BEFORE THE
U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
AND WAGE AND HOUR DIVISION
WASHINGTON, D.C.

Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States	Docket No. ETA-2025-0008

Comments from Mid-Atlantic Solutions, LLC dba másLabor

November 26, 2025

For over two decades, Mid-Atlantic Solutions, LLC ("másLabor") has been the leading for-profit, non-association H-2A employer agent, representing thousands of program participants across the country. Each year, the Office of Foreign Labor Certification ("OFLC") certifies másLabor clients for nearly 50,000 H-2A job positions across a diverse cross-section of agricultural industries. We are also industry leaders, advocating for seasonal agricultural businesses through our membership on the Executive Committee of the National Council of Agricultural Employers ("NCAE"), as well as our involvement with numerous other industry organizations and associations, including several in which we serve as the preferred service provider to members. This includes esteemed organizations such as the Washington Grower's League, the Florida Nursery Growers and Landscape Association ("FNGLA"), the Ohio Green Industry Association ("OGIA"), and the Oregon Association of Nurseries ("OAN").

Additionally, the másLabor compliance staff includes the nation's foremost subject matter experts on the H-2A and H-2B programs. Various national trade publications have highlighted our team's work, and each year we receive invitations to speak at local, regional, and national trade shows, conferences, and educational seminars on a variety of H-2A and H-2B-related topics. It is because of our renowned thought leadership in the industry that we are frequently the go-to background resource for national media publications and have on numerous occasions served as subject matter experts to publications such as *The New York Times*, *The Washington Post*, and *Bloomberg LP*, among others.

These comments offer both support for, and constructive criticism of, the Department's Interim Final Rule ("IFR"), modifying the methodology used to calculate the Adverse Effect Wage Rate ("AEWR") for H-2A occupations, which went into effect on October 2, 2025. We believe that many aspects of the IFR are *directionally* correct insofar as they result in a more equitable, market-based wage methodology that resolves longstanding issues with the existing methodology. Further, we concur with the Department's stated policy objectives and believe that several aspects of the rule represent a significant improvement to the status quo. Notwithstanding our general support for the rule, we note that other aspects of the rule re-introduce problematic, failed elements from prior regulatory frameworks and/or introduce new concerns and complexities that undermine the Department's stated goals. On that basis, we offer constructive feedback on the rule's substantive provisions for the Department's consideration.

I. DISCUSSION

Use of OEWS Data for Establishing AEWRs

The Department's IFR shifts the data source for determining AEWRs from the Farm Labor Survey ("FLS") conducted annually by the U.S. Department of Agriculture ("USDA") to the Occupational and Employment and Wage Statistics ("OEWS"). Per the IFR, this change was necessary

and urgent due to USDA's announcement that it would be terminating the FLS entirely, thus leaving a 'vacuum' in which there will be no valid wage data to govern AEWRs after December 31, 2025.

While we understand the Department's rationale, we believe the use of OEWS data as a replacement for the FLS data carries its own inherent flaws. Of particular concern is the risk that the lingering effects of the Biden-era rule will continue to taint OEWS data going forward. That is, wages surveyed by the Department may not be reflective of true market rates, but rather, artificially high pay rates caused by the imposition of a flawed AEWR methodology that the OEWS survey fails to exclude. In other words, the very existence of the Biden-era methodology in the past means that the data on which the Department is now relying for its new wage methodology is skewed and biased, rather than reflective of actual market rates. This is because employers paying the Biden-era rates were included within the methodology, creating an "echo" effect. We urge the Department to institute appropriate safeguards and more complex data scrutiny to compensate for this bias.

