



## Prevailing Wage Determinations Under the 2022 H-2A Rule

On October 12, 2022, the US Department of Labor (DOL) [published a final rule](#) amending the regulations of the H-2A temporary agricultural work visa program (the “2022 H-2A Rule”). Farmworker Justice welcomes the final rule’s limited improvements to worker protections and its rejection of harmful changes proposed by the previous administration.

*Farmworker Justice’s summary fact sheet on the 2022 H-2A Rule is [available here](#).*

The 2022 H-2A Rule makes major changes to the DOL’s process for determining prevailing wages in the H-2A program. As explained below, the prevailing wage is one of four key wage protections for workers under the H-2A regulations. The expressed aim of these methodology changes is to “to allow state workforce agencies to produce more prevailing wage findings,” as such findings have significantly declined in recent years.

Farmworker Justice supports DOL’s efforts to revive the essential prevailing wage protection, but it remains to be seen whether this methodology successfully results in an increased number of reliable prevailing wage findings. The new methodology maintains many core flaws of the existing system, as it continues to rely on voluntary employer responses and ignores direct worker reports as a potential source of data.

### **What are prevailing wages and why do they matter?**

Under long-standing DOL rules, employers seeking to use the H-2A program must pay their workers the highest of four different wage sources: (1) the state or federal minimum wage; (2) the agreed-upon collective bargaining rate; (3) the Adverse Effect Wage Rate (AEWR); or (4) the applicable prevailing wage. This four-pronged wage structure is carefully calibrated, with each piece designed to protect U.S. workers from different wage pressures that may result from the availability of an unlimited foreign labor source.

The prevailing wage requirement, in particular, is intended to guard against wage depression in the areas that broad protections like the AEWR and minimum wage miss: the localities and specific job duties in which workers make the most money. Functioning properly, prevailing wage surveys identify those localized geographic areas and particular agricultural activities with wages that are historically higher than the AEWR. By requiring H-2A employers to pay the prevailing wage in those areas and activities, DOL ensures that employers cannot use H-2A workers to escape the wage demands of the local labor market.

For example, workers harvesting apples and cherries in Washington state are typically paid by the piece rate and earn wages that are significantly higher than the hourly AEW in the state. Most of these workers would not accept jobs that are advertised as paying only the AEW, as it would represent a major pay cut. If DOL allows employers to hire H-2A workers at the lower wage, the agency will create a distortion of the local labor market. This downward pressure on Washington workers' wages would clearly violate Congress's mandate that the H-2A program cannot adversely affect the wages or working conditions of US workers.

### **How were prevailing wages determined before the 2022 H-2A Rule?**

For decades, state workforce agencies (SWAs) have been responsible for the surveys that DOL uses to determine prevailing wages, but there was no regulatory standard for survey methodology. The Department relied on the Employment and Training Administration's (ETA) Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to set the standards that govern the prevailing wage surveys.

In recent years, the prevailing wage survey system has broken down. According to DOL's Agricultural Online Wage Library, only 12 states had at least one prevailing wage finding in *either* 2020 or 2021. By contrast, 18 states and territories have not had a single prevailing wage finding in the last decade; an additional 16 have not had any findings in the last five years.

### **What are the new requirements for prevailing wage surveys?**

One of the biggest changes in the 2022 H-2A Rule is that SWAs are no longer the only entity responsible for prevailing wage surveys. Although the SWA must still ultimately submit the survey results to DOL, it can rely on another state agency, a state college, or a state university to independently conduct the survey.

Once it has received the survey results, DOL's Office of Foreign Labor Certification (OFLC) will then determine whether each prevailing wage finding meets the following standards:

- **Single Crop:** The surveyed wages for that finding are limited to work performed in one crop, and if applicable, a single work task within that activity (e.g. harvest or pruning)
- **Appropriate Geographical Area:** The survey covers an "appropriate geographical area" based on surveyor resources, the size of the agricultural population, and different wage structures, if any.
- **Employer Contact:** A reasonable attempt was made to contact all employers with employees in that crop activity OR a randomized sample of employers was contacted as long as the sample included more than five employers.
- **Unit of Pay:** The survey findings report the average wage of US workers using the unit of pay (e.g., hourly or piece rate) used to compensate the largest number of US workers whose wages are reported in the survey.

- **Number of Included Workers:** The survey findings include the wages of at least 30 US workers in the unit of pay used to compensate the largest number of US workers whose wages are reported in the survey.
- **Number of Included Employers:** Where the estimated universe of employers is more than five, the survey findings include at least five employers. Where it is less than five, the findings include all employers.
- **25% Rule:** Where the estimated universe of employers is at least four, the wages paid by a single employer represent no more than 25 percent of the sampled wages in the unit of pay used to compensate the largest number of US workers whose wages are reported.

**What happens when OFLC approves a state's prevailing wage findings?**

If OFLC approves the survey results submitted by the SWA, it will publish the prevailing wage. The new published wage rate will apply even to H-2A contracts already underway, unless it is lower than the existing contractual wage rate. Under the new rule, prevailing wage determinations will last for one year from the date they are published on the OFLC website.