



UNITED STATES DEPARTMENT OF LABOR

Temporary Labor Certification Program

2022 H-2A Final Rule

Prevailing Wage Surveys
January 18, 2023

Office of Foreign Labor Certification
Employment and Training Administration



Disclaimer

This presentation is intended for training use only and does not carry the force of legal opinion.

The Department of Labor is providing this information as a public service. This information and any related materials are presented to give the public access to information on the Department of Labor programs. You should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publications of the materials and the modification of these pages. Therefore, we make no express or implied guarantees. The *Federal Register* and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention.



UNITED STATES DEPARTMENT OF LABOR

OFLC Presenters

- Lindsey Baldwin
Program Director for National Prevailing Wage Center (NPWC)
- Cheryl Beasley
Supervisor Immigration Program Analyst (NPWC)
- Kisa Hyman
Senior Immigration Program Analyst (NPWC)
- Irene Kho
Immigration Policy Analyst



2022 H-2A Final Rule Overview for Prevailing Wage Survey

- Regulatory Action
- Prevailing Wage Surveys
 - Overview of Regulatory Changes
 - New Survey Methodology Criteria
- Submission, Review, and Approval Process



Regulatory Action



Regulatory Action

- In 2019, the Department published a Notice of Proposed Rulemaking proposing to comprehensively modernize and enhance the regulations governing the certification of temporary nonimmigrant agricultural employment and the enforcement of applicable obligations for employers of H-2A workers and workers in the United States similarly employed
- On October 12, 2022, the Department published a Final Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (“2022 H-2A Final Rule”) <https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-20506.pdf>
- The 2022 H-2A Final Rule addresses aspects of the H-2A program except for the Adverse Effect Wage Rate (“AEWR”) methodology
- The Department is addressing proposals for the AEWR methodology in a separate regulatory action



2022 H-2A Final Rule Overview

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



Effective Date and Transition Period

- The 2022 H-2A Final Rule became effective on November 14, 2022
- Department's ETA Handbook 385 guidelines apply if:
 - The Form ETA-232, *Domestic Agricultural In-Season Wage Report*, was submitted before November 14, 2022
- 2022 H-2A Final Rule procedures apply if:
 - The Form ETA-232 was submitted (mailed date) on or after November 14, 2022
 - The new OMB approved Form ETA-232 must be used if submitted on or after the effective date
- Prevailing wage surveys conducted before November 14, 2022, based on the ETA Handbook 385 may be submitted if:
 - The surveys satisfied the 2022 H-2A Final Rule prevailing wage methodology requirements



Prevailing Wage Surveys



Regulatory Changes

- Replaces the ETA Handbook 385 with new prevailing wage survey standards
- Allows State entities other than SWAs to conduct prevailing wage surveys for use in the H-2A program (e.g., State agency, State college, or State university), if that survey meets the methodological requirements
- Establishes a regulatory process for SWAs to submit prevailing wage surveys to OFLC to review, approve, and post prevailing wages on OFLC's Agricultural Online Wage Library
- Revised the Form ETA-232



New Prevailing Wage Survey Criteria

- OFLC Administrator will issue a prevailing wage for the crop activity or agricultural activity if a prevailing wage survey meets all of the requirements in § 655.120(c)(1):
 - The SWA submits a prevailing wage survey with Form ETA-232, which explains the methodology used to conduct the survey, see § 655.120(c)(1)(i)
 - The survey was independently conducted by the SWA or another State agency, State college, or State university, see § 655.120(c)(1)(ii)
 - The survey covers work performed in a single crop activity or agricultural activity and, if applicable, a distinct work task(s) performed in that activity, see § 655.120(c)(1)(iii)
 - The survey covers an appropriate geographic area, based on consideration of three factors (i.e., available resources to conduct the survey; the size of the agricultural population covered by the survey; and any different wage structures in the crop activity or agricultural activity within the State), see § 655.120(c)(1)(vi)



New Prevailing Wage Survey Criteria (cont.)

- The surveyor contacted employers to collect wage data as required by § 655.120(c)(1)(iv) (i.e., all employers or a randomized sample) based on the estimated universe of employers, as addressed in slide 13 below
- The survey data is not unduly impacted by the wages of a dominant employer (i.e., a single employer whose wage data represents 25 percent or more of the sampled wages), as required under § 655.120(c)(1)(ix) – as addressed in 14 below;
- The survey reports the average wage of U.S. workers in the crop activity or agricultural activity (and distinct task(s), if applicable) and geographic area, as required under § 655.120(c)(1)(v);



New Prevailing Wage Survey Criteria (cont.)

- The average wage reported in the survey is based on:
 - the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey, as required under § 655.120(c)(1)(v);
 - the wages of 30 or more U.S. workers receiving that unit of pay, if the estimated universe is at least 30 U.S. workers. Alternatively, if the estimated universe of U.S. workers is less than 30, the average wage reported is based on the wages of all such workers, as required under § 655.120(c)(1)(vii); and
 - the wages of 5 or more employers in that unit of pay, if the estimated universe is at least 5 employers. Alternatively, if the estimated universe of employers is less than 5, the average wage reported is based on the wages of U.S. workers employed by all such employers, as required under § 655.120(c)(1)(viii).