We further note that, with respect to non-standard occupations, the Department has given no indication that it plans to isolate survey data gathered from agricultural operations. Failure to isolate such data means that, regardless of whether farm and ranch employers are included in the survey, the OEWS wage data continues to be improperly influenced by non-farm employers. For example, the OEWS wage for heavy-tractor trailer truck drivers would continue to reflect the *totality* of trucking operations in a given geography, including the full spectrum of non-agricultural commercial freight operations. As recognized by the Court in the *Teche Vermillion* case, there are fundamental differences between truck driving in an agricultural context versus truck driving in a non-agricultural context. The inclusion of agricultural truck driving in the overall wage data does not 'solve' for this problem – indeed, the probative value of the agricultural truck driver wage data is most certainly diluted to the point of irrelevance by the much larger data set provided by non-agricultural truck driving employers. The same is true for other non-standard occupations, like the 'apples and oranges' comparison of equipment mechanics employed in a rural farm area versus unionized equipment mechanics operating in an urban,

metropolitan environment, or construction workers raising a barn in Wolcott, NY as opposed to a luxury high-rise on Billionaire's Row in Manhattan. Accordingly, the methodology imposed by the IFR does not resolve the longstanding legal and economic flaws of the Biden-era rule; to the contrary, it perpetuates them. The Department should consider a "firewall" approach in which only wage data from agricultural operations is utilized to calculate pay rates for non-standard occupations; otherwise, the Department will have failed to narrowly tailor its wage methodology to ensure that workers subject the pay rates are, indeed, "similarly employed" as the statute requires.

There are other flaws with the OEWS system, as well. For example, it is well established that OEWS excludes self-employed workers and small family farming businesses with unpaid family workers – both of which are core components of the agricultural labor market and are systematically underrepresented in the survey data relative to large, conglomerated agricultural enterprises. This has the net effect of further driving wages beyond typical market thresholds. There is no indication in the IFR that the revised OEWS procedures to include agricultural operations will address or mitigate this bias.

Given the foregoing, we urge caution in the Department's reliance on OEWS wage data and ask that the Department consider thoughtful strategies for reforming the OEWS data collection process to more accurately reflect the agricultural labor market. Including agricultural employers in the OEWS data collection is insufficient to ensure accuracy; the Department must undertake reforms to ensure that farm data continues to be treated as distinct from the broader labor market. Otherwise, the Department's wage rule simply repeats the mistakes of the Biden era.

Skill-Based AEWRs for All Job Opportunities

The Department's IFR adopts a skill-based approach to establishing an applicable rate of pay within a given occupational classification. Specifically, the IFR divides occupations into two discrete Skill Levels. H-2A job opportunities classified as Skill Level I are considered entry-level and command a rate of pay equal to the average of the lowest one-third of the pay range (i.e., at the 17th percentile) for the

designated occupation (or, in the case of 'standard' occupations, from among the five occupational classifications previously included with the FLS). Skill Level II occupations are considered advanced and command a rate of pay equal to the 50th percentile of the pay range.

Per the IFR, the specific skill level applicable to a given H-2A job opportunity purportedly depends on a holistic evaluation of the job duties and requirements. The specific factors analyzed under the balancing test include the complexity of duties performed, whether the performance of such duties require any specialized training, licensing, or certifications, and the existence of any educational requirements or requirements by employers for job applicants to possess work-related experience or other qualifications to be eligible for hire. Entry-level job opportunities without such requirements and requiring workers to perform only basic tasks requiring supervision, are considered Skill Level I job opportunities, while jobs requiring prior training or experience, and in which workers are expected to perform independently without significant or close supervision, are considered Skill Level II job opportunities.

Conceptually, we support the Department's idea of separating wage rates based on skill levels. Indeed, our clients have long taken issue with the "one size fits all" approach of the prior AEWR methodologies, which failed to account for genuine and bona fide differences between job opportunities that happen to share the same broad occupational classification. As the Department itself notes in the IFR, the occupational classification of Farmworker (45-2092) is an extremely broad umbrella classification that could encompass any number of jobs on the farm of varying complexity. The same is true for other agricultural occupations, including Agricultural Equipment Operator (45-2091) which could, for example, include anything from basic mechanized hand tools (chainsaws, electric pruners) to sophisticated GPS-controlled combine harvesters. The unique nature of the agricultural industry necessitates flexibility and wage differentials based on on-the-ground factors; we support the Department's decision to bifurcate wages according to skill level.

