Setting AEWRs that are “too high in any given area . . . will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers.”⁵⁰ The Department remains cognizant of the fact that the “clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive” and that “[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.”⁵¹

The methodology in this final rule addresses these concerns by tethering the AEWRs to broad economic data on labor costs using the ECI, which the Department currently uses to make AEWR determinations for H-2A herding and livestock jobs on the range, and adjusting the AEWRs annually beginning in calendar year 2023.⁵² Based on private sector ECI data, the average annual adjustment over the last decade would have been 2.78 percent, in contrast to the much higher annual AEWR adjustments cited by many association commenters.⁵³ Recent

⁴⁹ See DOL, *Historical State AEWRs, Adverse Effect Wage Rates by State from 2014 to Present*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/2c.%20AEWR%20Trends%20in%20PDF_12.16.19.pdf.

⁵⁰ 73 FR 8,538, 8,550 (Feb. 13, 2008); See also 73 FR 77,110, 77,171 (Dec. 18, 2008) (noting that wages above the market rate may “encourage employers to hire undocumented workers instead” of U.S. or H-2A workers because “many agricultural employers may be priced out of participating in the H-2A program” and “[w]hen employers cannot find U.S. workers” and “cannot afford H-2A workers because they are required to pay them above-market wage rates, some will inevitably end up hiring undocumented workers instead.”).

⁵¹ 54 FR 28,037, 28,046 (Jul. 5, 1989).

⁵² Since implementation of the 2015 H-2A Herder Rule, DOL has adjusted the AEWR applied to H-2A sheep and goat herding jobs using the ECI for wages and salaries published by the BLS for the preceding 12-month period (October-to-October).

⁵³ See BLS, *Employment Cost Index, Historical Listing – Volume III* at 8, National Compensation Survey (July 2020), available at <https://www.bls.gov/web/eci/echistrynaics.pdf>.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

AEWR data shows significant fluctuation in the AEWR in many states, both upward and downward. Data shows that annual AEWR adjustments of 3 percent, 4 percent, and 5 percent have not been uncommon, nor is it uncommon to see the AEWR increase one year, decrease the following, and then increase again in the third year.⁵⁴ For example, in Arizona, wages increased in 2016 by 6.3 percent, decreased in 2017 by 2.2 percent, decreased again in 2018 by 4.5 percent, and then increased a jarring 14.7 percent in 2019.⁵⁵ Further, the average difference between the highest and lowest change across all AEWRs in the state and regions was 11 percent from 2014 to 2018. In 2019 and 2020, it was 23.4 percent and 8.5 percent, respectively, further evidence of the year-to-year unpredictability in wage obligations employers face under current regulations.⁵⁶

The Department also understands the concerns raised by commenters regarding planning and budgeting difficulties when wage rates fluctuate widely, particularly in the context of the considerations a law firm noted about agricultural sector employers' obligations to fulfill multi-year contractual obligations, as well as a trade association's concerns surrounding longer-term workforce planning.⁵⁷ The FLS-based, ECI-adjusted AEWR methodology in this final rule is, in the Department's judgment, the most effective available methodology that addresses the oft-cited concern among many commenters that under the proposed approach, AEWRs would be too

⁵⁴ See DOL, *Historical State AEWRs, Adverse Effect Wage Rates by State from 2014 to Present*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/2c.%20AEWR%20Trends%20in%20PDF_12.16.19.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ USDA ERS, Economic Information Bulletin No. 203, *America's Diverse Family Farms* at 7-9 (Dec. 2018), available at <https://www.ers.usda.gov/webdocs/publications/90985/eib-203.pdf?v=2059.2> (noting agricultural employers commonly use marketing contracts and their use of production contracts have "ranged from 31 percent to 41 percent over the past two decades—with no discernible trend—and averaged 37 percent"); USDA ERS, Agricultural Economic Report No. 837, *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities* at 5 (Nov. 2004), available at https://www.ers.usda.gov/webdocs/publications/41702/14700_aer837_1_.pdf?v=41061 ("Many crop-production contracts hold for a growing season. Livestock contracts can range from one flock (less than 2 months) to 10 years, and some livestock contracts are automatically renewed unless cancelled.").

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

unpredictable and based on a methodology that would be too complex. ECI-based adjustments are straightforward to calculate and, based on the substantial historical data available, predictable. Because the AEW for these core occupations will be tied to the ECI and adjusted annually, the Department believes that the new methodology will reduce the significant fluctuations in AEWs and address the concerns raised by commenters about the need for certainty. During the past decade, the fluctuation in the ECI from one year to the next has not exceeded more than half of one percent and the total range of increases over that period was 2.1 to 3.9 percent⁵⁸, in contrast to AEWs that have fluctuated up or down within a much larger and less consistent or predictable range, as noted above.

The Department believes it is reasonable to make annual adjustments based on the ECI to reduce wage volatility from year to year, provide employers with greater stability and certainty regarding their wage obligations to workers, and address the concerns expressed by many commenters about the unpredictable increases in wages reported by the FLS in recent years. As noted above, the Department has determined it is best to utilize the current AEWs for the next two years and adjust annually thereafter based on changes in the ECI for the most recent preceding 12 months to provide stability and predictability for future wages, and as an acknowledgement that immediate implementation may cause additional disruption of the kind this approach seeks to avoid. The Department believes this approach will serve the AEW's intended purpose to 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 while addressing concerns raised by the commenters.

⁵⁸ See BLS, *Employment Cost Index, Historical Listing – Volume III* at 8, National Compensation Survey (July 2020), available at <https://www.bls.gov/web/eci/echistrynaics.pdf>.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Beginning the ECI adjustments for the FLS-based AEWRs in 2023 addresses commenters' concerns that recent accelerations in the wage rates are, in their view, attributable to flawed survey results and have caused artificially surging wage increases, as well as the need to have time to engage in long range planning. For example, commenters note AEWR increases have averaged as much as 9.5 percent annually in recent years. While the Department disagrees with the commenters' suggestions that the FLS survey results were flawed, this transition period, during which employers may prepare for the new indexed wage rates that will apply to the majority of H-2A job opportunities, adequately balances commenters' concerns related to significant wage fluctuations with the Department's obligation to protect against adverse effects. Giving employers advance notice of the new approach before it begins to result in more predictable wage adjustments ensures that the new rule does not cause, through more immediate implementation of the new adjustment methodology, precisely the kind of unexpected wage changes that commenters expressed concerns about.

This approach also addresses concerns from farmworker advocates about wage cuts, by using the ECI to ensure steady wage growth over time to 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. It also guards against the kind of immediate wage cuts that may have occurred in some cases under alternative methodologies by using the current, 2020 AEWR as the starting point from which future adjustments will be made.

In addition, this approach addresses the concerns of many worker advocates, SWAs, and some federal elected officials that the use of occupation-specific OES data proposed in the NPRM would have immediately, and in some cases significantly, reduced wages for many workers in the most common H-2A occupations (*i.e.*, SOC 45-2092, 45-2093, and 45-2041).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Although AEWRs for field and livestock workers will not increase or decrease annually under this final rule in the same manner as they had under AEWRs determined using previously available FLS data—in fact, the Department projects a slight reduction in wage growth relative to the previous methodology—the approach in this final rule will ensure consistent wage increases for field and livestock workers and ensure these workers’ wages keep pace with wage changes among U.S. workers more broadly. And this approach may result in higher AEWRs than would be the case using OES data. The Department has considered that the use of occupation-specific OES AEWRs could potentially reduce the wages of significant numbers of agricultural workers in states with high H-2A usage, such as California and Washington, including single year reductions of 10.3 and 6.4 percent, respectively, for crop workers, and 12.6 and 15.4 percent, respectively, for graders and sorters.⁵⁹ In contrast, AEWRs determined using the FLS wage data as a baseline and adjusted annually using the BLS ECI compensation data for all private sector workers, which has increased annually from 2.1 to 3.9 percent over the past 10 years, will serve to protect against the wage depression suggested by these commenters, thus protecting against the possibility of the presence of H-2A workers adversely affecting the wages and working conditions of workers in the United States similarly employed.⁶⁰ It also may protect against absolute decreases in AEWRs, which have been seen in some years in some states under the FLS methodology, even during a robust economic expansion, in contrast to the ECI which is a less volatile data source that has registered increases during economic contractions and

⁵⁹ This is based on a comparison of the 2020 AEWRs with the most recent OES data for SOCs 45-2092 and 45-2041 in these states, available at <https://www.bls.gov/oes/current/oesrcst.htm>.

⁶⁰ See BLS, *Employment Cost Index, Historical Listing – Volume III at 8, National Compensation Survey (July 2020)*, available at <https://www.bls.gov/web/eci/echistrynaics.pdf>.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

expansions.⁶¹ Additionally, in cases where the prevailing wage is higher than the AEWR adjusted based on the ECI, the employer will be required to pay the prevailing wage rate, and the Department proposed a revised prevailing wage determination methodology in the July 2019 NPRM, which, if adopted in the subsequent, second final rule, would likely affect the wages required to be paid to H-2A workers and may provide additional wage protection.

ii. Using 2019 FLS Data is a Reasonable Choice for Establishing an AEWR Baseline for the Most Common SOCs in the H-2A Program

The Department has chosen to use as a baseline the 2020 AEWRs determined using the combined field and livestock worker FLS wage data after consideration of comments on potential data sources, and for reasons explained below and in prior rulemaking. The Department received many comments on the efficacy of the FLS and OES survey as data sources for AEWR determinations. Some commenters—primarily employers and associations—opposed the use of the FLS to determine the AEWR. Some associations and an agent supported a move away from the FLS because the survey was not limited to U.S. workers and aggregated the wages of workers in many different occupations. Similarly, a business advocacy organization opposed use of the combined FLS wage under the 2010 Final Rule because it averaged the wages of lower-skilled farm workers with higher-skilled workers in, for example, supervisory and heavy machinery operator occupations, which the commenter asserted inflated wages and made it difficult to challenge AEWR determinations. Two associations and an employer opposed use of occupation-specific FLS data due to small sample sizes and opposed use of the FLS generally because it collected data on gross wages.

⁶¹ See DOL, *Historical State AEWRs, Adverse Effect Wage Rates by State from 2014 to Present*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/2c.%20AEWR%20Trends%20in%20PDF_12.16.19.pdf.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

In contrast, many commenters expressed general or conditional support for the use of the FLS as a primary or sole data source, including many worker advocacy organizations, as well as some associations and academic commenters. Several associations supported use of a modified and expanded FLS, while some employers and associations expressed a preference for retaining the 2010 Final Rule’s methodology based on the combined FLS data, but only if the sole alternative was the proposed methodology. One association urged the Department to rely on the FLS as the primary source where a wage is available at any geographic level and to use the OES only in cases where no state or national FLS wage is available. Another commenter believed the Department should rely solely on USDA or states’ departments of agriculture to determine the AEWWR because these agencies have the best understanding of agricultural employment and the wage setting process for agricultural job opportunities. A federal elected official urged the Department to rely on the FLS, rather than the OES survey, because the OES survey “reflects earnings from farm labor contractor employees, who are among the nation’s lowest paid farmworkers.” Similarly, two federal elected officials opposed use of the OES system because it “less accurately capture[s] actual wages paid to farm employees, who comprise the bulk of the H-2A guest worker workforce, because the OES data do not actually capture farm employer data and instead only reflect information concerning ‘establishments that support farm production.’”

As noted in the NPRM and prior rulemaking, and as discussed below, the Department continues to believe the FLS is a useful source of wage data for establishing the AEWWRs for the vast majority of H-2A job opportunities, and that alternative wage sources are, for most occupations, generally not superior to the FLS for the Department’s purposes in administering the H-2A program. With the exception of a brief period under the 2008 Final Rule, the Department has established an AEWWR using FLS data for each state in the multi-state or single-

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

state crop region to which the State belongs since 1987. One advantage of using a wage derived from the FLS as the baseline for these occupations is that the FLS surveyed farm and ranch employers and collected data on wages paid for field and livestock worker job opportunities common in the H-2A program.

