



September 23, 2021

Office of Information and Regulatory Affairs

On behalf of the membership of the National Council of Agricultural Employers (NCAE), we would like to express our thanks for the opportunity to provide the Administration with additional information pertinent to a new wage rule for the H-2A Temporary Agricultural Worker program. We hope the information provided in our comments during the teleconference was helpful and we encourage close review of the uploaded information accompanying this letter.

The importance of the H-2A program to America's farm and ranch families is critical. The importance of our nation to not have to be reliant on foreign nations to feed America is a matter of national security. A nation that is food insecure places that country's national security in peril. We appreciate the Administration's commitment to U.S. national security.

Several things became clearer to agricultural employers regarding the Trump Administration's proposed rulemaking following the publication of its wage rule for the H-2A program in November 2020. That rule was subsequently enjoined by the Federal District Court.

Consistent with the concerns expressed in NCAE's comments filed on September 24, 2019, and included in this submission, is that under statute the Secretary must first make a determination of any adverse effect visited on the domestic workforce prior to the mandate of an Adverse Effect Wage Rate (AEWR). 337 domestic referrals for almost 100,000 offered positions at a wage that is twice the federal minimum is hard evidence, in addition to volumes of additional evidence, that no such adverse effect exists. Assumption of an adverse effect absent any finding of that effect is arbitrary and capricious.

**525 9th Street NW, Suite 800
Washington, DC 20004
202-629-9320**

The utility of a fatally flawed Farm Labor Survey (FLS) to establish AEWRs by the Secretary is leading to the further exploitation of primary variable costs created by the AEWRs in the United States to the detriment of U.S. national security as foreign competitors take advantage of the flaws to further their penetration into the domestic market. This is why, today, American consumers are just as likely (if not more likely) to see blueberries produced in British Columbia in Spokane, bell peppers produced in Ontario in Des Moines, or tomatoes grown in Baja in Miami, than fruit and vegetables produced just down the road in their local grocery stores. The mandatory minimum wage rates created by this flawed process creates rates disconnected from the market it is intended to secure. This should not be compounded by regional differences in rates.

Consequently businesses, recognizing the opportunity for profitability created by this flawed process, are expanding operations overseas. This is a rational response by any enterprise to avoid irrational costs. Unfortunately, this circumstance jeopardizes U.S. national security while breaking the financial backs of American farmers and ranchers trying desperately to retain their legacy family operations. Most farms and ranches in America have been owned and operated by the same families for generations.

As President Kennedy once remarked, “The farmer is the only man in our economy who buys everything at retail, sells everything at wholesale, and pays the freight both ways.” Regulation promulgated by the Secretary should not hasten the demise of these family businesses nor further forfeit U.S. food production to foreign nations.

Further, NCAE members became acutely aware of the danger to their operations created by using disaggregated wage rates, once again disconnected from agricultural operations, for the certain occupations subjected to this treatment in the Trump wage rule. This Administration should not make the same mistake.

And similarly, utility of any disaggregated wage rates to ever be mandated, should never avoid the “primary duties” test outlined in the Fair Labor Standards Act. The American farm requires farmers and farm employees to be able to be flexible on a day-to-day basis. A farmer on one day can be a fieldworker, a mechanic, a veterinarian’s assistant, and a truck driver all in one day. The same is true for the farmer’s employees.

If disaggregated wages are used it will lead to further uncertainty on a daily basis about the appropriate wage for the worker and as we witnessed in the brief period before the Trump wage

rule was enjoined, chaos and confusion from the State Workforce Agencies trying to implement the disaggregated wages. The one thing farmers have been asking for from this program for years is certainty to know what to expect year after year, and this will make an already overly complex program more complex.

Finally, if this Administration follows the logical outgrowth of the previous Administration's rulemaking and attempts to disaggregate the FLS wages, we will again see extreme uncertainty on a yearly basis as to which wage will be paid. One year an Agriculture Equipment Operator in Florida may be given the FLS wage, the next the FLS annual average wage, and in a third year the Occupational Employment Survey wage. The fluctuations between these three wages are dramatic and cannot be planned for as it all depends on the statistical validity of the FLS results, which may vary from year to year and region to region.

NCAE again thanks you for the opportunity to provide these comments regarding the wage rule and urges the Administration to restart the rulemaking process surrounding the wage rule with a new Notice of Proposed Rulemaking because of the uncertainty as to what the policy is from Administration to Administration. This will allow all parties to meaningfully participate in the rulemaking process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Marsh", written in a cursive style.

Michael Marsh
President and CEO