We further concur with the Department's restraint in limiting the skill level framework to just Skill Level I and Skill Level II categories. The IFR notes that OEWS wage data exists for up to *four* different skill levels. The Department's decision *not* to mirror this framework in the H-2A wage methodology is both practical and consistent with the Department's objectives of achieving greater uniformity across H-2A job orders by eliminating subjectivity. By narrowing jobs into just two categories (instead of four), we believe the Department has adequately accounted for complexity and skill level differences while avoiding a complicated, confusing, and inconsistent framework that would come with an over-engineered skill level regime. On that basis, we believe that any Final Rule should retain the two skill levels (Level I and Level II) found in the IFR.

With respect to the Department's decision to set Skill Level I wages at the 17th percentile, we agree with the Department that this percentile is fair and reasonable. Setting Level I wages as the average of the lowest one-third of wages is a fair approximation of entry-level jobs, and more precisely captures an entry-level wage threshold that would be applicable to most Skill Level I farmworkers than would be the case if the Department had opted to adopt the Bureau of Labor Statistics (BLS) standard thresholds of 10% (likely too low to avoid an adverse effect on U.S. workers) or 25% (likely too high relative to labor market realities for the occupations in question).

We are less convinced of the merits of setting Skill Level II wages at the 50th percentile (i.e., the median). While this threshold may seem reasonable, we again remind the Department that agricultural employment is unique relative to other sectors and industries. Especially in the case of non-standard occupations, jobs performed in an agricultural context are quite different than their non-agriculture counterparts, even if the underlying occupational classification is the same by virtue of duties performed. These differences are not adequately taken into account if the Department uses the wage median as the benchmark for Level II wages, as it likely means that agricultural employers are paying an artificially high wage to workers who, in the open labor market, would not be able to command such a wage in the agricultural context (but *may* be able to do so in the non-agricultural context). This is especially the case

given the concerns highlighted earlier in these comments regarding the inclusion of non-agricultural survey data in the OEWS conclusions. The Department should either correct this shortcoming in the OEWS survey itself (see prior discussion in these comments) or compensate for it on the back end by lowering the wage level for Skill Level II occupations.

We believe a more appropriate threshold would be setting Level II wages at the 30th percentile. This would put Skill Level II wages above the wages earned at the standard BLS threshold of 25%, in essence capturing job opportunities in the lower quartile, where agricultural employment is likely to fall. Further, doing so would narrow the disparity between Level I and Level II job opportunities, creating a more equitable outcome for H-2A occupations with only modest differences in complexity, skill level, and job requirements. Note that despite a reduction in the wage floor, it is likely that some significant number of employers will voluntarily choose to pay their returning workers (U.S. and foreign) at higher wage rate, simply to preserve employee morale and retention. Competition between employers will further preserve wages, but the lowered floor will provide greater flexibility to allow wages to be driven primarily by market forces, not government intervention. We further note that the employers' ability to pay a lower "floor" wage to new hires while paying higher rates to returning workers (through pay differentials, bonuses, etc.) creates a system that can allow for career growth and upward mobility for workers in a way that was not previously possible. Under a high-floor wage system like the old FLS-based AEWR or Biden-era rule, employers had limited headroom to allow for such pay progression, resulting in new hires earning the same or similar rates as long-tenured employers who had earned their keep. This potentially creates an environment for resentment and interpersonal conflict in the workplace. Creating an environment that allows for upward mobility, as is the case with the IFR, has the downstream effect of incentivizing productivity and driving performance, further benefitting the American agricultural sector as a whole and bolster U.S. competitiveness vis-à-vis imported commodities from foreign producers.

With respect to the Skill Level regime in practice, we do wish to express concerns. First, the IFR itself does not adequately explain the methodology for determinations. Lack of explanation has resulted in significant speculation amongst stakeholders and inconsistent results from adjudicators. Contributing to this issue is the fact that the IFR provides only two hypothetical examples to illustrate its meaning, which stakeholders have now interpreted not as exemplars, but bright-line rules to a degree that the Department clearly did not intend. Ultimately, we believe the Department may have underestimated the administrative burden on SWAs in interpreting, applying, and enforcing the complex balancing test associated with the rule. In the short time since the rule's implementation (discounting the period in which the FLAG system was inoperative due to the 2025 federal government shutdown), the SWAs have arrived at wildly different conclusions regarding the skill level analysis. Anecdotally, from our perspective as a high-volume H-2A filer, some SWAs (Colorado, Idaho, and Louisiana for example) have made good-faith efforts to apply the more holistic approach outlined in the IFR (admittedly, with mixed results). Others (including New Jersey) have discarded any pretense of a holistic evaluation and have sought to establish hard-and-fast boundaries based on the *examples* provided in the IFR Others still (e.g., Oklahoma) have been forced, in absence of further guidance, to manufacture their own standards of review:

Good morning,

Until further guidance is issued by the U.S. Department of Labor, Oklahoma will be reviewing H-2A applications according to the following criteria:

1. ETA 790 – Experience Requirement (Section B.2: Experience Months)

- 0 months = ***Skill Level I*** ------ *will be* ***$11.27 an hour***
- More than 0 months = ***Skill Level II*** ------ *will be* ***$16.01 an hour***

In addition, the entire ETA 790 will be reviewed for any language that indicates prior training or experience requirements. If such language is present but Section B.2 lists "0 months," the position will be considered *Skill Level II* and a **Notice of Deficiency (NOD)** will be issued to reconcile the inconsistency.

2. Standard Occupational Classification (SOC) Assignment

If multiple SOC codes are listed and any of them fall outside of the five SOCs identified for consolidation under the Interim Final Rule (IFR), an **NOD** will be issued requesting clarification of the percentage of time spent on each task.

Thank you,
Oklahoma Employment Security Commission
Foreign Labor Division

It is, of course, understandable that there would be some degree of arbitrariness and confusion early in the rule's rollout. Indeed, such volatility is normal and expected for *any* rule change of this magnitude, especially early in the implementation period, when SWA staff are not yet trained and processing norms have yet to settle. We acknowledge that a perfect, uniform understanding and application of the rule across 50 discrete jurisdictions would be unreasonable, especially at this juncture. Nevertheless, we believe the *degree* of volatility speaks to the inherent complexity of the rule and difficulty of so many individual adjudicators (all with their own biases and understandings) being able to reach an objective outcome, given the sheer number of variables that must be considered.

Further, we note that even with extensive training and guidance, the inherent ambiguities of the rule and multitude of factors in the holistic analysis make the Skill Level assignment prone to subjectivity, undermining the Department's stated objectives in promulgating the rule. There are simply too many possible iterations of factual circumstances to consider, particularly given that individual job duties and their relative complexity can themselves potentially influence the skill level (i.e., the analysis is not limited to just concrete, objective measures like number of months' experience required). Because of the complexity, many SWAs have simply given up trying – opting to abandon all nuance and thoughtful analysis, which requires time and effort, in favor of easy-to-implement rules that impermissibly create bright-line thresholds contrary to the IFR's spirit of holistic evaluation. See, e.g., the Arkansas SWA:

> Good morning, Ms. Roach,
>
> For clarification, we have received NODs for experience greater than 2 months which is what we have set our requirement for Skill Level I and anything more is Skill Level II.
>
> Thank you again!
>
> Have a blessed day!
>
> Respectfully,
> Rebecca

Furthermore, simply put, we believe the methodology as currently constituted results in too many H-2A job opportunities being classified as Skill Level II, at least among those retaining their existing job requirements. According to the FY 2024 H-2A Disclosure Data, there were approximately 11,820 H-2A job orders submitted under the standard Farmworker (45-2092) occupational classification. This includes 5,829 job orders listing experience requirements of two months or less. Of the remaining 5,992, the vast majority – 5,984 job orders (99.86%) – listed experience requirements under six months, with the most common experience requirement being three months. For the Agricultural Equipment Operator (45-2091) occupation, which accounts for 5,396 job orders, only 580 job orders (10.75%) listed experience requirements below three months. Approximately 4,460 listed a 3-month experience requirement, while 358 job orders listed experience requirements greater than three months.

Across all of the "Big Five" standard occupations (which collectively account for 21,007 job orders, only about one-third (7,321 job orders) require experience of less than three months, while *more than half* list three months experience. The remaining 1,244 job orders require more than three months. Additionally, separate and apart from experience requirements:

- 417 job orders imposed an educational requirement of at least a high school diploma/GED;
- 176 job orders required 1 or more months of training;
- 1,498 job orders required workers to possess/obtain a license or certification;
- 7,790 job orders required workers to drive motor vehicles.
- 12 job orders required some supervisory or crew leader responsibilities.