Another advantage of the FLS has been its broad geographic scope, which “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,”⁶² and “reflects the view that farm labor is mobile across relatively wide areas.”⁶³

Finally, using the combined FLS data as the baseline to set the AEW for field and livestock workers 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.”⁶⁴

However, as noted above, recent FLS data has introduced a substantial amount of variability in wages in the H-2A program, which has led the Department to consider alternatives that still meet its statutory obligations and the need for sound program administration. The reasons why this variability is problematic are discussed throughout this preamble, and include economic hardship to farmers, which may induce them to reduce production and thus the hiring of U.S.

⁶² 84 FR 36,168, 36,182.

⁶³ *Id.*

⁶⁴ 75 FR 6,883, 6,899-6,900.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

farmworkers—or to resort to using illegal aliens; the difficulties of long-term planning, with attendant costs that may be felt by both employers and farmworker employees; and the current methodology’s artificial depression of wages for certain higher-skilled U.S. agricultural workers. The Department is also concerned about using a data source beyond its control and which is subject to an uncertain future, demonstrated by the recent suspension of data collection. The Department thus has decided to use ECI adjustments to these AEWRS moving forward.

This does not mean that the Department has concluded that the wages established by the FLS data, including the 2020 AEWRS, were flawed. Rather, the Department has simply determined that greater certainty going forward is necessary, and the ECI provides a reasonable data source for measuring wage growth consistent with the Department’s statutory mandate. Specifically, the Department has concluded, consistent with a commenter from academia, that use of an FLS-based AEWRS as the starting point rate to adjust annually based on the percentage change in the ECI is a reasonable approach for AEWRS determinations. Using the 2019 data from the FLS as the starting point and adjusting the wages using the ECI will provide greater wage continuity and avoid the further volatility that might occur if future FLS data were relied on to make year-to-year wage adjustments, which is beneficial for both farmworkers and employers, making it the preferred approach, even if FLS publication were resumed.

The Department has chosen not to use the OES survey to determine AEWRS for field and livestock worker job opportunities for several reasons. Most importantly, the OES survey does not include farm establishments that are directly engaged in the business of crop production and employ the majority of field and livestock workers. While establishments that support farm production participate in the H-2A program and are included in the OES survey, they constitute a minority of establishments in the country employing workers engaged in agricultural labor or

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

services, and so data reported by these establishments is generally not as useful for purposes of calculating the AEWR for field and livestock workers. In addition, the OES currently cannot produce a statewide or regional wage for both the field worker and livestock worker categories in every year, so a methodology using the OES for these job opportunities would require use of different wage sources from year to year. Thus, use of the OES would be contrary to the Department's goal of establishing greater consistency, reliability, and predictability in wages year to year.

The decision to use the 2019 FLS wage data for field and livestock workers (combined) as the baseline to index future AEWRs for these occupations also addresses commenters' concerns regarding the complexity of the proposals related to disaggregated, occupation-specific AEWRs. It addresses the common concern among employers that the disaggregation of the field and livestock workers classification into various occupations would impose significant recordkeeping burdens and create artificial boundaries for the labor force beyond what is functionally appropriate to support farming operations, especially smaller operations. Use of the combined FLS wage for field and livestock workers will reduce 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. Similarly, because the overwhelming majority of job opportunities will not be subject to a SOC-based OES AEWR, the new methodology also largely addresses SWA concerns that the Department's proposal would have required SWAs and OFLC to conduct more in-depth review of applications, focusing on the identified occupation and wage assigned, to ensure the employer is using the correct wage. For the same reason, it also serves to alleviate some of the concerns of worker advocates regarding

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

CO and SWA authority to determine appropriate SOCs and issue notices of deficiency to ensure correct classification of job opportunities.

b. Use of OES Wage Data for All Other Occupations

In the NPRM, the Department proposed to use the FLS to set the hourly AEWB except in limited circumstances where the FLS did not report a wage for an occupation or state or region. Under those circumstances, the Department proposed to use the statewide average hourly wage for the occupation using data from the OES survey, and noted that under the proposal, the OES statewide average hourly wage would be used to establish the AEWB if USDA ceased to conduct the FLS for budgetary or other reasons. After careful consideration of all comments received, and for the reasons explained below, the final rule requires that for all occupations other than field and livestock workers (combined), the hourly AEWBs will be annually adjusted and set by the statewide annual average hourly wage for the occupational classification, as reported by the OES survey. If the OES survey does not report a statewide annual average hourly wage for the SOC, the AEWB shall be the national annual average hourly wage reported by the OES survey.

While some commenters supported the use of occupation-specific FLS and OES data to set AEWBs and believed the proposed methodology would produce more accurate wages, many commenters worried that the proposal was too complex and difficult to administer and that the number of wage sources and potential wage rates would result in unpredictable and volatile wages. The Department acknowledges that to the extent the FLS did not consistently report data in each SOC for a state or region, under the proposal, the wage source used to establish the AEWB would have varied from year to year, which could have resulted in a much higher degree of year-to-year variability in the AEWB than exists under the current methodology. As discussed

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

above, the Department does not control the production of new wage data from the FLS in future years, and the Department will now use only one wage source—the OES survey—to determine the AEWRs for occupations other than field and livestock workers (combined) and for geographic areas for which FLS did not report a state or regional wage for field and livestock workers (combined) in its November 2019 report. By using this wage source to set the AEWR for these occupations and geographic areas, employers will have certainty regarding the wage source that will be used to set the AEWRs and the Department will meet its statutory mandate to protect against adverse effect.

Several commenters, including employers, associations, and worker advocacy organizations, were concerned about the Department’s proposal to rely on OES data where the FLS did not report a statewide or regional average wage for the occupation. Some commenters expressed concern that the OES surveys nonfarm establishments that support farm production, and urged the Department to rely on the FLS. The Department acknowledges commenters’ concerns; however, the Department does not control the production of new wage data from the FLS and recognizes the continued uncertainty about ongoing availability of FLS data. Furthermore, the Department declines to use the FLS as a baseline with annual ECI adjustments to set the AEWR for occupations other than field and livestock workers (combined). While the FLS-based approach is more accurate than the OES for field and livestock workers (combined), as noted above, the OES is more accurate than the FLS for other agricultural occupations, such as supervisors, that the FLS did not adequately survey, and occupations that are more often for contracted-for services than farmer-employed (*e.g.*, construction, equipment operators supporting farm production), therefore its use will better protect against adverse effect for those occupations for which the FLS did not provide valid wage data at a state or regional level. An AEWR based

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

solely on the field and livestock worker (combined) wage may have the effect of depressing wages in higher-paid occupations. This aspect of the methodology under the 2010 Final Rule appears to cause an adverse effect on the wages of workers in the United States similarly employed, contrary to the Department’s statutory mandate.⁶⁵ And, as explained above, the Department recognizes the continued uncertainty about ongoing availability of FLS data, including to set the 2021 AEWRs.

Furthermore, the OES is a reliable wage survey that consistently produces annual average wages for nearly all SOCs and is widely used in the Department’s other foreign labor certification programs. Additionally, because “each set of OES estimates is calculated from six panels of survey data collected over three years,” the commenters’ concerns regarding the volatility of the AEWRs and significant spikes in the FLS wages in recent years, leading the Department to implement annual ECI adjustments for those wages, are also greatly diminished for the SOCs that will shift to the OES-based methodology.

Accordingly, the Department will use the statewide OES average hourly wage for occupations other than field and livestock workers (combined) or, if one is not available, the national OES average hourly wage reported for the SOC. One commenter was concerned that by factoring in wages in both non-metropolitan areas and metropolitan areas (where wages are higher because of a higher cost of living), the use of a statewide OES wage would mean that employers in non-metropolitan areas would be required to pay inflated wages. Another commenter expressed a similar concern with respect to statewide or national AEWRs generally.

⁶⁵ 84 FR 36,168, 36,178; *see also id.* at 36,182 (discussing the need to disaggregate “wages of agricultural occupations that are dissimilar and that this may have the effect of inappropriately raising wages for lower-paid agricultural jobs while depressing wages in higher-paid occupations”).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

In the H-2B program, the Department generally establishes prevailing wages based on the OES survey for the SOC in a metropolitan or non-metropolitan area. However, as explained in prior rulemakings, the concern about 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.⁶⁷ The use of a statewide wage also more closely aligns with the geographic areas from the FLS. For these reasons, the Department believes it is important to use the statewide OES wage where one exists for the particular occupation. 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 AEW determination can be made each year without the need for any adjustment method.

c. Job Opportunities Covering Multiple SOCs Will Be Assigned the Highest AEW for All Applicable SOCs

The Department also received many comments that expressed concerns about the proposal to require employers to pay the highest applicable wage if the job opportunity can be classified within more than one occupation. Several farm bureaus, associations, and agents asserted the policy would disproportionately impact small employers that may have no human resources

⁶⁶ See, e.g., 75 FR 6,883, 6,895.

⁶⁷ *Id.* at 6,899 (The Department “consistently has set statewide AEWs rather than substate [] AEWs because of the absence of data from which to measure wage depression at the local level” and use of surveys reporting data at a broader geographic level “immunizes the survey from the effects of any localized wage depression that might exist.”)

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

personnel and must employ agricultural workers to perform a variety of similar, but distinct tasks on the farm to remain competitive. One small employer stated that use of separate occupational classifications would require the employer to hire more workers to perform distinct job duties and offer fewer hours to all workers. Another small employer noted that its U.S. workers perform duties ranging from driving tractors and operating forklifts to cleaning bathrooms. Some commenters asserted more generally that agricultural workers cannot be placed in “silos” because they are required to perform job duties outside of their job descriptions on occasion, not on a full-time basis, due to the nature of agricultural work or the need to respond to emergency situations and unforeseen circumstances. Some of these commenters expressed concern that the Department would classify jobs into the highest paid occupation in the particular state, leading to different occupational determinations in different states. An association commented that the states currently provide inconsistent occupation and wage determinations for similar job opportunities and expressed concern that occupation-based AEWs would lead to inconsistent AEWs from state-to-state for similar job opportunities.

Two federal elected officials stated that assignment of the highest wage among multiple applicable occupations would contradict the purpose of the proposal to provide more accurate wages. A worker advocacy organization expressed concern that the proposal to assign the wage of the highest paid occupation would result in employers misclassifying job opportunities into lower-paid occupations to avoid wage obligations. A second worker advocacy organization asserted the proposal would not prevent misclassification of workers because the rule does not require submission of a separate application for work performed in multiple distinct occupations or provide any limitation on the kinds of duties workers may be expected to perform. The commenter suggested the Department should require employers to post at the worksite the

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

AEWR for each occupational classification so that workers will know when they are misclassified. An SWA expressed similar concern that occupation-based AEWRs may encourage employers to misclassify workers into lower-paid job opportunities. Another commenter believed the difficulty of classifying job opportunities into occupational classifications would result in confusion among workers regarding the wage they would be paid at additional worksites.

Several commenters, including employers, associations, SWAs, and a worker advocacy organization, expressed concern or confusion regarding the method the Department would use to classify job opportunities into occupations within the SOC system. Noting that filing multiple applications under the current regulations has been burdensome and costly, three associations asked the Department to clarify whether employers will be required to file multiple applications for different job codes and urged the Department to permit an employer to list several SOC codes in one job order if they are all related to the same job opportunity. Many association commenters also sought clarification of the number of occupational categories the Department would use, including an association that noted the NPRM cited a different number of occupational categories for different states and did not mention some potential occupations, such as Pesticide Handlers and Sprayers (SOC 37-3012). Several commenters urged the Department to reduce the number of occupational categories it would consider, suggesting numbers ranging from four to six. Some associations and a State farm bureau specified five specific occupations: (1) Farmworkers and Laborers, Crop, Nursery, and Greenhouse; (2) Farm Workers and Laborers, Farm, Ranch and Aquacultural Animals; (3) Agricultural Equipment Operators; (4) Graders and Sorters; and (5) Supervisors. Two associations specified the first four of the above categories and

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

suggested supervisors could be a “higher tier” category derived from the others, such as “packing-supervisor” or “livestock-manager.”

