

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION
2022 H-2A Final Rule FAQs

Round 3: Job Offers, Assurances, and Obligations – Wages
December 7, 2022

Wage and Pay Obligations

1. What is the minimum wage an employer must offer, advertise, and pay H-2A workers and workers in corresponding employment?

H-2A employers, other than those whose workers will be employed in herding or production of livestock on the range, are required to offer, advertise in their recruitment, and pay, a wage that is at least equal to the highest wage rate applicable from the following wage sources:

- the Adverse Effect Wage Rate (“AEWR”);
- the prevailing wage rate (if available);
- the agreed-upon collective bargaining wage (“CBA”) rate (if applicable);
- the Federal minimum wage rate; or
- the State minimum wage rate.

Resources: Information about AEWRs is available on the Office of Foreign Labor Certification’s webpage at <https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates>, and information about approved prevailing wage surveys is available at the Office of Foreign Labor Certification’s (“OFLC”) Agricultural Online Wage Library (“AOWL”) at <https://www.dol.gov/agencies/eta/foreign-labor/wages/agriculture>.

Reminder: Prospective employers of workers to be engaged in herding or production of livestock on the range are covered by 20 CFR 655.200 through 655.235, which include a distinct list of wage sources applicable to H-2A job orders for work in those occupations.

2. What disclosures must an employer make regarding the wage rate to be offered, advertised, and paid to H-2A workers and workers in corresponding employment?

The employer must clearly and accurately identify the specified wage rate(s) offered in the Form ETA-790A, *H-2A Agricultural Employment Clearance Order* (“H-2A job order”), in Section B, Items 8.b through 8.e, and, if applicable in ETA-790A, Addendum A. If additional space is needed to disclose the employer’s wage offer accurately and clearly, the employer may also use ETA-790A, Addendum C.

The Department provides a standardized list of conditions of employment, assurances, and obligations, including pay requirements, that H-2A employers agree to comply with to participate in the H-2A program. For the Form ETA-790A, *H-2A Agricultural Clearance*

Order, the required conditions of employment are listed in Section I. For the Form ETA-9142A, *H-2A Application for Temporary Employment Certification*, the list of terms, assurances, and obligations are listed in Form ETA-9142A, Appendix A.

As the standardized lists accurately and clearly disclose the assurances, the employer should not add text in a form field that simply restates a regulatory requirement, such as the obligation to offer, advertise, and pay a wage rate that is at least equal to the highest of the AEW, prevailing wage, CBA, Federal minimum wage, or State minimum wage. The Department included the standardized list to ensure that the required terms, assurances, and obligations are clearly and accurately stated.

Information disclosed in ETA-790A, Addendum C, therefore, should not restate regulatory requirements, assurances, or obligations contained elsewhere on the form (*e.g.*, assurances contained in Section I). Similarly, information disclosed in ETA-790A may only relate to regulatory requirements of the H-2A program that are not already captured on the form, including Agricultural Recruitment System (ARS) regulations, found at 20 CFR part 653, subparts B and F, and part 654. Addendum C may not include statements or conditions related to the employer's work rules, employee handbook, or other similar detailed materials, unless directly related to the requirements of the H-2A program, including ARS regulations. For example, job related materials that an employer normally provides post-hire that are not directly connected to H-2A program requirements should not be included.

Finally, any additional material terms and conditions of employment in place must comply with the requirements of the Immigration and Nationality Act and the Department's applicable regulations. Additional, separate documents are not permitted; all additional material terms and conditions of the job offer must be contained in Addendum C.

Important Note: The SWA or the CO may ask employers to remove any noncompliant text from the job order, which may slow processing. The failure to remove any noncompliant text may result in the denial of the job order.

3. What are “piece rate” wages?

A piece rate is a wage rate where the employer assigns a dollar value to each “unit” or quantity of goods a worker produces. The employer will determine which types of piece rates are offered for work performed in its agricultural operation. For example, an employer may offer a range of piece rates depending on various unit sizes (*e.g.*, bushel, pot, container, etc.). In addition, an employer may offer piece rates that differ by crop or agricultural activity.

4. If the employer offers a piece rate wage, what is its wage obligation?

The employer must guarantee that workers will earn at least the hourly wage rate the worker would have earned if the worker had instead been paid at the required minimum hourly rate for each hour worked. In the event a worker's piece rate earnings do not meet or exceed that required minimum hourly rate, the employer must supplement the worker's pay at the end of

each pay period such that the worker’s earnings are at least as much as the worker would have earned if paid under the required minimum hourly rate. *See* 20 CFR 655.122(l)(2).

5. If the employer offers a piece rate, what additional wage offer disclosures are required in the H-2A job order?

To properly disclose piece rate wages offered in an H-2A job order, the employer must identify the rate of pay offered for each unit size. Each piece rate offered must be listed in Form ETA-790A, Section B, Items 8.b through 8.e, and, if applicable in ETA-790A, Addendum A and/or Addendum C.