The Department's IFR (or at least, how the IFR is being interpreted and applied) seems to place undue reliance on O*NET data when determining the appropriate skill level – specifically, the use of Job Zones and SVP ranges to reach a disposition. Job orders containing requirements that are consistent with the "normal" requirements listed on O*NET, are, per the IFR, inherently Skill Level II, while job orders listing lower requirements are properly within Skill Level I, unless there are other requirements imposed by the employer (e.g., education, training, licenses/certifications, etc.).

In practice, this means *most* H-2A job opportunities, regardless of occupational classification, will likely fall under Skill Level II if employers retain their existing job requirements. A small minority would, with such requirements, properly fall under Skill Level I, even though the majority of work being performed by H-2A workers across the board is predominantly entry-level farm duties. The reason for this is because three months has generally served a standardized, default experience requirement for most agricultural work (consistent with O*NET data).

We urge the Department to consider revisions the to skill level determination provisions of the IFR. Specifically, we believe that the Department should adopt a more flexible standard for 'standard' SOC job opportunities classified in O*NET as Job Zone 1. Employers should be permitted to require up to **three** months' experience and retain a Skill Level I wage assignment, provided that they do not impose any other significant job requirements (such as educational requirements, training, licensing/certifications, language proficiency requirements, supervisory duties, and the like). In the context of Job Zone 2 occupations and beyond, it would seem reasonable to continue evaluating whether the job requirements are at or below the 'normal' threshold established on O*NET, as Job Zone 2 occupations inherently have a wider spectrum of SVP values, thereby covering a wider range of occupational skill levels than Job Zone 1 occupations. We note that the Department has always recognized and treated Job Zone 1 occupations as distinct from other Job Zones, therefore a modified approach tailored to each Job Zone would not be without precedent. See, e.g., the method for calculating prevailing wages in H-1B and PERM cases, which utilize a slightly different 'points' system depending on the Job Zone assignment.

Likewise, we urge the Department to more explicitly define the methodology for determining the skill levels for non-standard SOC job opportunities. Specifically, we note that the IFR is ambiguous on the question of whether the analysis should look to the entry-level nature of the job, generally (i.e., compared to the broader universe of entry-level jobs), or whether the analysis should look to whether the job requirements are consistent with entry-level jobs *in the designated occupation*. We respectfully assert that the latter is a more appropriate method than the former, as it results in a more fair and accurate

assessment of market wages. In other words, we assert that a job order filed for Heavy Tractor-Trailer Truck Drivers (53-3032) should not be evaluated for whether it is entry-level in the broad sense (i.e., requiring limited to no preparation), but whether it is entry-level relative to *other truck driver job opportunities* (and, more precisely, other truck driver job opportunities *in the agricultural sector*). Otherwise, the wage does not truly get to the heart of who is ”similarly-employed” and who is not, thus precluding the Department from fulfilling its statutory mandate.

Duties and Qualifications to Determine Applicable SOC Code(s)

The IFR, like the Biden-era rule, evaluates H-2A job opportunities on the basis of duties performed. The duties inform the SOC assignment, and the SOC assignment in turn informs the specific wage assignment. Under the Biden-era rule, “standard” occupations within the five primary H-2A occupational classifications were based on the existing FLS methodology, while “non-standard” occupations would be governed by the OEWS state mean wage for the specific occupational classification in question. The IFR retains this bifurcated approach to wage assignments.

There are two key differences between the Biden-era rule and the IFR. First, obviously the IFR does not retain the FLS methodology for standard occupations. As previously discussed, OEWS wage data dictates the wage regardless of occupational classification. The second major difference is the standard by which occupational classifications are determined. The Biden-era rule applied a “single duty test,” in which the presence of a single non-standard duty would result in a non-standard occupational classification. This, in turn, would result in a non-standard OEWS-based wage, regardless of the frequency in which workers actually perform the duty in question. This “sudden death” approach to the wage methodology was unduly burdensome, unnecessarily rigid, and resulted in bizarre and inconsistent wage assignments. Many employers were forced to file multiple H-2A job orders with only modest differences in job descriptions to avoid having the totality of their workforce tainted by inflated wages. Likewise, many employers opted to remove certain duties to avoid complications with the wage. This was the case with many common duties, such as building fences or livestock enclosures, repairing barns, or