Most of these commenters urged the Department to ignore “de minimis” performance of duties or otherwise adopt some form of a primary or majority duties test, with some commenters suggesting the occupational classification should be based on work performed 51 or 75 percent of the time or should apply only if workers perform “substantially the same” duties as in the occupational description. An SWA asked if the proposal would separate workers into distinct agricultural occupations, such as agricultural carpentry as an occupation distinct from the general carpentry occupation and was concerned such a proposal would lower wages and disincentivize U.S. workers from applying for H-2A job opportunities. The SWA also expressed concern that OES wages for specific localities within a state would produce lower wages, disincentivize U.S. job seekers, and disadvantage workers who will have to commute longer distances for higher paid job opportunities in other parts of the state. A second SWA expressed concern that the occupation-specific wage proposal would require more in-depth review of H-2A applications by the SWAs and CO to determine that the appropriate occupation and wage are assigned.

A worker advocacy organization expressed concern that the proposed rule would shift occupational classification responsibilities from the SWAs to the Certifying Officers (COs) and, functionally, primarily to employers themselves, with only minimal review by COs. The commenter believed this would result in manipulation of duties and misclassification by employers and urged the Department to rely on SWAs to determine the proper occupational classification and issue Notices of Deficiency (NODs) for misclassification because SWAs are most knowledgeable about agricultural job opportunities and industries in local areas. The commenter urged the Department to provide SWAs authority to issue NODs for misclassification

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

under 20 CFR 655.120(b)(5) and 655.120(d)(1) as proposed. The commenter also suggested revisions to the regulatory language proposed at 20 CFR 655.120(d)(1).

A law firm and a public policy organization objected specifically to application of the construction laborer SOC and corresponding OES wage to H-2A job opportunities because the nature of the work is very different. The law firm acknowledged that agricultural construction workers may perform some of the same tasks as non-agricultural workers, but asserted agricultural construction work generally requires less-skilled workers than non-agricultural construction work and the OES wage would not be representative of wages paid to agricultural construction workers. This commenter also asserted that immediate implementation of the OES wage rate would have “catastrophic consequences” for construction contractors because these employers typically operate under multiple year contracts. In contrast, a worker advocacy organization noted that contractors often employ nonagricultural workers in the H-2A program to construct, for example, livestock buildings for farmers at or near the AEW. The commenter supported the proposal to provide an occupation-specific wage for agricultural construction job opportunities.⁶⁸

The Department has considered all of these comments and has decided to adopt the language of the NPRM as proposed. Under this final rule, if the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the CO 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

⁶⁸ The commenter also asserted that the Department has provided no justification for inclusion of these job opportunities in the H-2A program when the employer is not a farm operator. That point is outside the scope of this aspect of the proposed rule being finalized.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

of duties encompassed by two or more distinct occupational classifications (*e.g.*, an SOC occupation subject to the FLS-based AEW and an SOC occupation subject to the OES AEW, or two SOC occupations subject to different OES AEWs), the Department will assign the highest AEW among all applicable occupational classifications.

For example, 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 FLS-based AEW. In contrast, a job opportunity for workers to drive semi tractor-trailer trucks to and from specified destinations within 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 OES-based 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 FLS-based AEW for SOC 45-2091 or the OES-based AEW for SOC 53-3032, whichever is a higher rate per hour.

As explained in the NPRM, determining the appropriate occupational classification is an

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

important component of the Department’s decision to move to occupation-specific wages. Use of the highest applicable wage in these cases reduces the potential for employers to misclassify workers and imposes a lower recordkeeping burden 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 policy is consistent with the way the Department determines prevailing wage rates for jobs that cover multiple SOCs in the H-2B program. Under the final rule, employers who currently file a single *Application for Temporary Employment Certification* covering multiple workers and a wide variety of duties might 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*.

Many of the commenters’ concerns regarding administrative burdens, impracticality, and complexity of the wage proposal have been addressed as a result of the changes to the proposed AEW methodology discussed above, including assigning one AEW for all of the SOC codes covered by the field and livestock workers (combined) category. The overwhelming majority of H-2A job opportunities will fall within the FLS field and livestock workers (combined) category, as reported in the USDA FLS data published in November 2019. Use of the combined FLS with ECI adjustments for field and livestock workers (combined) largely addresses commenters’ concerns regarding the number of SOC occupations. However, the Department is not limiting the SOC codes applicable to job opportunities that fall outside of the field and livestock worker (combined) category to those suggested by commenters because the H-2A program is not limited

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

to job opportunities classifiable within those occupations. Based on the statutory and regulatory framework governing the definition of what constitutes agricultural labor or services, the Department's experience is that a wide range of jobs within the U.S. agricultural economy, depending on the nature and location of work performed, could be eligible under the H-2A visa classification. Though the majority of job opportunities will be classifiable within a relatively small number of SOC codes, the Department has issued H-2A certifications to employers covering jobs classified in dozens of SOC codes, including more than three dozen in fiscal year 2019 alone.

The Department declines to permit employers to pay an AEW based on the SOC in which work is "primarily" performed (*i.e.*, more than 50 percent), where multiple SOCs are covered by the job opportunity. Doing so could encourage employers to intersperse higher-skilled, higher-paying work among many workers so that the higher-paying work is never a duty "primarily" performed by any one employee. This would permit the employer to gain the benefit of that work without having to hire a U.S. worker at a higher wage to provide that work. The Department is also concerned with how this would work in practice. Such an approach would undermine the Department's goal of preventing the misclassification of workers and encourage employers to combine work from various SOCs. Ultimately, this approach runs an intolerable risk of adversely affecting the wages of workers in the United States similarly employed. Further, the Department believes commenters' concerns are overstated, because each SOC code encompasses a broad spectrum of job titles and covers a broad range of job duties.

With respect to the worker advocates' concerns about the SWA's role in review of SOC assignment, this final rule does not alter the authority or role of the SWA. SWAs will continue to review job orders—and SOCs therein—in the first instance following the "SWA Review"

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

procedures in 20 CFR 655.121. Those procedures include an SWA-level NOD process, which the SWA may use to address wage offer, occupational classification, and other deficiencies the SWA identifies. The Department has not adopted the commenter's suggested regulatory revision, as the Department is not incorporating the language of proposed paragraph (d) into section 655.120 in this final rule.

6. Alternative Methodologies Proposed

The Department received many comments suggesting alternative methods of setting the AEWR that it chose not to adopt for the reasons explained below.

Comments from employers, associations, agents, state farm bureaus, and business advocacy organizations urged the Department to adopt a simplified AEWR methodology, including suggestions to use the state or federal minimum wage, the minimum wage plus a fixed percentage, an AEWR based on changes in indices like the CPI, or an AEWR calculated based on the price of the agricultural commodity involved. Several commenters urged the Department to eliminate the AEWR and instead require employers to pay the State or Federal minimum wage or some form of enhanced minimum wage, which the commenters believed would provide employers a simpler and more uniform, consistent, and predictable wage determination. Other commenters suggested setting the AEWR at some fixed percentage or dollar amount above the applicable minimum wage, with suggestions ranging from 3 to 15 percent or one to two dollars above the minimum wage. One of those commenters suggested the enhancement should be lower if the applicable rate is the state minimum wage because these wages often exceed the federal minimum wage. A few commenters suggested using a minimum wage as a baseline and updating the wage annually based on changes in the CPI, which they believed would provide certainty about wages and eliminate administrative costs related to conducting multiple surveys to

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

determine AEWRs. Many of these commenters also suggested a cap on annual wage increases to avoid the annually compounded wage inflation they believed resulted from use of the FLS.

The Department declines to adopt these proposals. The Department establishes wages based on data related to actual wages paid to workers. For purposes of the AEWR, the Federal minimum wage does not sufficiently relate to the actual wages paid to similarly employed workers. The AEWR is meant to approximate the wage paid to workers in the United States similarly employed. Establishing a single national AEWR, either based on federal minimum wage or applicable state minimum wage, that covers all occupations would not meet that purpose, as further demonstrated by how it would immediately and dramatically reduce the wages of both H-2A and similarly employed workers, particularly those performing work in dozens of states currently being paid a wage above the FY 2020 national AEWR based on the FLS. For similar reasons, the Department will not base the AEWR on a standard (*e.g.*, federal or state minimum wage) below which many U.S. farmworkers would be expected to accept employment, and, in many instances, possibly disconnected from wages actually paid in the area of employment. As the Department noted in prior rulemaking, “a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects that have been previously discussed.”⁶⁹

Further, a primary reason the Department has decided to use occupation-specific wage data for occupations like construction and farm labor supervisor is due to concern that the FLS combined field and livestock worker wage does not accurately reflect wages paid to higher-paid

⁶⁹ Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 FR 8,537, 8,550 (Feb. 13, 2008) (2008 NPRM).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

occupations in agriculture. An AEW methodolgy based on the federal or state minimum wage, even one incorporating annual increases based on a broad index, is likely to create or perpetuate the potential wage disparities this final rule aims to avoid when applied to more highly paid occupations.

For similar reasons, the Department declines to impose a cap on wage increases unrelated to actual wage data. Wage increases under both the ECI and OES survey are based on data of actual wages paid or wages projected to be paid to workers and therefore protect against adverse effect on the wages of workers in the United States similarly employed by tracking the increase or decrease in wages. Commenters did not provide a sufficient economic rationale to impose a cap that is unrelated to employer costs. Such a cap would also produce wage stagnation, most significantly in years when the wages of U.S. workers are rising faster due to strong economic and labor market circumstances.

a. Use Two-tier System that Permits Paying H-2A Workers Lower Wages

An association suggested the Department should adopt a two-tiered wage system in which the Department would require employers to pay U.S. workers at least the AEW, but would permit employers to pay H-2A workers a rate 25 percent below the AEW. Similarly, a public policy organization suggested the Department should allow employers to pay foreign workers less than the currently required AEW or prevailing wage if the employer agrees to pay U.S. workers 5 percent more than the required rate. The commenter believed that this would benefit U.S. workers because some employers would be willing to pay a higher wage to U.S. workers if the Department permitted them to pay less to H-2A foreign workers. A law firm suggested the Department should permit employers to pay the OES-determined rate to U.S. workers and pay

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

the current FLS-based AEWB to foreign workers and increase penalties for failure to hire U.S. workers to ensure employers are not incentivized to prefer hiring H-2A workers.

The Department declines to adopt a two-tiered system by which U.S. workers must be offered a higher wage rate than that offered to foreign workers. To do so would provide a disincentive to the hiring of U.S. workers by allowing employers to hire foreign workers at lower wages.

b. Use Four-tiered, Skill-based Wage Structure

The public policy organization cited above also asserted that the statute, at 8 U.S.C. § 1182(p)(4), “foresees the possibility” of a four-tiered wage structure and “instructs” the Department to establish wages at four wage levels based on experience, education, and the level of supervision. The commenter believed the Department should adopt this tiered wage structure even if not required by statute because this would more accurately reflect real-world wages, which are strongly correlated with a worker’s level of skill.

The commenter refers to the H-1B Visa Reform Act of 2004,⁷⁰ which amended section 212(p) of the INA to provide as follows:

Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.⁷¹

⁷⁰ *Consolidated Appropriations Act, 2005*, Pub. L. 108-447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

⁷¹ 8 U.S.C. § 1182(p)(4).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The Department explained its reasons for not extending the tiered wage structure to the H-2A program in the 2010 Final Rule and has provided similar explanations in the H-2B rulemaking, most recently in the 2015 H-2B Wage Final Rule.⁷² In the 2010 H-2A rule, the Department determined that “the notion of meaningful skill differences among agricultural workers is unfounded” and that the most common H-2A agricultural 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.”⁷³ The Department eliminated the tiered wage structure in the H-2B program for the same reasons and noted that wage differentials among workers in an occupation can be the result of many factors other than skill differentials.⁷⁴

Importantly, the Department’s practical experience has demonstrated that use of a four-tiered wage structure in the H-2A program leads to the overwhelming majority of H-2A job opportunities being classified at a level I wage, well below the median wage for the occupation.⁷⁵ The Department’s experience using a tiered wage structure in the H-2B program led to a similar result and the Department ultimately determined that use of the tiered wage structure produced “artificially lower [wages] to a point that [they] no longer represent[ed] a market-based wage.”⁷⁶ The commenter above provided no evidence demonstrating the existence of meaningful skill

⁷² Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 FR 24,146 (Apr. 29, 2015).

⁷³ 75 FR 6,883, 6,900.

