



# The National Agricultural Law Center Mid-South Conference

Agricultural Labor Updates

Presented by: Brandon Davis

# Phelps at-a-glance

**1853**

Phelps is established

**17**

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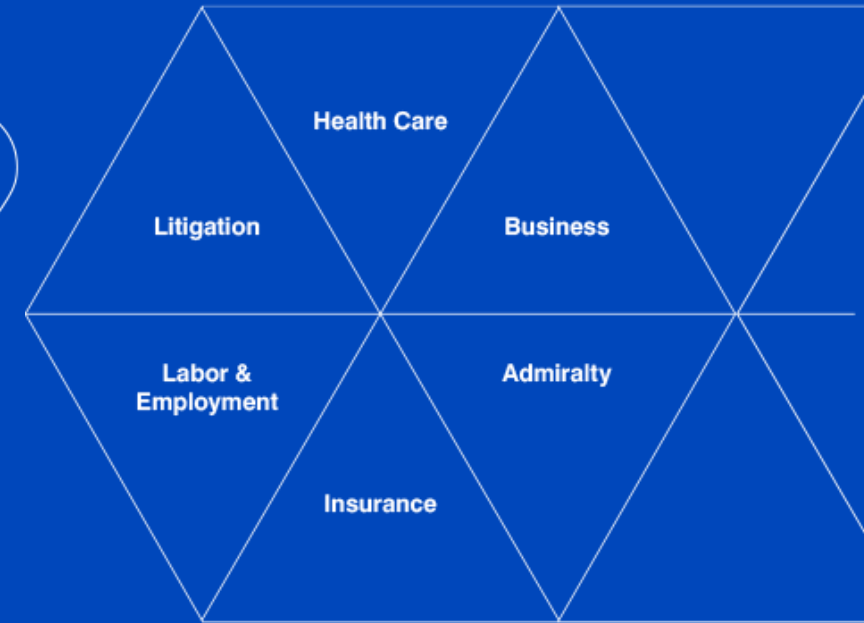
lawyers

