

RIN:1205-AB89

Title: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States

Agency/Subagency: Department of Labor (DOL) / Employment and Training

Administration (ETA)

E.O. 12866 Meeting Request

The NPRM entitled “Temporary Agricultural Employment of H-2A Nonimmigrants,” published under DOL Docket No. ETA-2019-007, includes a number of proposals to revise the federal standards for how state workforce agencies (SWAs) must administer wage surveys to establish prevailing wages for specific crop activity/region combinations. A stated goal within the NPRM is to encourage states to conduct more prevailing wage surveys – regardless of accuracy.

The H-2A program currently requires that growers utilizing the program pay the highest of the state or federal minimum wage, a wage agreed upon as a part of a collective bargaining agreement, the adverse effect wage rate (AEWR) reported annually by the U.S. Department of Labor (DOL), or a prevailing wage established by a state survey and certified by DOL. In the NPRM, DOL states that “the AEWR is actually a type of prevailing wage rate because it is the wage rate that is determined from a survey of actual wages paid by employers.”¹ The prevailing wage survey is intended to identify unique situations where a particular crop activity for a particular region may be higher than the prevailing agricultural wage for the entire area. DOL has acknowledged that, even if states conduct more surveys, the AEWR will still apply to over 92 percent of job orders; raising the question of whether the burden on states and employers outweighs the need for prevailing wage surveys in the H-2A program.

In fiscal year 2021, Washington state was the fourth-largest user of the H-2A program, representing nine percent of all certified positions.² Tree fruit is, by far, the largest user of the H-2A program within Washington state. Demonstrating the burden of these surveys, Washington state is the **only** state in the nation that routinely conducts prevailing wage surveys to establish wage rates through the H-2A program. However, that places the Northwest Horticultural Council (NHC) in a unique position to provide input on what changes would be helpful and harmful to establishing accurate wage rates that benefit both domestic workers and employers.

Current Challenges:

In recent years, the prevailing wage rates established by Washington state’s Employment Services Department (ESD) and certified by DOL have been inaccurate. The NHC has conducted an informal survey of Washington state tree fruit growers that represent a significant percentage the tree fruit acreage. The results of this survey have consistently reported that the ESD prevailing wage rates are much higher than what was actually paid during the previous year.

¹ DOL Docket N. ETA-2019-007 at 36179.

² https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2021.pdf

In a more concrete example, a significant percentage of the Washington apple industry reported in 2018 that over 85 percent of workers employed in apple harvest and harvest color picking were paid no more than \$15 per hour for Honeycrisp and \$14.12 per hour for other varieties.³ And yet, the 2019 DOL certified prevailing wage rate for Washington state apple harvest was \$16 per hour. These inaccuracies have been experienced by other industries as well - blueberry growers also saw an increase of 50 percent in the prevailing wage rate in 2019.⁴ Assuming the ESD survey of 2018 wages was conducted based on the requirements and guidance of DOL, it is unclear how those results could be validated under the required statistical thresholds.

Moreover, the NHC has heard universally from Washington state tree fruit growers that the H-2A wage (whether it be the AEWR or prevailing wage rate) serves as the wage floor for all growers – H-2A and non-H-2A alike. This is due to the corresponding employment requirements within the H-2A program and competition for domestic workers. This is even more reason to ensure that an accurate wage rate based in sound statistical surveying methods is used in the program.

Complexities: The establishment of wage rates by tree fruit growers is complex. When left to the private marketplace, wage rates are reliant on a multitude of different factors that can change from year-to-year as well as throughout the season. This is beneficial to workers who have the ability to earn more with these flexibilities. But these variances are very difficult to account for in employer surveys.

A tree fruit grower may pay their employees hourly, via piece rate (i.e., per bin of fruit picked), or an hourly rate plus a bonus if a certain metric is met. These rates may also differ based on variety of fruit picked (some varieties are more subject to bruising than others requiring more care by the worker) or whether an orchard is being color picked (taking more time and care by the worker) versus all non-damaged fruit being picked at the same time. A forecast of a potential freeze, rain, or other weather event that could harm fruit on the trees may prompt employers to pay workers a premium to get as much fruit picked as possible before the potential season-ending event occurs. In addition, crop load affects wage rates from year-to-year, with growers likely to offer a higher wage rate in years where there is a light crop load and workers have to take more time and cover a larger surface area of an orchard to pick the same number of apples. Conversely, in years where there is a larger-than-normal crop load on the trees, growers may offer a lower base rate of pay because workers can pick more fruit in less time and cover a smaller surface area, but still earn higher wages when factoring in piece rates. Similarly, pay rates may differ between orchards with tall, freestanding trees that require ladders to access, versus trellised orchards planted on dwarfing rootstock where workers are essentially picking from a wall of fruit because trees are planted so close together and ladder use is minimized.