⁷⁴ 80 FR 24,146, 24,159 (citing factors including, but not limited to, “[s]ize of employer; seniority; rate of worker turnover; union status; gender, race, ethnicity, or nationality; work hour schedule; age; availability of benefits in the form of training opportunity, health insurance, paid time off, and other benefits; sub-location within the same area of intended employment; and pay structure (performance-based pay vs. fixed pay per hour)”) (citation omitted).

⁷⁵ See 75 FR 6,883, 6,898 (noting that “73 percent of applicants for H-2A workers specified the lowest available skill level—corresponding to the wage earned by the lowest paid 16 percent of observations in the OES data” while “[o]nly 8 percent of applicants specified a skill level that translated in a wage above the OES median”).

⁷⁶ Final Rule, *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 FR 3,452, 3,463 (Jan. 19, 2011); see also 80 FR 24,146, 24,155.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

differentials among workers within any particular H-2A occupation, much less a nexus between those differentials and wages paid to workers in the occupation that would necessitate the same four-tiered, skill-based wage structure in the H-2A program that the Department eliminated in prior rulemaking. Therefore, the Department declines to implement a tiered wage structure in this final rule.

c. Accounting for Perquisites, Removing Incentive Pay, and Other Suggestions to Reduce the AEW

Many commenters, including trade associations, an employer, a law firm, and agents, recommended that the Department take into account additional costs that employers cover for H-2A workers, such as housing, meals, transportation, and other benefits, when determining the AEW. Commenters noted that U.S. workers cover these expenses out of their net pay, making the H-2A rate artificially inflated. Several commenters reasoned that if the purpose of the AEW is to set a wage rate that measures and protects against adverse effect (*e.g.*, by ensuring that employing H-2A workers is not less expensive than employing U.S. workers), considering the full cost of employing H-2A workers provides a more accurate picture of the expenses paid for H-2A workers than wages alone. One commenter objected, in particular, to the Department comparing H-2A AEWs to H-2B prevailing wage rates for agricultural construction occupations, noting that the H-2B rates anticipate workers providing their own housing and transportation, while the H-2A program does not.

Some commenters suggested how the Department could account for these additional costs in relation to the AEW. A trade association recommended the Department consider a “wage credit” to address the employer’s housing costs, such as 10 percent of the worker’s weekly earnings capped at not more than \$75.00 per week with an annual adjustment using the same

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

index as the Department uses to adjust the subsistence reimbursement minimum. An individual commenter suggested that housing provided to workers is worth about \$2 per hour, without providing a basis for that figure, while an employer calculated its additional costs to employ H-2A workers at \$5.61 per hour. An agent asked the Department to consider allowing the “fair-market value of rent” to count towards the required minimum wage in the H-2A program. An agent suggested the Department should allow a wage credit for the provision of food. An employer stated that the H-2A program needs an update because the wage rate they are assigned is 25 percent above the state minimum, and their expenses also include housing and transportation.

Some commenters more generally expressed concern that use of data sources that include incentive pay, such as piece rates or bonuses, and overtime in AEW R determinations created unfairly inflated AEW Rs. Some of these commenters expressed that including incentive pay and overtime in AEW R determinations resulted in “double counting,” and, because such payments are a reflection of individual worker productivity and performance, inclusion of these forms of compensation results in inaccurate AEW R determinations. A public policy organization urged the Department to require payment of the AEW R to workers in corresponding employment only if the worker was hired after the H-2A worker because payment of the AEW R to existing workers is not necessary to protect those workers’ wages.

The Department declines to adopt these suggestions because of its longstanding determination that such approaches would lead to an adverse effect on the wages of workers in the United States similarly employed in violation of the Department’s statutory mandate. Requiring employers to guarantee an hourly AEW R based on a wage survey without adjustments for housing and other benefits costs has been the Department’s interpretation of H-2A statutory

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

requirements since the 1980s. In addition, the statute contemplates a wage rate that accounts for the lower wages that the introduction of foreign workers causes, as well as no-cost housing and transportation for workers outside the local commuting area, which is intended to make agricultural jobs more attractive to U.S. workers.⁷⁷ This suggestion by commenters fails to account for the fact that H-2A workers, and those U.S. workers who live outside of the normal commuting distance, do not permanently live in the area and presumably also have housing costs in their home community. Additionally, the presence of significant differences in the price/cost of housing, meals, transportation, and other benefits across the country would make establishing any “wage credit” impracticable. Finally, reducing the guaranteed hourly AEWR for all workers to account for the costs of housing and other benefits would unfairly penalize the wages of similarly employed workers in the United States who do not receive housing benefits.

The Department also declines to remove piece rates, bonuses, and other incentive-based pay from wage data used to determine the AEWR. As some agricultural jobs guarantee only the state or federal minimum wage and otherwise pay based on a piece rate, advertising an hourly wage that does not include “incentive pay” is not a reasonable “base rate” for H-2A employers to advertise to U.S. workers. In addition, the approaches suggested would be inconsistent with the wage sources and approach the Department has adopted in the final rule. The OES survey collects wage data for straight-time, gross pay, exclusive of premium pay. Both the OES and the ECI measure of wages and salaries include, for example, commissions, production bonuses, piece rates, and other incentive-based pay.⁷⁸

⁷⁷ See, e.g., 8 U.S.C. 1188(c)(4) (requiring H-2A employers to “furnish housing in accordance with regulations”).

⁷⁸ See BLS, *Handbook of Methods: National Compensation Measures* (Dec. 15, 2017), available at <https://www.bls.gov/opub/hom/ncs/pdf/ncs.pdf>; BLS, *Occupational Employment Statistics Frequently Asked Questions*, https://www.bls.gov/oes/oes_ques.htm (last modified Apr. 15, 2020).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

d. Application of Collective Bargaining Agreement Wages

An association recommended the Department permit employers to use a wage established in a bona fide collective bargaining agreement (CBA), even where the AEW or prevailing wage rate is higher. The Department declines to permit employers to pay a wage below the AEW based on a CBA. As explained above, the AEW is the minimum rate the Department has determined is necessary to ensure the employment of H-2A workers does not adversely affect the wages of agricultural workers in the United States. As the Department noted in the 2010 Final Rule, due to relatively “[l]ow educational attainment, low skills, . . . and high rates of unemployment, agricultural workers have limited ability to negotiate wages and working conditions with farm operators or agricultural services employers.”⁷⁹ While collective bargaining may improve these workers’ positions, it may not do so enough to prevent downward pressure on workers in the United States similarly employed. The Department continues to share the concern of worker advocacy organization commenters recognizing the limited bargaining power of agricultural workers even when unionized. The AEW provides a floor below which wages cannot be negotiated, providing necessary protections for this particularly vulnerable labor force.⁸⁰

e. Use Median, Not Mean

A few commenters objected to the Department’s use of the mean wage rate to calculate the AEW. A trade association and an employer suggested that the Department calculate the AEW using the median wage rate, instead of the mean wage rate, which they explained would prevent “outliers” on both the low and high end from unduly influencing the AEW, and therefore

⁷⁹ 75 FR 6,883, 6,894.

⁸⁰ 74 FR 45,906, 45,911.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

produce a more representative wage rate. As noted in prior rulemaking, the Department believes use of the OES mean best meets the Department's obligation to protect against adverse effect and is the most appropriate wage to avoid immigration-induced labor market distortions.⁸¹ The Department has a long-standing practice of using the average or mean wage, within the FLS and OES wage distributions, to determine the AEW in the H-2A program and prevailing wages for other employment-based visa programs.

The Department declines to use the median because it does not represent the most predominant wage across a distribution, but instead represents only a midpoint. The mean is the best measure of central tendency for a normally distributed sample and provides equal weight to the wage rate received by each worker in the occupation across the wage spectrum. In low-skilled occupations, the mean represents the average wage paid to unskilled workers to perform jobs in the occupation. Setting the AEW below the mean in the relatively low-skill agricultural occupations that predominate in the H-2A program would have a depressive effect on wages of workers in the United States similarly employed.

f. Establish the AEWs Using Highest Among All Available Wage Sources

One worker advocacy organization urged the Department to require the highest of the FLS, OES, or other "valid source" wage rate for the area of intended employment, asserting that use of the FLS wage where a higher wage from the OES or another valid source is available would be indefensible. Similarly, a second worker advocacy organization suggested the Department require employers to pay the highest wage rate from among all available sources of wage data at all levels of geographic detail (e.g., SWA prevailing wage survey data; state, regional, and

⁸¹ See 80 FR 24,146, 24,159-24,160; see also Interim Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 FR 24,047, 24,058 (Apr. 24, 2013).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

national FLS data; and local, state, and national OES data). The commenter noted that the local wage is what U.S. workers expect to earn in a “healthy market” and asserted that sole reliance on state or regional FLS data would not take into consideration local wage differences that result from “market or crop specialty factors.” The commenter asserted that use of a lower wage rate based on broader surveys when a higher local OES rate is available would permit H-2A employers to undercut wages and would force other employers to lower wages to compete. The commenter suggested the Department revise section 655.120(b) to require the AEWWR to be set at the annual average hourly gross wage for the occupational classification in the state or region as reported by the USDA’s FLS, “unless the statewide annual average hourly wage, or applicable regional annual mean hourly wage for the [SOC] reported in the OES survey is a higher average hourly rate, in which case the OES State or OES Metropolitan and Nonmetropolitan Area data rate, whichever is higher, will be the AEWWR.”

This commenter also suggested the Department ensure that AEWWRs will not be reduced in the future based on the proposed methodology and recommended revising section 655.120(b)(1)(ii) to read, “[i]f an annual average hourly gross wage for the occupational classification in the state or region is not reported by the FLS, the AEWWR for the occupational classification and state shall be the statewide annual average hourly wage for the SOC if one is reported by the OES survey with respect to any H-2A applications filed within following the effective date of this regulation, the AEWWR shall be no lower than the applicable AEWWR established for that region or state in 2019.”

The Department declines to implement the commenter’s proposal to retain the current AEWWR methodology, while simultaneously instituting a new AEWWR methodology and requiring employers to pay the highest of all wage sources across the current and proposed methodologies,

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

as this would result in an exceedingly complex and confusing set of minimum wage guarantees.

The Department must set the AEW in a way that reasonably balances the needs and interests of workers in the United States similarly employed and employers and results in a wage that is a reasonable approximation of wages paid to workers in the United States similarly employed.

Requiring payment of the highest wage rate among all available sources at all levels of geographic specificity, regardless of the occupation and area of intended employment, would in many cases require an employer to pay an enhanced wage untethered to actual wages paid to similarly employed workers in the area. This would not only unreasonably increase the labor costs of H-2A employers in those cases, but could reduce agricultural job opportunities and place upward pressure on wages in order for employers to attract a sufficient number of available workers. This result would be inconsistent with the twin purposes of the H-2A program to “assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other.”⁸²

The Department also declines to require employers to pay the local OES wage rate for the occupation if this rate is higher than rate determined by the applicable source under this final rule. For the reasons stated in the NPRM and above, the FLS should be used as the baseline to set the AEW for field and livestock worker (combined) job opportunities—such as those requiring crop, nursery, and greenhouse workers (SOC 45-2092) and workers attending to farm or ranch animals (SOC 45-2093)—which constitute the overwhelming majority of employer requests for H-2A workers. The FLS is the preferred wage source for establishing the AEW in these occupational classifications for the reasons discussed above. All other AEWs will be

⁸² 54 FR 28,037, 28,044 (citations omitted).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

established by using the OES survey, including in the unique circumstance that a wage rate for these occupations is not available from the FLS.

Regarding the use of local OES data, the Department is retaining use of geographically broader data sets for reasons explain above. The Department is using a statewide, or in some cases national, OES-based AEW R both to more closely align with the geographic areas from the FLS and to protect against the potential for wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level. The Department “consistently has set statewide AEW Rs rather than substate [] AEW Rs because of the absence of data from which to measure wage depression at the local level” and use of surveys reporting data at a broader geographic level “immunizes the survey from the effects of any localized wage depression that might exist.”⁸³ As explained above and in prior rulemaking, use of a broader geographic scope to determine the AEW R is consistent with the statute and addresses the unique nature of the agricultural labor force and the migratory pattern of employment and AEW Rs. Data from a broader geographic span “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 importation of foreign labor on an ongoing basis.”⁸⁴

Further, the use of local OES wages would introduce significant complexities in establishing the offered wage. For example, agricultural associations filing master applications that cover members and worksites across two states or other occupations engaged in itinerant work across multiple states would have to keep pace with literally dozens of different minimum wage rates

⁸³ See 75 FR 6,883, 6,899.