New Prevailing Wage Survey Criteria (cont.)

- Estimated Universe of Employers under 655.120(c)(1)(iv)
 - If the estimated universe of employers employing workers in the crop activity or agricultural activity (and distinct work task(s), if applicable) in the geographic area to be surveyed is five or more, the surveyor must either:
 - Make a reasonable, good faith attempt to contact all employers in the estimated universe; or
 - Conduct a randomized sample of all the employers in the estimated universe and contact all of the employers in the randomized sample.
 - If the estimated universe of employers is four or fewer, the surveyor must contact all employers in the estimated universe



New Prevailing Wage Survey Criteria (cont.)

- Dominant Employer under § 655.120(c)(1)(ix)
 - Where the estimated universe of employers is at least four, the wages paid by a single employer may not represent no more than 25 percent of sampled wages in the unit of pay
 - However, where the estimated universe of employers is three or fewer the prevailing wage methodology provides an exception to the 25 percent ceiling on sampled wages from a single employer.



**Filing and Review of Form
ETA-232, Domestic
Agricultural In-Season Wage
Report (“Form ETA-232”)**



Form ETA-232 Filing Procedures

- SWA prepares and submits the survey with the new Form ETA-232 as approved by the Office of Management and Budget.
- OFLC strongly recommends submitting the survey and Form ETA-232 electronically, using the Agricultural Wage Surveys email box at agwage.surveys@dol.gov. If electronic filing is not feasible, mail the survey and Form ETA-232 to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center, 200 Constitution Ave., NW, Box N-5311, Washington, DC, 20210.



Review of Form ETA-232

This form is for use of State Workforce Agencies to submit survey results for prevailing wage determinations. Please read and review the Form ETA-232 form instructions carefully before completing this form electronically. A copy of the instructions can be found on the Office of Foreign Labor Certification website at <https://www.dol.gov/agencies/eta/foreign-labor/forms>. Those items marked with an asterisk () are required and must be completed. Items marked with the section symbol (§) are conditional and are to be completed if the condition is met.*

A. State Workforce Agency Prevailing Wage Survey Point of Contact

1. Name *	2. Title *	3. State *
4. Telephone number *	5. Email address *	



Form Review of ETA-232

B. Survey Information and Results

1. Is the ETA-232 a resubmission? *		<input type="checkbox"/> Yes <input type="checkbox"/> No
2. A copy of the wage survey is attached. *		<input type="checkbox"/> Yes
3. Identify the State agency, college, or university that conducted the survey. *		
3a. Surveyor name, if different from Item A.1. §		3b. Surveyor title. §
3c. Surveyor telephone number. §		3d. Surveyor email address. §
4. Identify the geographic area of the wage report. *		



UNITED STATES DEPARTMENT OF LABOR

Form Review of ETA-232

5. Identify the crop activity or agricultural activity covered by the survey. *	
5a. Identify the distinct work task(s) in the crop activity or agricultural activity covered by the survey. *	
6. The survey result meets each regulatory criteria to produce a prevailing wage rate (See Section C). * <input type="checkbox"/> Yes <input type="checkbox"/> No	
6a. Prevailing wage rate. § \$ _____	6b. Per (choose only one) § <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Month <input type="checkbox"/> Piece Rate (unit): _____
7. Comments (describe variables affecting rates, crop conditions, or other explanatory and pertinent information): §	



UNITED STATES DEPARTMENT OF LABOR

Review of Form ETA-232

C. Survey Data and Methodology

1. The survey was independently conducted by the State (e.g., any State agency, State college, or State university). *	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. The survey covers work performed in a single crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that crop activity or agricultural activity. *	<input type="checkbox"/> Yes <input type="checkbox"/> No
3. The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State. *	<input type="checkbox"/> Yes <input type="checkbox"/> No
3a. Explain how the surveyor determined the scope of the geographic area to survey. *	
4. For the geographic area, the surveyor (mark only one): *	
<input type="checkbox"/> Attempted to contact all employers employing workers in the crop activity or agricultural activity and, if applicable, distinct work task(s) performed in that crop activity or agricultural activity <input type="checkbox"/> Contacted a randomized sample of such employers <input type="checkbox"/> Contacted all such employers (required where the estimated universe of employers in Item C.4b is less than 5) <input type="checkbox"/> None of the above	
4a. Name of the source(s) used to identify the employers that employ U.S workers in the crop activity or agricultural activity (and distinct work task(s), if applicable) and geographic area surveyed: *	
4b. Estimated number of employers identified through the source(s) in Item C.4a: *	4c. Estimated number of U.S. workers identified through the source(s) in Item C.4a: *