driving shuttle vans to transport workers to the worksite. In contrast, the IFR instead uses a "primary duties test," in which the Department evaluates the frequency of duties performed and only considers the primary duties in determining the occupational classification. Under the IFR's methodology, the presence of secondary or incidental non-standard duties will have no impact on the occupational classification or wage assignment, providing greater flexibility to growers and ranchers.

In general, we are supportive of the "primary duties test." We believe the primary duties test is entirely responsive to the significant concerns we raised over the earlier "single duty test," and we appreciate the Department's efforts to adopt a more reasonable, practical standard. Our only criticism of the IFR's approach is how primary duties are defined. The IFR states that a duty is considered primary if it is performed on at least half of the contract's *workdays*. Taken by its plain meaning, this means that duties performed on less than half of the workdays do not impact the occupational assignment, and thus have no bearing on the wage. Our concerns with this provision are two-fold: (1) the IFR's "workday" standard is not being applied consistently, with some SWAs and even OFLC analysts sporadically accepting a time-based standard (i.e., duties performed more than half of the worker's *time*) in lieu of the workday standard, and (2) that the workday standard itself is too restrictive, arbitrary, and ought to be replaced by a time-based standard.

To the first concern, we note that the IFR clearly states that the primary duties test is based on workdays, yet we have heard and seen anecdotal instances where the SWA and/or the Department itself has accepted job orders under a time-based standard. This indicates that there is still internal disagreement or confusion as to the exact intent of the IFR. On that basis, if the Department did indeed intend to allow a time-based model, it should revise the IFR to clearly say so. The rules must be explicit as to the intent, otherwise the open-ended and ambiguous nature will continue to lead to different outcomes across jurisdictions.

To the second concern, we believe a time-based approach (which, as stated above, SWAs and the Department are accepting sporadically) *should be* permitted, either in addition to or in lieu of the

workday-based approach specified in the IFR. We believe a workday-based standard is too restrictive and does not take into account minor duties that may be performed on a daily basis, but do not consume a significant amount of the worker's time and thus ought not to be considered primary.

For example, note that certain transportation duties (i.e., driving a bus or shuttle van according to a set schedule) may be considered part of a non-standard occupation – Shuttle Drivers and Chauffeurs (53-3053). Because of the H-2A program's daily transportation requirement, employers frequently utilize workers to drive the workers from the housing to the worksite, and back to the housing at the end of the workday. In many instances, these trips are brief and cover extremely short distances, often on private roads. Thus, workers may only spend a small fraction of time each workday performing driving duties – a brief period in the morning and a brief period after work concludes. Yet under a workday-based standard (as specified in the IFR), workers who perform such duties would be properly classified as Shuttle Drivers, notwithstanding the fact that driving represents a de minimis portion of the standard eight- or nine-hour workday. Under a time-based standard, by contrast, the fact that it represents a *de minimis* amount of time each day would be determinative, and job opportunities would only be classified under a Shuttle Driver occupational code if workers were performing the driving duties more than half of the time each work day. The former workday-based standard makes little sense, and workers in that situation cannot rationally be considered "similarly employed" to full-time Shuttle Drivers and Chauffeurs. The latter time-based standard, however, *does* make sense and serves as a more accurate yardstick for measuring adverse effect against similarly-employed U.S. workers.

To this point, we further note that a worker performing non-standard duties for a short period each day may, in the aggregate, perform such duties less (over the life of the contract) than a worker who performs the non-standard duties a significant amount of time, but on a limited number of workdays. A workday-based standard, thus, seems inappropriate as the standard. Given the potential issues with this approach, we recommend that the Department revise the primary duties standard to look to the duties performed by workers the majority of *time*, relative to the total contract hours. In other words, a duty

would only be considered primary if it is performed for more than half of the total contract hours. This would offer greater latitude for employers without triggering a non-standard occupational assignment.