⁸⁴ *Id.*

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

and the potential adjustments to each of those during the course of a work contract period. The wage payment, recordkeeping, and compliance burden associated with that kind of AEW methodological approach would be substantial and unjustifiable. Finally, as noted above, the Department also proposed a revised prevailing wage determination methodology in the NPRM, which, if adopted in a separate final rule, would likely impact the number of prevailing wages that are established for H-2A job opportunities. Employers are currently required to pay the prevailing wage if higher than the AEW and this wage rate is specifically tailored to crop or agricultural activities and geographic areas, as it may be based on a sub-state area when appropriate.

7. Comments Beyond the Scope of this Rulemaking

The Department also received several comments that were beyond the scope of this rulemaking. Some comments were specifically related to reforestation employers, and were not addressed because the definition of *agricultural labor or services* at 20 CFR 655.103(c), and the Department's proposal to incorporate reforestation and pinestraw activities into the H-2A program, is not included in this final rule. Some commenters expressed concerns about housing obligations. Several comments related to AEWs for job opportunities in the herding and production of livestock and suggested the Department revisit the wage rate methodology at 20 CFR 655.211(c). For example, one commenter suggested that the monthly AEW should account for commodity pricing. Another commenter objected to the Department's annual adjustment of the monthly AEW for range occupations governed by the procedures in sections 655.200 through 655.235 using the ECI, noting that employers of such workers are required to provide all food, housing, tools and equipment without cost to the worker. The commenter requested the Department permit a "wage credit" for the provision of food both to mitigate the combined impact of the ECI and the "consumer price index" on such employers' costs and for

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

consistency with the requirements placed on H-2A employers outside of range herding occupations. However, these comments are outside the scope of this rulemaking.

A state agency expressed concern that the use of the AEW for a particular occupation at an annual average hourly gross wage was not inclusive of service agricultural positions, and suggested that BLS work closely with the sheep-shearing industry before completing the OES, with careful consideration of how an hourly gross wage would negatively impact industries paying workers piece rates. Two commenters recommended the Department expand the wage data used to calculate AEWs to include H-2A workers' wages in areas where more than 10 percent of the agricultural workforce is composed of H-2A workers and workers in corresponding employment. These commenters stated that H-2A wage requirements, whether due to the AEW or prevailing wage rate, drive up non-H-2A wages and skew survey results in areas where H-2A workers represent a substantial percentage of the agricultural workforce. Further, these commenters requested the FLS continue to include the wages of U.S. workers in corresponding employment in states that meet the 10 percent threshold they recommended the Department employ for the AEW.

These comments are beyond the scope of this rulemaking and the Department's authority, as they recommend changes to the methodology of the surveys the Department proposed to use to determine hourly AEWs. As the Department noted in the NPRM with respect to potential changes to the FLS, the Department would engage in notice-and-comment rulemaking before implementing significant changes to AEW data collection and reporting methods.⁸⁵

III. Administrative Information

⁸⁵ See 84 FR 36,168, 36,179, n.30 (Jul. 26, 2019).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563 and Improving Regulation and Regulatory Review; Executive Order 13771; and the Congressional Review Act

Under E.O. 12866, the Office of Management and Budget's (OMB) 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.⁸⁶ 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.⁸⁷ This final rule is an economically significant regulatory action under this section and was reviewed by OIRA. This final rule is a deregulatory action under E.O. 13771 because the Department expects the unquantified cost savings of this final rule will outweigh the total annualized costs associated with rule familiarization.

Pursuant to the Congressional Review Act (5 U.S.C. § 801, *et seq.*), OIRA has designated this rule as a "major rule," as defined by 5 U.S.C. § 804(2). Under the Congressional Review

⁸⁶ Exec. Order No. 12,866 of Sept. 30, 1993), 58 FR 51,735 (Oct. 4, 1993).

⁸⁷ *Id.* at 51,738.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Act (CRA), a major rule ordinarily takes effect 60 days after the date it is published.⁸⁸ An exception to the delay in a rule's effective date exists, however, in cases where "an agency for good cause finds... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."⁸⁹ Because the full 60-day waiting period from the date this rule is published to the date it becomes effective is unnecessary and would result in the very kind of disruption to the conduct of regulated entities that the rule is meant, in some degree, to ameliorate, the Department has determined that there exists good cause under the CRA to have this rule take effect less than 60 days from the date of publication. In the Department's judgment 45 days is sufficient time, given the nature of this rule, to allow Congress and the regulated community an opportunity to review and assess the rule before it becomes operative, and is the appropriate delayed effective period in light of the significant potential for confusion and disruption among affected parties if the rule were to have a later effective date.

The Department has determined that a 60-day waiting period between publication and the effective date of this rule would result in serious disruption and uncertainty for regulated parties. The Department's regulations require that it "publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWRs for each State as a notice in the Federal Register." 20 CFR 655.120. The Department has not yet published notice of new AEWRs for calendar year 2021, and therefore must do so before January 1st to avoid violating its own regulations. If this rule were not in effect in time to allow the Department to publish AEWRs calculated under the new methodology, the Department would have to publish AEWRs determined according to the methodology in the 2010 Final Rule.

⁸⁸ 5 U.S.C. § 801(a)(3).

⁸⁹ 5 U.S.C. § 808

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Even assuming data from the FLS were available to calculate AEWs under the prior methodology, doing so would likely lead to significant confusion for affected parties given that, shortly after this calendar year's notice is published, a new methodology resulting from this rule would be in effect, and the Department would again adjust the AEWs to ensure they align with what the Department has determined is the appropriate wage rate for the H-2A program. These kinds of disruptive and nearly contemporaneous changes in the obligations the Department imposes on regulated entities engenders the precise kind of instability and unpredictability in the wages employers must pay to workers that the Department seeks to reduce through this rulemaking. Avoiding such disruption is sufficient grounds for shortening the delay between publication and when the rule becomes effective.⁹⁰

Moreover, the purpose of delaying the effective date of a regulation is, generally speaking, “to give affected parties a reasonable time to adjust their behavior before the final rule takes effect.”⁹¹ Relatedly, the CRA “provides for a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.”⁹² By delaying the effective date for a specified period after the contents of the rule have been made public, the CRA gives both Congress and the public an opportunity to assess and understand the rule before its operation requires changes in the behavior of regulated entities.

Here, the effective date of the rule will not precipitate an immediate impact on the interests or obligations of affected parties. A 60-day delay in the rule's effectiveness is

⁹⁰ See *Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 228 n.34 (D.C. Cir. 1967).

⁹¹ *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996); See also *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (“Unlike the notice and comment requirements, which are designed to ensure public participation in rulemaking, the 30-day waiting period is intended to give affected parties time to adjust their behavior before the final rule takes effect.”).

⁹² *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1375 (Fed. Cir. 2002); See also Office of Mgmt. & Budget, Exec. Office of the President, Guidance on Compliance with the Congressional Review Act 2 (2019).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

therefore unnecessary. As explained above, for the overwhelming majority of job opportunities covered by the new AEW methodological, the rule maintains, for the next two years, the existing wage rates currently in effect. This preserves the status quo for an extended period to give regulated entities sufficient opportunity to prepare for the new manner in which wage rates will be adjusted.

Similarly, if new wage rates were calculated and published under the prior methodology before the end of this calendar year, they would not become applicable until after a 14-day delay under the Department's customary practices.⁹³ That means that, even if the effective date of this rule were delayed by the full 60 days, wage rates calculated under the prior methodology likely would not alter the wages to which U.S. and foreign workers are entitled before the new methodology would become effective early next year, at which point the Department could adjust the wage rates accordingly. There would be no practical effect on the wages paid, even while, as noted above, the issuance of two separate sets of AEWs, published only weeks apart, would sow the type of confusion and uncertainty that this rule is meant to prevent.

Thus, the rule taking effect does not meaningfully alter, in the short term, the status quo, meaning the full 60-day delay between publication and when the rule becomes operative is not necessary to satisfy the purposes of the CRA.⁹⁴ Because the rule gives parties time to assess and understand the rule even after it takes effect, shortening the period between the rule's

⁹³ See, e.g., *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-Range Occupations*, 84 FR 69,774 (Dec. 19, 2019).

⁹⁴ See *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

publication and its effective date is consistent with the delayed effectiveness required by the CRA.⁹⁵

For these reasons, the Department has determined it has good cause to shorten the lapse under the CRA by 15 days between when the rule is published and when it takes effect. The Department has typically published AEW notices in mid-to-late December, and, in the Department's experience, there can be as much as a week's delay between when the Department finalizes such notices and when they are actually published. In light of these considerations, and given that the new methodology must be effective this calendar year to avoid the disruption described above, the Department has determined that shortening the CRA waiting period by 15 days is necessary to the effective administration of the H-2A program. Because this rule is being published in early November, a waiting period of 45 days is, in the Department's judgment, appropriate as it leaves adequate time for the Department to establish AEWs under the new methodology before the end of the calendar year, while not shortening the CRA waiting period beyond what is necessary to avoid the kinds of disruption that the full 60-day waiting period would entail.

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.⁹⁶ E.O. 13563 recognizes that some benefits are difficult to quantify and provides that,

⁹⁵ *Cf. Black v. Pritzker*, 121 F. Supp. 3d 63, 81 (D.D.C. 2015).

⁹⁶ E.O. 13,563 (Jan. 18, 2011), 76 FR 3,821 (Jan. 21, 2011).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.⁹⁷

Outline of the Analysis

Section III.A.1 describes the need for the final rule, and section III.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 III.A.3 explains how the provisions of the final rule will result in quantifiable costs and transfer payments and presents the calculations the Department used to estimate them. In addition, section III.A.3 describes the unquantified transfer payments of the final rule. Section III.A.4 summarizes the estimated first-year and 10-year total and annualized costs and transfer payments of the final rule. Finally, section III.A.5 describes the regulatory alternatives that were considered during the development of the final rule.

Summary of the Analysis

The Department estimates that the final rule will result in costs and transfer payments. As shown in Exhibit 1, the final rule is expected to have an annualized cost of \$70 thousand and a total 10-year quantifiable cost of \$460 thousand at a discount rate of 7 percent.⁹⁸ The final rule is estimated to result in annual transfer payments from H-2A employees to H-2A employers of \$170.68 million and total 10-year transfer payments of \$1.68 billion at a discount rate of 7 percent.⁹⁹

⁹⁷ *Id.*

⁹⁸ The final rule will have an annualized cost of \$0.05 million and a total 10-year cost of \$0.46 million at a discount rate of 3 percent in 2020 dollars.

⁹⁹ The final rule will have annualized transfer payments from H-2A employees to H-2A employers of \$169.10 million and a total 10-year transfer payments of \$1.44 billion at a discount rate of 3 percent in 2020 dollars.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Exhibit 1: Estimated Monetized Costs, Cost Savings, Net Costs, and Transfer Payments of the Final Rule (2020 \$millions)		
	Costs	Transfer Payments
Undiscounted 10-Year Total	\$0.46	\$1,677.61
10-Year Total with a Discount Rate of 3%	\$0.46	\$1,442.50
10-Year Total with a Discount Rate of 7%	\$0.46	\$1,198.77
10-Year Average	\$0.05	\$167.76
Annualized at a Discount Rate of 3%	\$0.05	\$169.10
Annualized with at a Discount Rate of 7%	\$0.07	\$170.68
Perpetuated Net Costs* with a Discount Rate of 7% (2016\$ Millions)		

*Net Cost Savings = [Total Cost Savings] – [Total Costs]

The total cost of the final rule is associated with rule familiarization. Transfer payments are the results of changes to the methodology for determining the AEWs. See the costs and transfer payments subsections of section III.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some transfer payments of the final rule. The Department describes them qualitatively in section III.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

The Department has determined that this rulemaking is necessary to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program’s strong protections for the U.S. workforce. Consistent with the goal of modernizing the H-2A program, this final rule amends the methodology by which the Department determines the hourly AEWs for non-range agricultural occupations using wage data reported by the USDA FLS and the BLS OES survey. It also makes minor revisions related to the regulatory definition of the AEW to conform to the methodology changes adopted in this

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

final rule and to more clearly distinguish the hourly AEWRs applicable to non-range occupations from the monthly AEWR applicable to range occupations under 20 CFR 655.200–235.