Review of Form ETA-232

5. The survey reports the average wage of U.S. workers in the crop activity or agricultural activity (and distinct work task(s), if applicable) and geographic area using the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. *	<input type="checkbox"/> Yes <input type="checkbox"/> No
5a. Identify the unit of pay used to compensate the largest number of U.S. workers in the crop activity or agricultural activity (and distinct work task(s), if applicable) and geographic area surveyed. *	
6. If Item C.4c is at least 30, the survey includes the wages of at least 30 U.S. workers in the unit of pay in Item C.5a, OR If Item C.4c is less than 30, the survey includes the wages of all such U.S. workers. *	<input type="checkbox"/> Yes <input type="checkbox"/> No
7. If Item C.4b is at least 5, the survey includes wages of U.S. workers employed by at least 5 employers in the unit of pay in Item C.5a, OR If Item C.4b is less than 5, the survey includes the wages of U.S. workers employed by all such employers. *	<input type="checkbox"/> Yes <input type="checkbox"/> No
8. If Item C.4b is at least 4, the wages paid by a single employer represent no more than 25 percent of sampled wages in the unit of pay in Item C.5a. * (Not applicable if the estimated universe of employers in Item C.4b is less than 4.)	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A



OFLC Review and Posting upon Approval

- NPWC reviews the submission and, if all prevailing wage methodology criteria are met, approves the prevailing wage finding
- NPWC may request additional information regarding the survey and survey methodology if necessary
- Upon approval of the prevailing wage finding, NPWC posts the prevailing wage rate(s) on OFLC's Agricultural Online Wage Library ("AOWL"), <https://www.dol.gov/agencies/eta/foreign-labor/wages/agriculture>
- Once posted on AOWL, a prevailing wage rate remains valid for 1 year, unless replaced with an adjusted prevailing wage rate. If not replaced, the prevailing wage rate will be removed from AOWL after 1 year.

Note: If the wage rate is adjusted, that adjusted wage rate is valid for one year from the date posted on the AOWL.

Examples





UNITED STATES DEPARTMENT OF LABOR

Example: Less Than 5 Reported Employers and 30 Reported U.S. Workers

Estimated Employers	Estimated U.S. Workers	Number of Reported Employers	Number of Reported U.S. Workers' Wages	Survey Must Have Employer's Response Rate	Analysis (Looking for reported wages in the unit of pay for the largest number of workers)
ETA-232 C.4.b	ETA-232 C.4.c.	ETA-232 C.7	ETA-232 C.6		
4	29	4	29	100%	<p><u>Employers:</u> Since the survey estimated less than 5 employers in the universe, the survey must report all wages from all 4 estimated employers.</p> <p><u>Workers:</u> Since the survey estimated less than 30 workers in the universe, the survey must report wages in all units of pay for all 29 estimated workers.</p> <p><u>Unit of Pay:</u> The survey must report all units of pay. We are looking for the unit of pay that pays the largest number of workers out of the 29 reported workers. For example, if 20 workers out of 29 were paid hourly, and 9 workers out of 29 were paid in piece rate. Therefore, the prevailing wage analysis is focused on the 20 workers who are paid hourly. Hourly is the unit of pay used to compensate the largest number of workers.</p>



UNITED STATES DEPARTMENT OF LABOR

Example: 5 Reported Employers and 30 Reported U.S. Workers

Estimated Employers ETA-232 C.4.b	Estimated U.S. Workers ETA-232 C.4.c.	Number of Reported Employers ETA-232 C.7	Number of Reported U.S. Workers' Wages ETA-232 C.6	Survey Must Have Employer's Response Rate	Analysis (Looking for reported wages in the unit of pay for the largest number of workers)
5	30	5	30	100%	<p><u>Employers:</u> Since there are 5 estimated employers in the universe, the survey must report all wages from all 5 employers.</p> <p><u>Workers:</u> Since the survey estimated 30 workers, the survey must report all wages for all 30 workers.</p> <p><u>Unit of Pay:</u> We are looking for the unit of pay used to compensate all 30 workers' wages. All 30 workers must be paid in the same unit.</p>



Example: Dominant Employer Assessment

How NPWC assesses whether wages paid by a single employer represent no more than 25 percent of the sampled wages in the unit of pay.

Reported Employers	Reported U.S. Workers	Reported Wage Paid	Unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey
A	1	\$12	Piece rate
B	7	10	Piece rate
C	1	14	Piece rate
D	2	13	Piece rate
E	2	11	Piece rate
F	5	10	Piece rate
Total: 6	18	69	



Example: Dominant Employer Assessment

Calculation

- First: Look at the list of employers to see which has the highest number of workers. In the example provided, the highest is 7 with Employer B
- Second: Sum the number of workers whose wages are reported in the unit of pay. In the example provided, the total is 18
- Third: Divide the highest number of workers (7) by the total number of workers (18) to determine if that employer's wages exceed the 25% limit
 - $7/18 = .38 \times 100 = 38\%$
 - 38% exceeds the 25% limit. The survey is **invalid** because the Employer B's wages exceed the 25% threshold. Therefore, NPWC will post a "No Findings" for the survey



Reminders

- The survey should be included with the Form ETA-232
- The number of workers employed by the employers should be included in the survey
- All units of pay should be included in the survey if applicable
- When the estimated and reported universe of employers are less than 5, the survey should include all wages from all employers (100% response rate)
- Request for additional information regarding the survey and survey methodology will be sent if necessary



Questions
