

U.S. Custom Harvesters Inc (USCHI) E.O 12866 Meeting Comments

RIN 1205-AC05. ETA-ETA-2021-0006, “Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States”

U.S. Custom Harvesters, Inc. (USCHI) is an association of professional custom harvesters, serving the needs of the American farmer. We have approximately 500 harvester members who are hired specifically to harvest crops for an individual farmer or business. USCHI serves as a link between the harvesters themselves and people they work with including farmers, input businesses, and policymakers. Furthermore, custom harvesters provide a unique and valuable role in grain, forage and cotton harvesting as they operate on an itinerary, across multiple states, and in a very time sensitive manner factoring in crop patterns and weather conditions.

As noted in previous comments by USCHI members, USCHI encourages DOL to reevaluate its proposal to bifurcate occupational categories, its decision not to apply the primary duty doctrine if multiple wage classifications are used, and lastly USCHI encourages DOL to reevaluate its use of the USDA Farm Labor Survey in light of recent wage spikes that will leave many employers struggling to afford its workforce and stay in business.

As with many in the agriculture sector, custom harvesters struggle to find enough willing, able and qualified domestic workers and turn to the H-2A temporary visa program to fill those shortages. Our workforce must be able to safely operate expensive harvesting equipment and drive commercial trucks as we move the equipment along an itinerary, typically over the course of a nine-month period of time. Currently, we estimate about 30 percent of our employer members use the H-2A program accounting for approximately 60 to 70 percent of the total harvesting workforce. Additionally, the average custom harvester hires less than 10 H-2A employees, making it critical that each employee can do multiple tasks. Custom harvesters operate under the recently codified H-2A special procedures because the employees travel across state lines and operate outside of a single “area of intended employment” in order to support multiple farmer customers. The nature of the work requires flexibility from some of the H-2A program’s standard requirements, including allowing employers to reposition H-2A workers to various job sites on an itinerant basis and to provide mobile housing rather than fixed site housing.

Occupations included in the USDA Farm Labor Survey (FLS) field and livestock

(combined) category: The NPRM proposed use of an annual average hourly gross wage as reported in the FLS. If not available, the AEWG would be set using the statewide annual average hourly gross wage in the state as reported by the Occupational Employment and Wage Statistics (OEWS), or if that number is not available, the national annual average hourly gross was as reported by the OEWS survey.

The proposed rule did not meet the underlying need of both employers and employees for a more accurate way to assess wages within the H-2A program. However, this is amplified by USDA’s most recent FLS results. The survey, published in November, resulted in increases in all states,

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with the highest being nearly 16 percent wage spike in a single year. USCHI members primarily operate in the plains state and will be up to 7 percent increase up to \$17.33 in the Northern Plains states. The wage spikes in a single year are not sustainable for employers. USCHI strongly encourages DOL to completely re-review the AEW method under this open rulemaking and evaluate limiting the fluctuation in wages rates year to year. This is critical to both protecting workers from adverse effect and addressing the current reality that these wage increases are forcing driving custom harvesters out of businesses – impacting both domestic and foreign workers - rather than being a solution where there are labor shortages.

Additionally, H-2A employers have commented to DOL that wage stability is critically important to the viability of the H-2A program. DOL notes that the “FLS consistently collects sufficient data to generate a wage finding for field and livestock workers (combined...),” yet goes on to say that “the Department does not have direct control over the FLS, and USDA could elect to terminate the survey at some point in the future” (86 F.R. 68180-81). Under both Democrat and Republican administrations, USDA has attempted to suspend the survey due to funding restrictions. Also, DOL has taken steps to stop its own funding of the survey at various points in the past, which puts additional strain on USDA to continue producing the survey. While DOL provides alternate wage classifications to fall back to if the FLS is not produced, we have little confidence that another survey will be any more accurate. Therefore, we ask that DOL reconsider the use of the Economic Cost Index as a stabilizing, yet reasonable way to prevent an adverse effect to U.S. workers and urge DOL to relook at that as a reasonable, justifiable methodology.

Occupations not included in the FLS field and livestock (combined) category: The NPRM proposes use of the statewide annual average hourly gross wage for those occupations in the state as reported by the OEWS survey, or if not available, the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

USCHI strongly opposes the bifurcation of wage classification and setting separate, higher wages, for on-farm work of truck drivers, construction workers, supervisors, and occupations in contract employment creates an adverse effect on the U.S. workforce. Specifically, we believe this bifurcation will disproportionately impact custom harvesting businesses who hire H-2A truck drivers to move equipment between itinerary – an occupation explicitly permitted by DOL and critical to custom harvesters operations. The bifurcation will increase the wage rates for those workers, but also adds unnecessary complexity to our operations. Also, we believe DOL should conduct a more robust analysis that includes the current state of the general economy to justify the bifurcation of wage classification and whether the employment of H-2A workers for on-farm work of truck drivers, construction workers, supervisors, and occupations in contract employment actually creates an adverse effect on the U.S. workforce.