As discussed above, the FLS has been the only comprehensive survey of wages paid by farmers and ranchers and has enabled the Department to establish minimum hourly rates of pay for H-2A job opportunities. However, the Department acknowledges the concerns expressed by many commenters about the unpredictability and volatility of the wage data from year-to-year, which the Department believes is a sufficient reason to reconsider its sole reliance on annually produced wage data from the FLS as a means to establish the AEWRs, even were FLS data currently available or made available in the future. On the other hand, given the comprehensiveness and relevance of the FLS data, the Department has determined it is appropriate to use the 2020 AEWRs,¹⁰⁰ which were based on the results of the FLS published in November 2019, to establish AEWRs for most H-2A job opportunities during calendar years 2021 and 2022 and, as the starting point, subject to annual adjustments, to establish most AEWRs in subsequent years. Accordingly, the Department will freeze wage rates for field and livestock worker occupations at based on November 2019 FLS data and adjust these wages annually beginning in 2023 based on the change in the ECI for wages and salaries computed by the BLS. This two-year transition period provides employers with a reasonable amount of time to plan their labor needs and agricultural operations under the new wage requirements. Using the current, 2020 AEWRs as the starting point also ensures that employers will not be subject to further volatility in wage adjustments when this rule takes effect because the Department will be relying on the wage rates that employers are already paying. For all other occupations, the

¹⁰⁰ Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-Range Occupations*, 84 FR 69774 (Dec. 19, 2019).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Department, as explained in Section II.B.5.b., will annually adjust and set the hourly AEWRs based on the statewide annual average hourly wage for the occupational classification, as reported by the OES survey. If the OES survey does not report a statewide annual average hourly wage for the occupation, the AEWR shall be the national annual average hourly wage reported by the OES survey.

On September 30, 2020, USDA publicly announced its intent to cancel the October 2020 data collection and resulting publication of the Farm Labor report.¹⁰¹ Consequently, NASS may not release its November 2020 report containing the annual gross hourly rates for field and livestock workers (combined) for each State or region based on quarterly wage data collected from employers during calendar year 2020. Under the Department's current AEWR methodology, this annual report is used to establish and publish the hourly AEWRs for the next calendar year period on or before December 31, 2020. NASS is not legally required to produce the annual Farm Labor reports has suspended collection on at least two prior occasions.¹⁰² USDA's decision to suspend data collection and the release of the report planned for November 2020 has been challenged in litigation.¹⁰³ That litigation challenges whether USDA provided adequate reasons for its decision to suspend data collection and whether it considered important aspects of its decision, and USDA was recently ordered to proceed with the collection of FLS data for 2020. The litigation does not challenge, however, USDA's discretion—if adequately explained—to terminate the FLS at any time. Therefore, regardless of whether USDA is ultimately successful in the ongoing litigation, it will remain the case that no statute or regulation requires that USDA

¹⁰¹ 85 FR 61,719; *see also* USDA, *USDA NASS to Suspend the October Agricultural Labor Survey* (Sept. 30, 2020), <https://www.nass.usda.gov/Newsroom/Notices/2020/09-30-2020.php>.

¹⁰² 76 FR 28,730 (May 18, 2011); 72 FR 5675 (Feb. 7, 2007).

¹⁰³ *See United Farm Workers v. Perdue*, No. 1:20-cv-01432-DAD-JLT (E.D. Cal. filed Oct. 13, 2020).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

perform the FLS. The Department has determined that this uncertainty regarding the near- and long-term future of the FLS also weighs in favor of the Department establishing now a revised methodology for determining the AEW, given its importance to the Department's administration of the labor certification requirement. Accordingly, the Department has determined it is necessary to issue this final rule to establish the new hourly AEW methodology, and to do so before the end of the calendar year in order to ensure there is no disruption in setting the AEWs for calendar year 2021.

As discussed in this final rule, the Department believes that the FLS data is the most appropriate wage source for establishing AEWs for the majority of H-2A job opportunities. For example, the FLS has been the only comprehensive survey of wages paid by farmers and ranchers that has enabled the Department to establish hourly rates of pay for H-2A opportunities. Because doing so will be more predictable, less volatile, and easier to understand, while also ensuring protection of U.S. workers' wages and accurate AEWs for job opportunities in higher-skilled occupations not adequately represented or reported by USDA in the current FLS data, and given that it may no longer be possible for the Department to rely on new wage data from the FLS, and that, even if such data were available, relying on it to make new adjustments to the AEWs would likely cause, in some cases, the kinds of volatile and unpredictable wage fluctuations the Department seeks to avoid going forward, the Department has determined it is appropriate to use the 2020 AEWs, which were based on the results from the FLS published in November 2019, as the foundation to establish AEW for most H-2A job opportunities. Accordingly, the Department will use this FLS data for the specified SOCs and adjust the wages based on the ECI computed by the BLS.

2. Analysis Considerations

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The Department estimated the costs and transfer payments of the final rule relative to what would happen in the absence of the rule (*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). Ordinarily, there are some uncertainties in predicting the future, but this is particularly problematic because the regulatory provision that is being replaced required use of the USDA's FLS, which has been suspended for October 2020. Therefore, what would have happened in the absence of this rule is speculative. Here, we have assumed that in the absence of this rule the AEWRs would continue to increase at the same rate that it would have in previous years. However, other outcomes could also have occurred. For example, employers might have concluded that in the absence of an updated FLS they would be subject to the previously existing AEWRs. This would be quite similar to the policy adopted for 2021 and 2022 in the final rule and so under this approach the final rule would be estimated to have substantially smaller transfers than we have estimated here.

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 final rule (*i.e.*, costs and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2021 through 2030) to ensure it captures costs and transfer payments 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 entities that are expected to be affected by the final rule. The number of affected entities is calculated using OFLC certification data from 2016 through 2019. The Department provides this estimate and uses it to estimate the costs of the final rule.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Exhibit 2: Number of Affected Entities by Type (FY 2016-2019 Average)	
Entity Type	Number
Unique H-2A Applicants	8,050

Growth Rate

The Department estimated growth rates for applications processed and certified H-2A workers based on FY 2012-2019 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

The geometric growth rate for certified H-2A workers using the program data in Exhibit 3 is calculated as 17.2 percent. This growth rate, applied to the analysis time-frame of 2021 to 2030, would result in more H-2A certified workers than projected Bureau of Labor Statistics (BLS) workers in the relevant H-2A SOC codes.¹⁰⁴ Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012-2019 H-2A program data to forecast workers and applications, and estimate geometric growth rates based on the forecasted data.

¹⁰⁴ Extrapolating BLS 2029 projections for combined agricultural workers and comparing with a 17.2 percent growth rate of H-2A workers, yields estimated H-2A workers that are about 115 percent larger than extrapolated BLS 2029 projections to 2030. The projection of workers for the agricultural sector was 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>.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The Department ran 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.¹⁰⁵ Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and applications through 2030. 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 6.2 percent for both H-2A applications and H-2A certified workers. The estimated growth rates for applications (6.2 percent) and workers (6.2 percent) were applied to the estimated costs and transfer payments of the final rule to forecast employer 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 III.A.3 (Subject-by-Subject Analysis).

Compensation Rates

In section III.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the final rule. Exhibit 4 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the final rule. The Department used the mean hourly wage rate for private sector human resources specialists.¹⁰⁶ Wage rates are adjusted to

¹⁰⁵ 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.

¹⁰⁶ BLS, *Occupational Employment and Wages, May 2019: 13-1071 Human Resources Specialist*, <https://www.bls.gov/oes/current/oes131071.htm> (last modified July 6, 2020). Because the OES wage rate is in 2019 dollars, the Department inflated to 2020 dollars using the ECI to be consistent with the rest of the analysis which is in 2020 dollars.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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 percent¹⁰⁷ and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2019. For the private sector employees, we use a fringe benefits rate of 43 percent.¹⁰⁸ 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	\$33.52	\$14.35 (\$33.52 x 0.43)	\$5.70 (\$33.52 x 0.17)	\$53.57

3. Subject-by-Subject Analysis

The Department’s analysis below covers the estimated costs and transfer payments of the final rule. In accordance with Circular A-4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. This final rule maintains the methodologies for estimating the cost of rule familiarization and the transfer payments associated with the AEW wage structure from the NPRM. However, the AEW wage structure proposed in the NPRM has been replaced with a wage structure for the

¹⁰⁷ 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>.

¹⁰⁸ BLS, *Employer Costs for Employee Compensation*, <https://www.bls.gov/news.release/eccc.toc.htm> (last modified Sept. 17, 2020) (ratio of total compensation to wages and salaries for all private industry workers).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

final rule that is substantively different and is discussed in more detail in the estimation of transfer payments.

Costs

The following section describes the costs of the final rule.

Quantifiable Costs

a. Rule Familiarization

When the final 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 (6.2 percent) to the number of unique H-2A applicants (8,050) to determine the number of unique H-2A applicants impacted in the first year. The number of unique H-2A applicants in the first year (8,551) was multiplied by the estimated amount of time required to review the rule (one hour).¹⁰⁹ This number was then multiplied by the hourly compensation rate of Human Resources Specialists (\$53.57 per hour). This calculation results in a one-time undiscounted cost of \$458,099 in the first year after the final rule takes effect. This one-time cost yields a total average annual undiscounted cost of \$45,810. The annualized cost over the 10-year period is \$53,703 and \$65,223 at discount rates of 3 and 7 percent, respectively.

Transfer Payments

The following section describes the transfer payments of the final rule.

Quantifiable Transfer Payments

¹⁰⁹ This estimate reflects the nature of the final rule. As a rulemaking to amend to parts of an existing regulation, rather than to create a new rule, the one-hour estimate assumes a high number of readers familiar with the existing regulation.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

This section discusses the quantifiable transfer payments related to revisions to the wage structure.

a. Revisions to the AEW Methodology

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 meets this statutory requirement by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEW, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. As discussed in detail earlier in this preamble, the Department has carefully considered public comments related to the proposed changes to the methodology by which it establishes the AEWs, and has made substantive revisions in this final rule.

Public Comment: The Department received one comment on the NPRM transfer payments from the proposed wage option. One commenter said the Department had underestimated the transfer of debt burden to workers because of a discrepancy in the number of certified H-2A workers for 2018 used in the Department’s calculations in the NPRM, citing OFLC data and the Department of State’s data on the number of non-immigrant visas issue in fiscal year (FY) 2018.

As explained in the NPRM, the total number of certified workers is based on the average number of H-2A workers in FY 2016 and FY 2017. Based on the Department’s NPRM estimate for H-2A workers’ certified growth rate of 0.19, the estimated number of certified workers for

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

FY 2018 is 223,411, which is closer to the figure provided by OFLC. Transfer payments computed under this final rule are reflective of the changes adopted to the AEW methodolgy and are substantively different from transfer payments presented in the NPRM.

This final rule revises the AEW methodolgy so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. The Department currently sets the AEW at the annual average hourly gross wage for field and livestock workers (combined) for the state or region from the FLS conducted by the USDA's NASS, which results in a single AEW for all agricultural workers in a state or region. As discussed in depth in the preamble, the Department is concerned that this AEW methodolgy may have an adverse effect on the wages of workers in higher paid agricultural occupations, such as construction laborers on farms, whose wages may be inappropriately lowered by an AEW established from the wages of field and livestock workers (combined), an occupational category from the FLS that does not include those supervisory workers.

The Department will set the AEW under this final rule based on the USDA 2019 FLS 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

Beginning on the effective date of the final rule through calendar year 2022, the wages for Field Workers and Livestock Workers (combined), as reported for the state or region by the USDA 2019 FLS, shall continue to be the AEWs where the agricultural services or labor is classified under the above SOC codes. Beginning calendar year 2023 and annually thereafter, the

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

AEWRs based on FLS will be adjusted by the percent change in the BLS ECI for the preceding 12 months.

For all other SOC codes, the Department will annually set the AEWRs based on the statewide annual average gross hourly wage reported by the BLS OES survey. If the OES survey does not report a statewide annual average gross hourly wage for the SOC, the AEWR shall be the national annual average gross hourly wage reported by the OES survey.