The employer must also identify the estimated hourly wage rate equivalent for each distinct piece rate offered. Although estimated hourly wage rate equivalents are neither the offered rate nor a guarantee, they must be entered on the Form ETA-790A to enable the SWA to “check if the employer’s calculation of the estimated hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher.” 20 CFR 653.501(c)(2)(i).

To enable the SWA to complete this check, the employer must identify the:

- crop;
- wage offer (amount of pay per piece) for each possible unit. Here the employer must specify how a unit will be determined using plain language. For example, describing the unit using measurements, dimensional or by weight, for containers. Simply stating a “box” of undefined size is insufficient;
- how many of each of the listed units are workers typically able to complete per hour; and
- the estimated hourly wage rate for each of the listed units, assuming a worker completes the typical number of units per hour.

The Form ETA-790A provides a free text field at Item A.8e, and corresponding fields appear in the Form ETA-790A, Addendum A, where an employer may disclose additional information about its piece rate wage offers as is necessary, such as detailed information on unit size and the estimated hourly wage rate equivalent for the offered piece rate.

Example using ETA-790A, Item A.8e:

8b. Wage Offer * \$ 17.41	8c. Per * <input checked="" type="checkbox"/> HOUR <input type="checkbox"/> MONTH	8d. Piece Rate Offer \$ \$ 0.75	8e. Piece Rate Units/Special Pay Information § <i>Per Pound of Blueberries Harvested. Estimated hourly wage rate equivalent for this piece rate is \$37.50/hr based on workers picking 50 lbs/hr on average. Guaranteed \$17.41/hr.</i>
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Example using ETA-790A, Addendum A:

A.9. Additional Crop or Agricultural Activities and Wage Offer Information

Crop ID	Crop or Agricultural Activity	Wage Offer	Per	Piece Rate Units / Estimated Hourly Rate / Special Pay Information
	Apple Harvesting	\$ <u>25.00</u>	bin	Per 47x47x24.5 bin. Estimated hourly wage rate equivalent for this piece rate is \$18.75/hr based on workers filling 0.75 bin/hr on average. Guaranteed \$17.41/hr.
	Pear Harvesting	\$ <u>25.10</u>	bin	Per 47x47x24.5 bin. Estimated hourly wage rate equivalent for this piece rate is \$18.82/hr based on workers filling 0.75 bin/hr on average. Guaranteed \$17.41/hr.

Also, as reflected in the examples above with “Guaranteed \$17.41/hr.” the employer must disclose the hourly wage rate that it guarantees the worker will earn for any pay period in which the worker’s earnings at the piece rate are less than what the worker would have earned if the worker had instead been paid at the appropriate hourly wage rate for each hour worked. *See* 20 CFR 655.122(1)(2). The employer’s obligation to supplement pay, if necessary, at the end of each pay period is fully disclosed in Form ETA-790A, Section I and does not need to be restated.

6. If the employer uses a written contract distinct from the job order, what wage should be listed in the contract?

If the employer uses a written contract distinct from the job order, it must list the same wage rate as the rate listed on the job order and approved by the SWA and OFLC National Processing Center (“NPC”).

Important Note: If the employer intends to sign work contracts before the SWA and NPC accept the job order for recruitment and the SWA or NPC subsequently directs the employer to modify the wage rate listed on the job order, the employer will be required to also modify its work contracts to reflect the approved wage rate.

7. How often must workers receive their paychecks?

An employer must pay H-2A workers and workers in corresponding employment at least twice monthly, or according to the prevailing practice in the area of intended employment, whichever is more frequent.

Important Reminder: OFLC has established the Agricultural Employment Practice Survey Library, which makes prevailing practice information available to employers and the public. This library is available on our website at http://www.foreignlaborcert.doleta.gov/aowl_survey_pdf.cfm.

8. If OFLC publishes notice of an updated hourly AEW or another wage source in 20 CFR 655.120(a) changes, does the employer need to re-evaluate its wage offer and pay obligations?

Yes. An employer in the H-2A program is required to offer, advertise in recruitment, and pay H-2A workers and workers in corresponding employment a wage that is at least equal to the highest wage rate applicable to the job opportunity, based on a review of the following wage sources: the AEW; the prevailing wage rate (if applicable); the CBA rate (if applicable); the

Federal minimum wage rate; or the State minimum wage rate. If the wage rate for any one of the wage sources changes, the change may impact which of the wage sources is the highest applicable to the employer's job opportunity and/or the rate governing the employer's minimum wage obligation.

For example, if the Department publishes an adjusted AEW and that wage is higher than the wage rate listed on the employer's job order and/or work contract, the employer will be required to increase the offered wage so that the wage rate offered and paid to H-2A workers and workers in corresponding employment is at least equal to the new, higher AEW. Similarly, if an applicable prevailing wage is updated during the contract period and the Department notifies employers of the update, all employers whose approved wage rate (listed on the job order and/or work contract) is lower than the new prevailing wage will be required to adjust the wage paid to H-2A workers and workers in corresponding employment so that their pay is at least equal to the new, higher prevailing wage rate. The Department's notification of AEW adjustments and/or prevailing wage updates will state the effective date of the wage increase. All affected employers must adjust to the higher wage rate upon the effective date of the new rate.