Using truck drivers as an example, many economists point to the lack of domestic truck drivers – an issue prior to the pandemic – as one of the drivers for the significant supply chain disruptions the U.S. is experiencing. In fact, as DOL argues that additional protection is needed from foreign labor suppression of domestic wages, President Biden has issued an action plan to address the truck driver shortage. (Biden-Harris Administration Trucking Action Plan to Strengthen America’s Trucking Workforce, December 16, 2021). Considering this

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Administration's effort contrary to DOL's justification of the proposal to bifurcate wages for truck drivers using the OEWS wage category, DOL should provide additional analysis to determine if there is an adverse effect on U.S. workers given these current dynamics. Also, a similar analysis should be done on other possible job categories that the DOL believes will be classified as OEWS categories.

Primary Duty Doctrine: If DOL moves forward with the approach of requiring different wage rates established by different surveys depending on the occupational classification of workers, for the reasons outlined below, USCHI supports DOL employing the "primary work" doctrine to allow the flexibility that is needed on the ground and the continued filing of a single application.

The NPRM proposed that if all job duties did not fall within a single occupation, then the highest AEW for any occupational classification must be applied. As noted above, on average USCHI members hire less than 10 H-2A workers. As a result, it is critical that these workers are able to perform a wide variety of tasks such as driving farm equipment, fixing mechanical issues, and driving trucks between job sites. While it is anticipated many employers may be able to file multiple *Application for Temporary Employment Certification* and separate out employee tasks, these small harvesting businesses cannot absorb the costs of multiple applications, nor would harvesters be able supply full time work for those employees if they are dedicated only to truck driving. Also, we anticipate that an increase in filings for employers that hire workers with work duties that – however nominally – fall outside of the farm/livestock category, will increase administrative costs and has the potential to cause administrative delays.

Instead, we once again propose that DOL employ the "primary work" doctrine so that workers will be paid at the rate for their primary job duties. Alternatively, we propose that individual employees be paid at the wage rate of the occupational classification that they fit under for the time in which the activities are performed. For example, if a worker spends 80 percent of his or her time conducting activities covered under the field/livestock category and 20 percent of his or her time driving a semi-truck, then the worker would be compensated at the field/livestock AEW for the hours performing those duties and the appropriate OEWS-established AEW for the hours performing the job duties under that classification.

It must be emphasized that this solution would increase the administrative burdens on H-2A employers – which is the last thing that is needed in this already overly complex program. However, this approach does allow more options for an employer – choosing to either track tasks as individual time codes or opting to pay the higher wage for all the time working. That would better meet DOL's obligations under the Regulatory Flexibility Act. Therefore, if DOL moves forward with this approach to establishing different AEW's, we believe that either employing the "primary work" doctrine or allowing workers to be paid at the wage rate of the occupational classification they fit under for the time in which the activities are performed, are the fairest options for H-2A workers who fall under multiple classifications, those that do not, and the growers who should not be required to pay an employee at a higher rate than the job duties require.

USCHI also has concerns about the proposed process for determining occupational classification. The proposal explains that a State Workforce agency will first determine the classification, but

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then a Certifying Officer will make a case-by-case factual determination, which we believe will only result in uncertainty and large numbers of Notices of Deficiency, delays, and appeals. If DOL finalizes the proposed approach, we would appreciate additional examples provided in the preamble or guidance to better inform growers as to how DOL would expect to rule on whether a job duty falls within or outside of the field/livestock category.

In conclusion, by continuing to utilize a failed wage survey as the basis for the AEW, the proposed rule in its current form fails to provide the necessary reforms to serve the H-2A workers, domestic workforce, and growers that DOL is statutorily required to consider in the implementation of the H-2A program. DOL continues to cite concerns about wage depression from the employment of foreign workers are greater because there is no cap on the program and that the U.S. agricultural workers are susceptible to adverse effect because they generally comprise an especially vulnerable population. As DOL states, it has had this concern for 30 years since the inception of the AEW. Yet, it has **never** shown any validation of the concern and has ignored data directly to the contrary. This program – which has become increasingly critical to the ability for more and more U.S. farmers to grow and harvest their crops as the size of the domestic workforce continues to dwindle – will continue to be inaccessible to many small businesses and will become increasingly untenable for even current users absent more significant reform to the way in which wages are established within the H-2A program.

USCHI asks that if it has not, DOL reevaluate its proposal based on these comments to allow this program to meet the needs of both of custom harvesting businesses and worker communities.

JC Schemper
President, US Custom Harvesters, Inc.