AEWR Adjustment to Account for Non-Wage Compensation Benefits Provided to H-2A Workers

The IFR creates a new downward compensation adjustment to the base AEWR. This adjustment is intended, per the IFR, to mitigate the effect of the non-wage compensation paid primarily to H-2A workers in the form of employer-provided housing, a benefit that most U.S. workers are ineligible to receive (the regulations specify that housing must be provided at no cost to all non-local workers unable to return to their permanent residence each work day; thus, most U.S. workers need not be provided housing). This adjusted AEWR may be paid to H-2A workers, *regardless of whether they actually reside in the housing*, but may <u>not</u> be paid to U.S. workers *even if they are migrant workers eligible for housing and do indeed receive such benefits*.

Conceptually, we support the idea of wage differentials for U.S. and foreign workers. The Department is correct that housing is a substantial non-monetary benefit, and in fact represents one of the biggest costs of program participation for employers. The Department is also correct that this non-wage benefit is principally enjoyed by foreign H-2A workers, who are inherently 'non-local' (unless they are border commuters) while the significant majority of U.S. workers obtain employment locally. An increasingly small number of U.S. workers are migratory and, thus, eligible for housing. Accordingly, we concur with the Department's reasoning that the housing benefit may, itself, constitute an adverse effect on U.S. workers, due to the disparity in functional earnings between U.S. workers and their foreign counterparts who receive free housing. On that basis, we support this provision in the IFR.

Notwithstanding our support, we encourage the Department to provide clarity and/or training and interpretive guidance as to the mechanics of the wage adjustment. While the language in the IFR is generally clear and unambiguous in our expert opinion, there is a high volume and frequency of misinformation circulating in the industry (and among SWAs) as to the exact nature of the adjustment and

how it functions. Some SWAs, including New Jersey, have taken the position that the downward-adjusted AEWR constitutes a "deduction" from pay that makes the wage subject to state laws and regulations concerning deductions for board, lodging, and other facilities. Under this interpretation, New Jersey has concluded (erroneously) that the downward compensation adjustment is illegal under state law, and on that basis has sought to arbitrarily and capriciously impose wages higher than the IFR requires.

On November 10, 2025, the New Jersey SWA sent a mass communication to stakeholders announcing that the IFR "does not apply to New Jersey farm proprietors," seemingly attempting to nullify not only the wage rates themselves, but the *entirety* of the IFR. New Jersey may as well be storming the Capitol with "Stop the Steal" signs.

To all New Jersey H-2A Program Customers:

Please be advised of the following regarding the application of the H-2A adverse compensation adjustment under the October 2, 2025 Interim Final Rule (IFR)

NJDOL administration has recently clarified that, according to NJ's Supreme Court Ruling Docket No. A-5989-91T3, in the case of "CATA et al. vs NJDOL et al.," the **NJDOL holds**:

"It is the Department's policy and interpretation of its regulation at N.J.A.C, 12:56-8.6(e) that *migrant labor camp housing is primarily for the benefit of the employer and therefore*, **credits or deductions for such housing shall be prohibited**..."

Thus, please note and adjust to the following:
• The non-finalized Interim Final Rule, effective October 2, 2025, does not apply to New Jersey farm proprietors, as per the NJ Supreme Court ruling in "CATA et al. vs. NJDOL et al."
• The NJDOL will accordingly not authorize the approval of any applications containing agricultural worker labor camp housing-related adjustments.
• All applications must reflect, or be granted modification allowance to reflect, adherence to applicable policies as a condition of approval.

We appreciate your cooperation as we continue to obtain clarification and guidance regarding policy application and changes.

Dennis Valentin
Employment & Training Specialist 1
Foreign Labor Certification H-2A

Other states have expressed similar confusion. Anecdotally, we have heard of at least three other SWAs communicating with employers that the adjustment functions as a *deduction from pay*. In some cases, the SWAs have even gone as far as advising employers to pay the base AEWR to all workers and then itemize the amount of the compensation adjustment on the workers' pay statements as a deduction for the provision of lodging. Instructions for completing the ETA 790, accordingly, vary by state, with

some states (such as Pennsylvania) directing employers to list the H-2A compensation adjustment in the "Deductions" section of the ETA 790 rather than follow the disclosure protocols set forth in the IFR.