To estimate wage impacts, the Department uses FY2016 through FY2020 OFLC labor certification data. To include the most recent H-2A certification data (FY2020) the Department simulated Q3 and Q4 data based on FY2016 – FY2019 data, to produce a full year of certification data.¹¹⁰ For the most common SOC codes (45-2091, 45-2092, and 45-2093), the Department calculated the average certification growth rate from FY2016 to FY2019 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 percent or less than 80 percent 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 each quarter of 2019 by state, and SOC, and applied the applicable growth rate to quarters three and four to estimate FY2020 quarters three and four certifications. For all other SOC codes, the Department took the average of the number of certifications for each SOC and state from FY2016 to FY2019. The Department also needed to estimate the period of need, number of workers per certification, and number of hours per certifications.

¹¹⁰ FY2020 certification data consists of only two quarters of data as of the date of analysis for this final rule.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

For the three most common SOC codes used in the H-2A program, 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 SOC codes, the Department used the national average from FY2016 to FY2019 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 certification and number of hours, the average number of workers for each SOC code and state from FY2016 to FY2019 was applied. Total wages were then calculated using the simulated Q3 and Q4 certifications and these estimated FY2020 Q3 to Q4 wage impacts were summed with the FY2020 Q1 to Q2 wage impacts to create an estimate of total wages for the entirety of FY2020.

The Department calculated the impact on wages that would occur from the implementation of the revised AEW methodological. For each H-2A certification in FY2016 through FY2020, the Department calculated total wages under the previously existing AEW baseline methodology and total wages under the revised AEW methodology. We assume that in the absence of this rule the AEWs would continue to increase at the same rate that it would have in previous years. Then, the Department averaged total wages by SOC code across FY2016 through FY2020 to produce an annual average wage under the baseline and final rule. Total wages were projected for SOC codes that are updated annually beginning in 2023 with the most recent 12-month ECI by calculating the nominal wage in each year from 2021 through 2030 using an average of

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

annual September to September ECI growth rates since 2016 (2.89 percent).¹¹¹ Nominal wages were then converted to real wages by deflating each year by the same ECI growth rate.¹¹²

The Department provides two illustrative examples illustrating the above methodology. Exhibits 5 and 6 illustrate how total wages are calculated for the final rule and baseline. The Department multiplied the number of certified workers by the number of hours worked each week, the number of weeks in a given year that the employees worked, and the annual average hourly gross state AEW wage for SOC codes set by the AEW. For SOC codes set by OES the annual average hourly gross wage from the state-level OES by SOC code for the work performed, or national OES if the state-level wage is not available. Exhibit 5 includes an example for each case set by the AEW and OES.

Exhibit 5: AEW Wage Under the Final Rule (Example Case)									
SOC Code	Final Rule Wage Source	Number of Certified Workers (a)	Basic Number of Hours (b)	Number of Days Worked in 2016 (c)	Number of Days Worked in 2017 (d)	Wage 2016 (e)	Wage 2017 (f)	Total AEW Wages 2016 (a*b*(c/7)*e)	Total AEW Wages 2017 (a*b*(d/7)*f)
45-2091	FLS AEW	14	35	306	10	\$11.74	\$12.02	\$251,470.80	\$8,414.00
53-7062	OES	10	40	280	50	\$12.76	\$13.08	\$204,160.00	\$37,371.43

After the total wages for the final rule was determined, the wage calculation under the baseline AEW was calculated. The methodology is similar to that used to estimate the projected AEW under the final rule: the number of workers certified is multiplied by the number of hours worked each week, the number of weeks in a given year that the employees

¹¹¹ September to September growth rates are used to reflect the month vintage of ECI data that will be used to update the AEW. For the Department to process and release the bi-annual ECI updated AEW wages in January, the latest ECI value that will be available is the released September value. The ECI is available and released at <https://www.bls.gov/news.release/eci.toc.htm>.

¹¹² Each year's estimated wages were deflated using the formula: Wage / (1+0.289)^(Year – Base year).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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).

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 2016 (c)	Number of Days Worked in 2017 (d)	Wage 2016 (e)	Wage 2017 (f)	Total AEWB Wages 2016 (a*b*(c/7)*e)	Total AEWB Wages 2017 (a*b*(d/7)*f)
45-2091	FLS AEWB	14	35	306	10	\$11.74	\$12.02	\$251,470.80	\$8,414.00
53-7062	FLS AEWB	10	40	280	50	\$11.74	\$12.02	\$187,840.00	\$34,342.86

The total wages for every certification from FY2016 through FY2020 were calculated using the method in Exhibit 5 and Exhibit 6. Wages for each year were converted to 2020 dollars using the ECI, summed by SOC code, then averaged to produce the average annual total wages by SOC code. To simulate the final rule wage methodology of annually updating the AEWB for SOC codes set by FLS, beginning in 2023, the Department provides an illustrative example in Exhibit 7 for the 45-2091 SOC code.

Exhibit 7: Example Projected Total Wages for 45-2091				
	FLS AEWB Growth Rate¹¹³	Total Wages (Nominal dollars)	Deflator (ECI)	Total Wages (2020 dollars)
2020 ¹¹⁴	N/A	\$235	1	\$235
2021	0%	\$235	0.972	\$228
2022	0%	\$235	0.945	\$222
2023	2.89%	\$242	0.918	\$222
2024	2.89%	\$249	0.892	\$222
2025	2.89%	\$256	0.867	\$222
2026	2.89%	\$263	0.843	\$222
2027	2.89%	\$271	0.819	\$222

¹¹³ The growth rate for each year represents the final rule AEWB for SOC codes 45-2091, 45-2092, 45-2093, 45-2041, 45-2099, and 53-7064. They have a 0 percent growth rate from the prior year in years which wages are held constant (e.g., 2021 and 2022). Beginning in 2023 they are updated annually based on the most recent 12-month ECI, which for the purposes of this analysis is 2.89 percent.

¹¹⁴ 2020 nominal wage is the average of total wages for 45-2091 from FY2016-FY2020 data.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

2028	2.89%	\$279	0.796	\$222
2029	2.89%	\$287	0.774	\$222
2030	2.89%	\$295	0.752	\$222

Once the total wages for the AEWB baseline and final rule were obtained for each SOC code, the Department estimated the wage impact of the revised AEWB by subtracting the baseline AEWB total wages from the final rule total wages in each year from 2021 through 2030 to determine the final rule wage impact. The resulting difference between final rule wages and baseline wages are presented in Exhibit 8.

Exhibit 8: Difference Between Final Rule Wages and Baseline Wages by SOC Code (2020 \$ Millions)								
Year	45-2091	45-2092	45-2093	45-2041	45-2099	53-7064	All Other	Total
2021	-\$7	-\$61	-\$4	\$0	-\$1	\$0	\$18	-\$54
2022	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2023	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2024	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2025	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2026	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2027	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2028	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2029	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124
2030	-\$13	-\$120	-\$8	\$0	-\$1	\$0	\$18	-\$124

The changes in wages constitute a transfer payment from H-2A employees to H-2A employers for SOC codes set by the FLS AEWB and annually updated. For all other SOC codes set by OES, and updated annually, the change in wages constitutes a transfer from H-2A employers to H-2A employees. In total, there is a transfer from employees to employers. To account for the growth rate in H-2A workers the total transfers in each year from Exhibit 8 are

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

increased annually by the estimated growth rate of H-2A workers (6.2 percent).¹¹⁵ The results are average annual undiscounted transfers of \$167.76 million. The total transfer over the 10-year period is estimated at \$1.68 billion undiscounted, or \$1.44 billion and \$1.20 billion at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is \$169.10 million and \$170.68 million at discount rates of 3 and 7 percent, respectively.

Unquantifiable Transfer Payments

a. Revisions to Wage Structure

The decrease (or increase) in the wage rates for H-2A workers represents an important transfer from non-H-2A workers in corresponding employment to agricultural employers, not just H-2A workers to agricultural employers. The lower (or higher) wages for H-2A workers associated with the final rule's methodology for determining the monthly AEWR will also result in wage changes to workers in corresponding employment. However, the Department does not have sufficient information about the number of workers in corresponding employment affected and their wage structure to reasonably measure the wage transfer to or from these workers.

The program has experienced a substantial increase in the number of certified H-2A applications and worker positions in the last 10 years that generally reflects the improving economy and lack of a sufficient number of domestic agricultural workers during the period (see Exhibit 3). The new AEWR methodology may further encourage U.S. employers to use more H-2A workers for field and livestock work in the absence of available U.S. workers; however, we

¹¹⁵ 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: $\text{Transfer} * (1.062^{(\text{Current year} - \text{Base year})})$.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

cannot measure the potential increase in the number of H-2A workers attributable to the new AEWB methodology due to data limitations.

4. Summary of the Analysis

Exhibit 9 summarizes the estimated total costs and transfer payments of the final rule over the 10-year analysis period.

The Department estimates the annualized costs of the final rule at \$0.07 million and the annualized transfer payments (from workers to H-2A employers) at \$170.68 million, at a discount rate of 7 percent.

Exhibit 9: Estimated Monetized Costs, Cost Savings, Net Costs, and Transfer Payments of the Final Rule (2020 \$millions)		
Year	Costs	Transfer Payments
2021	\$0.46	\$57.09
2022	\$0.00	\$139.71
2023	\$0.00	\$148.41
2024	\$0.00	\$157.65
2025	\$0.00	\$167.46
2026	\$0.00	\$177.89
2027	\$0.00	\$188.96
2028	\$0.00	\$200.72
2029	\$0.00	\$213.22
2030	\$0.00	\$226.49
Undiscounted 10-Year Total		
	\$0.46	\$1,677.61
10-Year Total with a Discount Rate of 3%		
	\$0.46	\$1,442.50
10-Year Total with a Discount Rate of 7%		
	\$0.46	\$1,198.77
10-Year Average		
	\$0.05	\$167.76
Annualized with a Discount Rate of 3%		
	\$0.05	\$169.10
Annualized with a Discount Rate of 7%		
	\$0.07	\$170.68

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

5. *Regulatory Alternatives*

The Department considered two alternatives to the chosen approach of establishing the AEW at the annual average hourly gross wage for the state or region and SOC from the FLS where USDA reports such a wage. First, the Department considered using the current FLS occupational classifications of field and livestock workers for each state or region to set a separate AEW for field workers and another AEW for livestock workers at the annual average hourly gross wage from the FLS for workers covered by those classifications. Under this alternative, the Department would use the OES average hourly wage for the SOC and state if either (1) the occupation covered by the job order is not included in the current FLS occupational classifications of field or livestock workers;¹¹⁶ or (2) workers within the occupations classifications of field or livestock workers but in a region or state where USDA cannot produce a wage for that classification, which is expected to occur only in Alaska. Finally, under this alternative where both OES state data is not available, and the work performed is not covered by the field or livestock worker categories of the FLS, the Department would use the OES national average hourly wage for the SOC.

The total impact of the first regulatory alternative was calculated in the same manner as the revised wage using FY2016 to FY2020 certification data. The Department estimated average annual undiscounted transfers of \$18.48 million. The total transfer over the 10-year period was estimated at \$184.76 million undiscounted, or \$159.97 million and \$132.37 million at discount

¹¹⁶ Among the workers excluded from the field and livestock worker categories of the FLS are workers in the following SOCs: Farmers, Ranchers and Other Agricultural Managers (SOC 11-9013) and First Line Supervisors of Farm Workers (SOC 45-1011), Forest and Conservation Workers (SOC 45-4011), Logging Workers (SOC 45-4020), and Construction Laborers (SOC 47-2061).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was \$18.75 million and \$19.12 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative considered by the Department, the Department would set the AEWL using the OES average hourly wage for the SOC and State. When OES state data is not available, the Department would set the AEWL at the OES national average hourly wage for the SOC under this alternative. The Department again used the same method to calculate the total impact of the regulatory alternative. The Department estimated average annual undiscounted transfers of \$66.36 million. The total transfer over the 10-year period was estimated at \$663.56 million undiscounted, or \$574.51 million and \$482.21 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was \$67.35 million and \$68.66 million at discount rates of 3 and 7 percent, respectively.