Important Note: OFLC encourages employers to monitor each of the wage sources that impact their H-2A wage obligation from the time of job order submission (or signing a work contract) until the last date an H-2A worker or worker in corresponding employment is employed under the H-2A job order to ensure that they are in compliance with the obligation to offer, advertise, and pay workers a wage rate that is at least equal to the highest rate among the sources at all times.

9. If OFLC publishes an adjusted hourly AEW or prevailing wage rate update during the work contract period and the new rate is lower than the certified rate, does the employer's wage obligation to workers decrease?

No. An employer's obligation to pay H-2A workers and workers in corresponding employment at least the certified wage rate remains throughout the work contract period.

Important Note: The Department's H-2A regulations prohibit contract terms that would decrease the wage paid in the event an adjusted AEW or prevailing wage rate is lower than the offered rate. 20 CFR 655.120(b)(4), (c)(4).

Prevailing Wages

10. How are prevailing wage rates determined?

In the H-2A program, the prevailing wage rates may be based on either SWA surveys of wages paid for a particular crop activity or agricultural activity or, if applicable, a distinct task within the crop activity or agricultural activity. The SWA may conduct the survey itself, or the SWA may use a survey independently conducted by another State agency, a State college, or a State university. After conducting a survey, or selecting a State survey, the SWA submits the survey and Form ETA-232, *Domestic Agricultural In-Season Wage*

Report, to OFLC for review. If the OFLC Administrator determines the survey complies with the prevailing wage survey methodology criteria at 20 CFR 655.120(c)(1), the OFLC Administrator will approve the prevailing wage finding(s) and post the prevailing wage rate(s) on OFLC's Agricultural Online Wage Library (AOWL) (<https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates>).

11. Is a prevailing wage rate always available for H-2A job opportunities?

No. A SWA may conduct a survey but be unable to reach a prevailing wage finding that satisfies prevailing wage methodology requirements at 20 CFR 655.120(c)(1) based on the survey results (e.g., due to insufficient numbers of employer responses and/or workers' wages reported). In such cases, OFLC may post "No Finding" on AOWL for the crop activity or agricultural activity and, if applicable, the distinct task(s) within that activity.

In addition, the SWA may determine not to survey crop activities or agricultural activities and, if applicable, distinct work task(s) within those activities. For example, where a SWA's knowledge and information regarding employment in the State indicates that a survey would generate a prevailing wage finding at an hourly rate lower than the other wage sources listed in 20 CFR 655.120(a), the SWA may determine not to expend resources to survey that agricultural activity. In contrast, where an activity or task is compensated at a rate other than hourly (e.g., piece rate), the SWA may conduct a survey to establish the prevailing rate, including establishing the minimum piece rate wage offer permitted for H-2A workers and workers in corresponding employment, if a piece rate is found to be the prevailing unit of pay. The rates that are generally available for the other wage sources listed in 20 CFR 655.120(a) are hourly.

Important Note: Where there is no prevailing wage rate posted on AOWL, or "no finding" is posted on AOWL, for the activity or task(s) applicable to the employer's job opportunity, the employer must offer, advertise, and pay H-2A workers and workers in corresponding employment a wage that is at least equal to highest applicable wage rate from the other four wage sources listed in 20 CFR 655.120(a) (i.e., the AEW, the CBA, the Federal minimum wage, or the State minimum wage, as applicable).

12. How will the Department notify an employer if the prevailing wage rate changes after the employer submits a job order and/or H-2A application?

When a prevailing wage rate changes, OFLC posts the new prevailing wage rate, including the effective date, on AOWL, available at <http://www.foreignlaborcert.doleta.gov/aowl.cfm>. Also, the NPC notifies employers whose H-2A applications have not yet been certified of the change during application processing. After certification, the NPC notifies all potentially affected employers with active certifications of the change by email, or alternative direct means.

Important Note: Because OFLC receives new wage findings from States for different crops/occupations on a rolling basis, employers are encouraged to periodically check the AOWL to ensure that they are paying the appropriate required wage throughout the certified period of employment. If needed, Employers may direct their questions regarding the

applicability of new wage determinations to TLC.Chicago@dol.gov.

13. May an employer appeal a wage determination in the H-2A program?

Not directly. The H-2A regulations do not contain a provision for appealing wage determinations. However, if the SWA and the employer do not agree on the correct wage that must be offered in the H-2A job order, the employer may bring the disagreement to the NPC by filing an H-2A application with the NPC, following the emergency filing procedures contained in 20 CFR 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. *See* 20 CFR 655.121(e)(3). If the matter is not resolved with the CO, and the CO issues a Final Determination denying the H-2A application, the employer may follow the appeal procedures at 20 CFR 655.171 and request an appeal from the Final Determination.

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Important Note: *The examples provided are for illustrative purposes only. The Department evaluates each application on its merits and based on the information available during processing.*