Good afternoon,

I am reaching out to confirm and clarify a few items on your H-2A Application (JO-A-300-25323-421454)

1. The updated AEWR for a nursery worker with level II experience of 3 months or more is now $17.99. The job offer in FLAG shows $13.88. Please let me know how you would like me to make changes should you choose to keep level II work experience with 3 months experience.
2. Do you intend to charge the Adverse Compensation Adjustment of $1.52/hour for housing?
3. If yes, this information must be included in the "Deductions from Pay" section of the ETA-790. If you are not choosing to deduct the Adverse Compensation Adjustment, then you do not need to include it in the ETA-790.

Please respond as soon as possible so we can make necessary changes and process your H-2A application in a timely manner. Thank you so much!

Best,

Kaitlyn Bell-Perhac | Bilingual Workforce Development Analyst II
PA Dept. of Labor & Industry | Bureau of Workforce Partnership Operations
651 Boas Street, 12th Floor | Harrisburg, PA 17121
717-996-8502

My workday may look different from your workday. Please do not feel obligated to respond outside of your normal working hours.

Good afternoon, Madam/Sir,

This notification is to provide an update to the deficiencies identified during a recent review of your *Agricultural Clearance Order*, housing inspection report, responses, and/or documentation received to resolve identified deficiencies:

NOTE: *Clear, distinct picture(s) must be sent to show modifications taken to resolve the following Identified deficiencies.*

1. **Identified Deficiency:**
   The job order states the employer will pay the AEWR $14.83 which is above the newly established AEWR of $13.40 and $12.27 per hour for the adjusted AEWR as established in the Interim Federal Register effective October 2, 2025. The job order does not provide an adjusted AEWR for H-2A workers for Skill Level I AEWR.

Similarly, some SWAs have claimed (erroneously) that the compensation adjustment does not apply to any H-2A workers who decline housing accommodations, as the 'deduction' (their words) is only lawful if workers are actually provided the benefits for which they have paid via payroll deduction.

We have also experienced other bizarre situations, such as the Arkansas SWA claiming that the AEWR rates for both U.S. and foreign workers are *mandatory* (i.e., implying that an employer paying

above-AEWR is unlawful) and issuing deficiencies asking the employer to specify a lower wage. Situations like this would seemingly go against the clear statutory directive to protect wages.

Arkansas, for what it's worth, backtracked when pressed. Nevertheless, the misinformation associated with the adjustment is dangerous and may have far-reaching consequences for employers who misunderstand their obligations (in part due to guidance from the SWAs). Employers may inadvertently structure the compensation adjustment as a deduction that is only applicable to foreign workers, creating potential liability for national origin discrimination claims if foreign workers are forced to pay for a benefit that U.S. workers, in theory, receive for free. Likewise, employers confused by the methodology may erroneously believe that the AEWR adjustment applies universally to all H-2A rates of pay, including non-AEWR compensation such as state prevailing wages, collective bargaining wages, or state/federal minimum wage. For example, if an employer believes that the compensation adjustment functions as a deduction, the employer may incorrectly believe that it is permissible to apply the compensation adjustment as a deduction from state minimum wage, when this is NOT the case. The compensation adjustment only exists to create a separate AEWR applicable to H-2A workers; it does not give employers license to freely deduct the amount from other wage sources.

Given the high degree of confusion and misunderstanding, we urge the Department to promulgate clear, unambiguous guidance on this topic explaining the mechanics of the compensation adjustment and expressly disclaiming any claim that the adjustment functions as a deduction or credit. Otherwise, we believe the misinformation and confusion will continue.

II. CONCLUSION

Generally, we are supportive of the Department's IFR and believe the rulemaking sufficiently addresses longstanding stakeholders concerns about the H-2A wage methodology. Notwithstanding the foregoing, we believe there are many areas where the IFR could be improved to greater benefit H-2A program users while protecting workers against any adverse effects.

We respectfully ask the Department to consider these comments with respect to the IFR and issue a Final Rule taking into account the concerns and criticism raised herein.

Sincerely,



Thomas P. Bortnyk
Senior Vice President and General Counsel
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