These examples provide merely a portion of the variability in pay rates and types, and is certainly not exhaustive. It is nearly impossible to account for all of the factors in a survey and

³ Workers are traditionally paid more to pick Honeycrisp, due to the characteristics of the variety.

⁴ Zirkle Fruit Co. v. U.S. Dep't of Labor, et al., 442 F. Supp. 3d 1366, 1383 (E.D. Washington 2020)

inaccurate survey results can negatively impact to the earning potential of the workers DOL is charged with protecting.

Unsurprisingly, Washington state's ESD has been inconsistent in accounting for these many factors. In 2018, prevailing wages for tree fruit were based on the density of the orchard planting (i.e., low, medium, high, or all), as well as whether a variety was being color picked or an orchard was being stem clipped. This led to 71 separate wages being established. In 2019, there were significantly fewer wage rates established (31), with only harvesting, pruning, or thinning listed for different commodities. Density was not considered, and there were four fewer apple varieties listed. In 2020, the number of separate commodity/activity combinations were further reduced to 19. There has been no consistency to the wages established through the existing survey process.

Also, the unit of payment identified as the prevailing wage for crop activities has also been highly inconsistent. In 2019, the prevailing wage for harvesting berries was set at \$12.64 per hour. In 2019, it was set at \$0.50 per pound picked (i.e., the unit of pay changed from hourly to piece rate). Harvesting Dark Red cherries went from \$12.00 per hour to \$0.22 per pound picked, and harvesting Lapin cherries went from \$12.00 per hour to \$0.22 per pound picked. To wrap it all up, 17 percent of commodity/activity combinations were based on hourly wages in 2018, 81 percent in 2019, and 47 percent in 2020.

Transparency: NHC members have voiced concerned about the lack of transparency in how Washington ESD has conducted their prevailing wage surveys. The ESD and DOL have been sued multiple times in recent years from both employers and labor unions representing farmworkers for how crop activities were defined and how the agencies' utilized the data collected in the survey to determine wage rates. Most recently, this has resulted in a court settlement between Farmworker Justice, the state, and DOL that ultimately established the harvest wage rate for all apples in 2022. The NHC vehemently opposes a process that results in court settled wages rates that do not include adequate employer representation. Also, the NHC contends Congress did not intend court settlements to dictate wage rates in the H-2A program.

ESD's refusal to share basic information about the data, its data collections methods, and how the data was used in setting the prevailing wage have raised significant questions about the survey integrity and whether federal Handbook 385 standards were met. Also, questions exist regarding whether the data collected was interpreted in a manner that accurately reflects crop activities. For example, we understand that the 50 percent increase in wages for picking blueberries between 2018 and 2019 was because the ESD decided to combine hand harvest and mechanical harvest activities for blueberries on a per-unit basis. This dramatically skewed the wage rate for blueberries in 2019 forcing the state's largest blueberry grower to leave a significant acreage of blueberries unharvested

Nationwide Impacts: While this is currently only occurring in Washington state because no other states are currently conducting prevailing wage surveys consistently, it is routine for states to mirror their regulatory approaches to other states. In addition, the NPRM states that a goal of DOL through this rulemaking process is to increase the number of prevailing wage surveys that

are conducted by states by making it easier and cheaper for SWAs to conduct the surveys. Therefore, it is critically important to ensure that the process by which prevailing wage rates are established is justifiable, defensible, and strives for accuracy.

Policy Recommendations within the NPRM:

As discussed, NHC is uniquely positioned to provide recommendations to improve and enhance the prevailing wage survey process to ensure accuracy of prevailing wage rates.

