



## **New H-2A Rule Makes Progress on Worker Protections, But Further Reforms Needed**

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 2022 H-2A Rule’s limited improvements to worker protections and the standards that prospective H-2A employers must meet to obtain DOL certification. The impact of other changes, such as a new methodology for critically important prevailing wage determinations, remains unclear.

**What is clear is that this rule does not go far enough to make the structural reforms that are necessary to confront the widespread abuse of US and foreign farmworkers in the H-2A program.** The H-2A visa puts a worker's legal status under the control of their employer, creating a power imbalance that too often results in exploitation and violation of workers’ rights. These workers need more than limited technical changes to achieve a safe and fair workplace.

### **Which changes are important for farmworkers and their advocates?**

The 2022 H-2A Rule makes a wide range of technical changes to the program and certification process, but there are a few changes that should have significant impact on workers and their ability to vindicate their legal rights. These changes include the following:

- **Rental Housing:** Improves protections for workers housed in hotels, motels, and other public accommodations. Requires employers to attest that rental housing meets specific, articulated safety and health standards. (*See FJ’s fact sheet on [H-2A rental standards](#).*)
- **Meals and Reimbursements:** Clarifies that any meal charges are subject to limitations and recordkeeping requirements under the Fair Labor Standards Act.
- **Labor Contractor Bonds:** Increases the bond amounts that must be paid by H-2A labor contractors based on the number of employees they seek and the AEW for each year.
- **Debarment:** Establishes explicit authority for DOL to debar attorneys and/or agents for misconduct and violations of worker rights, independent of an employer’s violations.
- **Prevailing Wage Determinations:** Aims to increase the number of prevailing wage findings by updating the methodology used for prevailing wage surveys and allowing SWAs to rely on surveys conducted by other state entities, such as state colleges and universities. (*See FJ’s fact sheet on [prevailing wages in the 2022 H-2A Rule](#).*)

DOL’s preamble to the rule also includes important guidance on existing regulatory requirements. For example, it emphasizes the need for workers to receive meals that are “calorically and nutritionally adequate.” The rule provides clarifying language reiterating that grower associations filing as joint employers are liable for violations committed by member employers and that fixed site employers can legally be held jointly liable with the labor contractors they hire even if the two did not file a joint H-2A application.

### **What is the origin of the 2022 H-2A Rule?**

The 2022 rule finalizes portions of an H-2A rule proposed by the Trump Administration in 2019. As initially proposed, the Trump Administration's rule included numerous harmful changes to the H-2A program, detailed below, along with a few minor improvements. That proposed rule was later broken into two separate rules in 2020, when DOL finalized proposed changes to the methodology for the H-2A program's Adverse Effect Wage Rate (AEWR) which would have resulted in significant wage cuts for farmworkers. That final AEWR rule was blocked in 2021 and ultimately [vacated earlier this year](#) in a lawsuit brought by the United Farm Workers, who were represented by Farmworker Justice and WilmerHale.

The remainder of the Trump Administration's 2019 proposed rule is the basis of this 2022 H-2A Rule. As a result of this history, the Biden Administration faced strict legal limits in this rulemaking; the 2022 H-2A Rule could not make changes to the H-2A program that were not contemplated in the 2019 proposed rule.

### **How does the 2022 H-2A Rule differ from the 2019 proposed rule?**

We are pleased that DOL listened to farmworker advocates' concerns and declined to adopt several harmful provisions from the 2019 proposed rule. A few examples are below:

- The 2022 H-2A Rule does not redefine agricultural labor to include reforestation and pine straw activities, which would have limited certain rights of workers in those industries and circumvented the statutory cap on visas in the corresponding H-2B visa program.
- DOL rejected several proposals that would have harmed the ability of US workers to find and access agricultural jobs, such as eliminating the 50% rule—a rule that gives US workers preference for H-2A jobs up to the 50% point of the contract—and allowing employers to file staggered entry applications.
- For housing inspections, DOL rejected a 24-month certification period and self inspections, acknowledging that it would enable substandard, dangerous housing conditions to go undetected.

### **When does the 2022 H-2A Rule go into effect?**

The 2022 H-2A Rule will go into effect on November 14, 2022. However, DOL is providing an additional implementation period: After it goes into effect, the new 2022 H-2A Rule will only apply to applications for workers with a contract start date that is after February 12, 2023.

### **Will there be other changes to the H-2A program?**

DOL has already [announced its intent to issue another rule](#) aimed at improving worker voice and protections in the H-2A program, in addition to ongoing rulemaking on a [new AEWR methodology](#). The Department of Homeland Security also plans to issue a rule on H-2 program reforms under its jurisdiction. Farmworker Justice looks forward to engaging with policymakers to ensure that the next rule makes the meaningful reforms that farmworkers seek.