Exhibit 10 summarizes the estimated transfer payments associated with the three considered revised wage structures over the 10-year analysis period. Transfer payments under the final rule are transfers from H-2A employees to H-2A employers and transfers under both alternatives are transfers from H-2A employers to H-2A employees. The Department prefers the current approach because it allows specific OES wages for workers in higher-paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, while simplifying the AEWL for SOC codes set by the FLS AEWL and tying it to the ECI index. The Department prefers the chosen approach to the second regulatory alternative: the Department finds benefits to maintaining the FLS AEWL for some SOC codes, which is a superior wage source to the OES for those occupations. The FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages. The

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

chosen approach maintains the second regulatory alternative advantage of using OES for SOC codes where wages may be underestimated by the FLS AEW.

Exhibit 10: Estimated Monetized Wage Structure Transfer Payments and Costs of the Final Rule, Undiscounted (2020 \$millions)			
	Final Rule	Regulatory Alternative 1	Regulatory Alternative 2
Total 10-Year Transfer	\$1,678	\$185	\$664
Total with 3% Discount	\$1,442	\$160	\$575
Total with 7% Discount	\$1,199	\$134	\$482
Annualized Undiscounted Transfer	\$168	\$18	\$66
Annualized Transfer with 3% Discount	\$169	\$19	\$67
Annualized Transfer with 7% Discount	\$171	\$19	\$69

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, hereafter jointly referred to as the RFA, requires a final regulatory flexibility analysis (FRFA) when issuing regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM.¹¹⁷ The Chief Counsel for Advocacy of the Small Business Administration did not submit public comments on the NPRM.

The Department believes that this final rule will have a significant economic impact on a substantial number of small entities and therefore the Department publishes this FRFA. The

¹¹⁷ See 5 U.S.C. § 604.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Department invited interested persons to submit comments on the following estimates, including the number of small entities affected by the proposed rule, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

1. Objectives of and Legal Basis for the Final Rule

The Department is amending current regulations related to the H-2A program in a manner that modernizes and eliminates inefficiencies in the process by which employers obtain a temporary agricultural labor certification for use in petitioning DHS to employ a nonimmigrant worker in H-2A status. Sections 101(a)(15)(H)(ii)(a) and 218(a)(1) of the INA, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(a)(1), establish the H-2A nonimmigrant worker visa program which enables U.S. agricultural employers to employ foreign workers to perform temporary or seasonal agricultural labor or services where the Secretary of DOL certifies (1) there are not sufficient U.S. 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 aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. The standard and procedures for the certification and employment of workers under the H-2A program are found in 20 CFR part 655 and 29 CFR part 501.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, ETA, who in turn has delegated that authority to ETA's OFLC. Secretary's Order 06-2010 (Oct. 20, 2010). In addition, the Secretary has delegated to WHD the responsibility under section 218(g)(2) of the INA, 8 U.S.C. § 1188(g)(2), to assure employer

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

compliance with the terms and conditions of employment under the H-2A program. Secretary's Order 01-2014 (Dec. 19, 2014).

2. The Agency's Response to Public Comments

The Department received one comment on the IRFA. One commenter stated that, in their view, the proposed rule would fail to protect farmworkers and would disproportionately favor larger farming operations at the expense of smaller operations.

The Department does not believe that the final rule will have a disproportionately detrimental impact on small farms as the wage impacts on small entities are primarily a cost decrease. In fact, the Department estimates that more than 99 percent of small entities will receive a reduction in wage obligations. Additionally, the Department believes that the proposed changes to the wage rates reasonably implement the statute's requirement that the wages of workers in the United States similarly employed not be adversely affected by the employment of H-2A foreign workers.

3. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

The Department did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration.

4. Description of the Number of Small Entities to Which the Final Rule Will Apply

a. 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

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

defined by SBA, in effect as of August 19, 2019, to classify entities as small.¹¹⁸ 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 non-commercial banks) are classified by total assets (“small” is defined as less than \$550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.¹¹⁹

b. 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 FYs 2015, 2016, 2017, 2018, and 2019. Disclosure data for 2015 was included for cases that have certified workers in both 2015 and 2016. 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 identified 23,045 unique cases. Of those 23,045 cases, the Department was able to obtain data matches of revenue and employees for 6,135 H-2A cases with work in any year between 2016 and 2019. Because a single entity can apply for temporary H-2A workers multiple

¹¹⁸ Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.

¹¹⁹ See <http://www.sba.gov/advocacy/regulatoryflexibility-act> for details.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

times, unique entities had to be identified. Additionally, duplicate cases that appeared multiple times within the dataset were removed (*i.e.*, the same employer applying for the same number of workers in the same occupation, in the same state, during the same work period). Based on employer name, city, and state, the Department identified 2,627 unique entities with work in a year between 2016 and 2019, and of those determined that 1,990 (75.8 percent) were small.¹²⁰ These individual small entities had an average of 11 employees and average annual revenue of approximately \$3.31 million. Of these entities, 1,946 of them had revenue data available from Data Axle. The Department’s analysis of the impact of this final rule on small entities is based on the number of small individual entities (1,946 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 11 shows the number of individual H-2A small entities employers with certifications in any year between 2016 and 2019 within each NAICS code at the 6-digit and 4-digit level.

Exhibit 11: Number of H-2A Small Entities by NAICS Code

6-Digit NAICS	Description	Number of Employers	Percent
111998	All Other Miscellaneous Crop Farming	625	31%
444220	Nursery, Garden Center, and Farm Supply Stores	144	7%
445230	Fruit and Vegetable Markets	124	6%
561730	Landscaping Services	125	6%
111339	Other Noncitrus Fruit Farming	92	5%
424480	Fresh Fruit and Vegetable Merchant Wholesalers	78	4%
112990	All Other Animal Production	76	4%
115210	Support Activities for Animal Production	43	2%
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	37	2%
312130	Wineries	35	2%
Other NAICS		611	31%

¹²⁰ Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

4-Digit NAICS	Description	Number of Employers	Percent
1119	Other Crop Farming	632	32%
4442	Lawn and Garden Equipment and Supplies Stores	147	7%
4452	Specialty Food Stores	133	7%
5617	Services to Buildings and Dwellings	125	6%
1113	Fruit and Tree Nut Farming	109	5%
4244	Grocery and Related Product Merchant Wholesalers	97	5%
1129	Other Animal Production	84	4%
4249	Miscellaneous Nondurable Goods Merchant Wholesalers	73	4%
1151	Support Activities for Crop Production	49	2%
1152	Support Activities for Animal Production	43	2%
Other NAICS		498	25%

c. 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 final rule. We estimated the costs of (a) time to read and review the final rule and (b) wage cost savings (or 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-2A labor contractors, 1,946 unique small entities,¹²¹ would incur a one-time cost of \$53.57 to familiarize themselves with the rule.¹²²

In addition to the cost of rule familiarization above, each small entity will have a decrease (or increase) in the wage costs (or cost-savings) due to the revisions to the wage structure. To

¹²¹ The 1,946 unique small entities excludes all labor contractors.

¹²² $\$53.57 = 1\text{hr} \times \53.57 , where $\$53.57 = \$33.52 + (\$33.52 \times 43\%) + (\$33.52 \times 17\%)$.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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, we calculated total wage impacts by projecting total wages for 10 years under the baseline and 10 years under the final rule. If a small entity had a certification in multiple years in the historical data (*e.g.*, both 2016 and 2017) then we took an average of the projected 10-year wage impacts for each certification to avoid double-counting.

The Department determined the proportion of each small entities' total revenue that would be impacted by the cost savings (or costs) of the final rule to determine if the final 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 final rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a 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 is consistent with the threshold in the NPRM and has been used in prior rulemakings for the definition of significant economic impact.¹²³ This threshold is also consistent with that sometimes used by other agencies.¹²⁴ The Department used a threshold of 15 percent of small entities in the NPRM and has used 15 percent in prior rulemakings for the definition of substantial number of small entities.¹²⁵

¹²³ See, *e.g.*, Final Rule, *Establishing a Minimum Wage for Contractors*, 79 FR 60,634 (October 7, 2014); Final Rule, *Discrimination on the Basis of Sex*, 81 FR 39,108 (June 15, 2016).

¹²⁴ 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 3 percent annually are not economically significant).

¹²⁵ See, *e.g.*, 79 FR 60,634.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

Exhibit 12 provides a breakdown of small entities by the proportion of revenue affected by the costs of the final rule. Of the 1,946 unique small entities with work occurring in any year from 2016 to 2019 and revenue data, 8.2 percent of employers had more than 3 percent of their total revenue impacted in the first year. In the 10th year, 42.3 percent are estimated to have more than 3 percent of their total revenue impacted in the first year. Although a substantial number of small entities have a significant economic impact in the 10th year, more than 99 percent of small entities have an economic impact that is a cost savings due to declines in wages associated with the annual ECI update for the SOC codes set by FLS AEWR.

Exhibit 12: Cost Impacts as a Proportion of Total Revenue for Small Entities

Proportion of Revenue Impacted	1st Year	1st Year - %	10th Year	10th Year - %
< 1%	1,462	75.1%	620	31.9%
1% - 2%	239	12.3%	273	14.0%
2% - 3%	85	4.4%	229	11.8%
3% - 4%	45	2.3%	153	7.9%
4% - 5%	28	1.4%	126	6.5%
> 5%	87	4.5%	545	28.0%
Total >3%	160	8.2%	824	42.3%

5. *Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final*

Rule

The final rule does not have any reporting, recordkeeping, or other compliance requirements impacting small entities.

6. *Steps the Agency Has Taken to Minimize the Significant Economic Impact on Small*

Entities

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

The final rule will result in net cost savings to most (more than 99 percent of) small entities because the wage cost savings outweigh the trivial rule familiarization cost. Therefore, the Department did not consider alternatives to reduce the burden on small entities because there is no net cost imposed on small entities by this final rule..

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 final 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) (Pub. L. 104-4, codified at 2 U.S.C. § 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded federal mandates on state, local, and tribal governments. UMRA requires federal agencies to assess a regulation's effects on state, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each federal agency to prepare a written statement assessing the effects of any regulation that includes any federal mandate in a proposed or final agency rule that may result in \$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. A federal mandate is any provision in a regulation that imposes an enforceable duty upon state, local, or

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

tribal governments, or upon the private sector, except as a condition of federal assistance or a duty arising from participation in a voluntary federal program.

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

E. Executive Order 13132, Federalism

This final 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 Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

The Department has reviewed this final rule in accordance with E.O. 13175 and has determined that it does not have tribal implications. This final rule 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.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, 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 amends 20 CFR part 655 as follows:

Title 20—Employees’ Benefits

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), 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).

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).

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

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) 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).

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) *Definitions.* For the purposes of this subpart:

* * *

Adverse effect wage rate. 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 removing paragraph (c), redesignating paragraph (b) as paragraph (c), and adding a new paragraph (b) as follows:

20 CFR 655.120 Offered wage rate.

* * * * *

(b) *AEWR determinations.* (1) Except for occupations governed by the procedures in §§

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

655.200 through 655.235, the OFLC Administrator will determine the AEWs as follows:

(i) If the occupation and geographic area were included in the USDA FLS for wages paid to field and livestock workers (combined) as reported for November 2019,

(A) For the period from the effective date of this rule through calendar year 2022, the AEW shall be the annual average hourly gross wage for field and livestock workers (combined) in effect on January 2, 2020; and

(B) Beginning calendar year 2023, and annually thereafter, the AEW shall be adjusted based on the Employment Cost Index (ECI) for wages and salaries published by the BLS for the most recent preceding 12 months.

(ii) If the occupation or geographic area was not included in the USDA FLS for wages paid to field and livestock workers (combined) as reported for November 2019,

(A) The AEW shall be the statewide annual average hourly gross wage for the occupation if one is reported by the OES survey; or

(B) If no statewide wage for the occupation and geographic area is reported by the OES survey, the AEW shall be the national average hourly gross wage for the occupation reported by the OES survey.

(iii) The AEW methodologies described in paragraphs (b)(1)(i) and (b)(1)(ii) shall apply to all job orders submitted, as set forth in § 655.121, on or after the effective date of this rule, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134.

(2) The OFLC Administrator will publish a notice in the *Federal Register*, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEW.

Disclaimer: This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official regulation.

(3) [Reserved]

(4) [Reserved]

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

(c) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEW, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

John Pallasch,
Assistant Secretary for Employment and Training, Labor.