NHC contends that DOL should not reduce the rigor of the agency's current standards for development of a prevailing wage that have already proven to be insufficient in producing an accurate wage rate. While there may be cases where conducting a prevailing wage survey is appropriate, there are also instances where it is simply impossible to validly account and set a wage rate for a crop activity because the multitude of factors affecting how workers' wages are calculated are too complex. The results of the Washington state surveys and resulting litigation from all sides demonstrates that prevailing wage surveys are not an appropriate method to protect domestic workers in the H-2A program, at least in this instance. This is especially true when the prevailing wage process is unnecessary when by DOL's own account the AEWR serves as a prevailing wage since it is based on employer-provided data.

If a prevailing wage survey is deemed necessary, the accuracy of surveys must be improved in order for DOL to meet its statutory obligations of protecting U.S. workers from adverse effect. DOL must be able to demonstrate that the data collected and used in setting a federally mandated wage rate meets all required standards. DOL should not certify any prevailing wage rate absent verification that the state survey meets those standards. Also, the survey process should always be transparent and explainable to all stakeholders.

The NHC acknowledges that there is statistical variability in any survey. However, considering the burdens placed on the states and survey respondents, combined with the availability of the AEWR to protect against adverse effect, accuracy and statistic validity should not be sacrificed simply to make it more cost effective for a state to establish a prevailing wage.

As discussed, the impact of releasing an inaccurate wage rate is great. In Washington state, for both H-2A and non-H-2A employers, the distorted wage rates have been the primary driver in a number of growers going out of business.

The NHC would like to emphasize the following specific proposals to improve the administration of prevailing wage surveys, which is a subset of what was included in our substantive comments on the NPRM in 2019.

“Peak Week”: Current guidance in Handbook 385 directs SWAs to estimate the beginning and end of the harvest season for each crop and the “period of peak activity” in state grant plans. While not required, Washington state has asked employers to provide wages for their “peak week” only in its prevailing wage survey.

The NHC supports DOL requiring SWAs to survey either the entirety of a season or the entirety of a crop activity (i.e., harvest) during a season.

Surveying only the wages of the “peak week” is unrepresentative of the wages paid to a worker in the tree fruit industry throughout the year because wages can vary substantially due to a variety of factors. For example, if a rain or hailstorm is forecast during cherry harvest or a freeze is forecast during apple or pear harvest, growers will pay workers a premium over a few-day period in order to get as much fruit as possible off of the trees before the potentially season-ending weather event. In another example, labor availability can fluctuate throughout the season due to any number of factors, including overlap with other commodities that share the same labor force in some years.

If a grower has fewer workers at the start or end of harvest, then the grower will likely pay a premium to the workers they do have during that time period. By taking this approach, states are establishing a new base wage for the following year based on the highest premium wages paid the previous year – which may have only been paid to workers for a few days or weeks out of the totality of the season.

In the past, DOL has claimed that asking employers to provide data for an entire season would deter them from participating in the survey due to the length of the season and possible number of unique wage rates paid. In practice, in Washington state, the biggest deterrence to employer participation is a lack of trust in the survey because the wages reported have been so much higher than the wages actually paid by the vast majority of employers during the previous season. By adding a provision that requires SWAs to look at more than just the “peak week,” results would likely be more accurate, and employers would likely gain more confidence in the survey integrity – leading to more participation.

Unit of Pay: Currently, Handbook 385 requires that, if a survey includes more than one unit of pay, a prevailing wage rate is issued based on the unit of pay that represents the largest number of workers. The NPRM proposed that a prevailing wage only be issued if a single unit of pay is used to compensate at least 50 percent of the U.S. workers included in the survey.

The NHC supports adoption of the NPRM proposal to only allow a prevailing wage to be established if it is truly the prevailing wage – i.e., more than half of the respondents pay their workers using a single unit of pay.

Unit of pay is inconsistent throughout the tree fruit industry, varying from grower to grower and year to year. This can include hourly, piece rate, guaranteed hourly plus bonus, etc. Many factors affect how a grower decides to pay their workers, including adaptation to new state regulations regarding paying piece rate workers for rest time, and how to best incentivize workers to be more productive as baseline wage rates continue to climb so steeply – to the point where growers cannot afford to offer much of a premium beyond the baseline wage rate.

By allowing a prevailing wage rate to be established in cases where less than half of workers are paid based on the same unit of pay, DOL is forcing a majority of employers to adopt a unit of pay used by a minority of survey respondents. This is not indicative of a prevailing wage and does not reflect the realities of the modern budget environment for employers because it limits how they are able to incentivize/reward workers for productivity. Once again, it also sacrifices accuracy for the sake of incentivizing states to establish a prevailing wage rate – which DOL

acknowledges will continue to only be relevant for a small percentage of job orders with the AEWR serving as the applicable wage rate on the vast majority of job orders.

Statistical Standards: The NPRM proposes to reduce the statistical standards required for a prevailing wage survey to be considered valid from the current standards in Handbook 385 – which includes different requirements for different categories based on the size of the universe being surveyed – to an across-the-board requirement to survey at least 30 workers from five employers.

To be statistical valid, the employee and employer thresholds must be based on the circumstances in each survey area. While 30 workers from five employers may be an appropriate sample size for some crop activities/regions, it is far below what is considered statistically valid in all cases. For example, Washington state has an estimated 2,500 apple growers⁵ that employ an estimated 40,000 to 50,000 seasonal workers during harvest.⁶ (source).. To achieve a confidence level of 95 percent with a margin of error of five percent, 381 workers would need to be surveyed from 333 employers (assuming a conservative 40,000 worker universe).

The NHC opposes the proposed change and supports DOL adopting a requirement that a SWA survey the number of employers and employees necessary to meet a minimum threshold of a 95 percent confidence rate, with a margin of error of five percent, for a particular region/crop activity.

DOL has recognized that these proposed standards may not ensure statistically valid estimates for large categories of workers. The agency has justified this proposed approach by stating they are making the surveys less costly – giving SWAs more options to decide whether to prioritize precision, accuracy, granularity, or other factors in the data they use to inform prevailing wages. However, this is at the cost of the integrity of the survey results.

While we acknowledge that no data set will be perfect in informing the development of a prevailing wage, it is without question within DOL’s duties to establish as accurate of a prevailing wage calculation as is within their power, and that the agency should take steps to enhance the quality of the data collected to inform the development of prevailing wages where possible.

A statistical threshold that is so far out of scope from what is considered statistically valid for some universes of workers – including one of the very few that is actually affected by prevailing wages currently – is a dereliction of this duty. DOL should not give states the option to conduct a survey with a sample size so unrepresentative of the population being surveyed, and then expect it to be certified as a part of the H-2A program. Such a policy would also allow for substantial inconsistency in how surveys are conducted by SWAs, and importantly, the wage rates the survey sets.

⁵ [USDA NASS Census of Agriculture 2017](#)

⁶ [USDA ERS - Supplement to Adjusting to Higher Labor Costs in Selected U.S. Fresh Fruit and Vegetable Industries: Case Studies](#)

Minimum standards must be established that provide some degree of statistical confidence that they are representative of the population size. Otherwise, a large number of employers will continue to refuse participation due to a lack of confidence in the survey's integrity. Accurate wage rates benefit both employees and employers.

Transparency and Accountability: The NHC supports several provisions included in the NPRM that enhance the transparency and accountability of DOL in certifying prevailing wage surveys that truly meet federal standards.

First, the NHC supports a provision requiring the state to submit a standardized form providing the methodology of the prevailing wage survey, which we believe is necessary in order for the Office of Foreign Labor Certification (OFLC) to properly vet the manner in which the survey was conducted and verify its validity.

Second, the NHC supports a provision clarifying that the requirement to offer and pay the prevailing wage rate only applies if the OFLC Administrator has approved the prevailing wage survey conducted by the state. We support requiring the OFLC Administrator review survey methods to ensure it was conducted under DOL requirements.

The Northwest Horticultural Council is a trade association that represents the growers, packers, and shippers of apples, pears, and cherries, in Washington, Oregon, and Idaho on federal policy and regulatory issues, as well as policies impacting international trade. Our growers produce approximately 69 percent of the apples (supplying 78 percent of the U.S. fresh market), 88 percent of the fresh pears, and 69 percent of the fresh sweet cherries grown in the United States. As mentioned previously,

Washington state ranks fourth in number of H-2A petitions filed nationwide, and tree fruit growers are by far the largest users within the state. The NHC has an ad hoc workforce advisory committee that provides staff with guidance in regard to agricultural labor policy. Members of this committee represent a substantial percentage of the tree fruit acreage in the Pacific Northwest.