**400+**

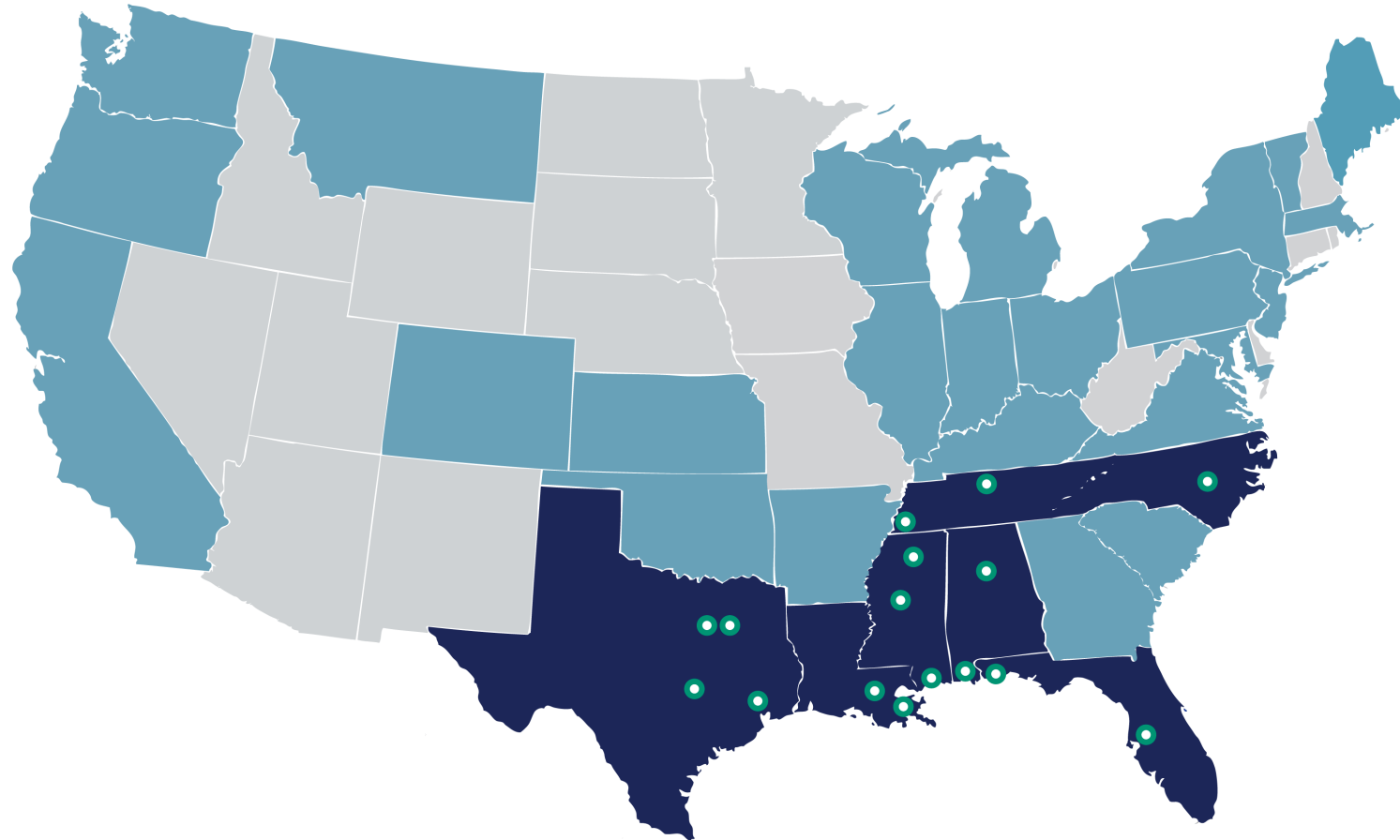
staff members



**6** primary areas of focus



# Locations



 Our Locations

 At least one Phelps lawyer licensed to practice

- Austin
- Baton Rouge
- Birmingham
- Dallas/Fort Worth
- Fort Worth
- Gulfport
- Houston
- Jackson
- London
- Memphis
- Mobile
- Nashville
- New Orleans
- Pensacola/Destin
- Raleigh
- Tampa
- Tupelo

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## Understanding the H-2A and H-2B Program

Obtaining a cost-effective labor supply

### Step 1



Obtain a labor certification from the **Department of Labor**  
– Requires conducting a labor market test with the State Workforce Agency where work will be performed

### Step 2



Obtain an approved petition from the **DHS United States Citizenship and Immigration Service** for a specific number of workers under H-2A visa classification

### Step 3



After receiving USCIS petition approval, workers will apply with one of the **Department of State** visa-issuing consulates abroad for an H-2A visa

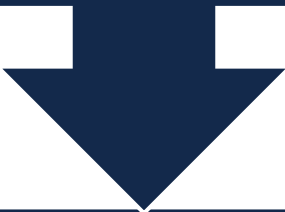
### Step 4



After receiving the visa from a DOS consulate, workers arrive at a port of entry where **DHS's Customs and Border Protection** officers verify eligibility for admission and length of stay

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

When do we start? Generally, employers must start the H-2A and H-2B Programs 180 days before the date of need.



What do we do six months before the date of need?

<b>Identify your date of need</b>	<b>Determine the number of laborers</b>	<b>Decide the scope of duties</b> <ul style="list-style-type: none"><li>• Agricultural Duties</li><li>• Non-Agricultural Duties</li><li>• The Majority of Duties</li></ul>	<b>Determination the Work locations</b>	<b>Determine the Housing Locations</b>
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# Work Permits, Guest Laborers and the H-2A and H-2B Programs



When do we file our application? **Generally, employers must file the H-2A Job Order no more than 75 and no fewer than 60 calendar days before the employer's first date of need. Filing within this window is critical to allow time for recruitment of U.S. workers before labor certification is approved.**



Can you show me how to measure the job order filing timeline?

**If you need planting labor on March 1, 2026, then file your job order by December 16, 2025.**

**If you need harvest labor by August 15, 2026, then file your job order by June 1, 2026.**

# Work Permits, Guest Laborers and the H-2A and H-2B Programs



**What terms can I list in my job order?** Farm employers should explain all the material terms and conditions of the work, including primary duties, secondary duties, experience, skill, hours, pay, work location(s), housing location(s), supervisor(s), date of need, number of workers needed, employer contact information, FEIN, transportation arrangements (international and domestic), applicable deductions, drug testing, background screening.



**What are my transportation obligations?**

Drive employees from across the border to the farm.

Transport farm employees in DOT vehicles.

# Work Permits, Guest Laborers and the H-2A and H-2B Programs



**What are my housing obligations?** H-2A employers must provide housing at no cost to H-2A workers and to those workers in corresponding employment who are not reasonably able to return to their residence within the same day. H-2A employers may house workers in temporary labor camps that they own or control, or they may use rental or public accommodations, such as hotels or motels.



**See WHD's Housing Safety and Health Standards Checklists for the Occupational Safety and Health Act (OSHA) standards and for the Employment and Training Administration (ETA) standards to learn more about the housing standards that apply to temporary labor camps under the H-2A program.**

**<https://www.dol.gov/agencies/whd/osha-housing-checklist>**

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## Can you explain the housing specs?

- A. Each room** where workers sleep must contain **at least 50 square feet per person**. Ceilings must be at least 7 feet high. (29 CFR 1910.142(b)(2)).
- B. Each room** where workers sleep must have **beds, cots, or bunks, as well as storage facilities** such as wall lockers for clothing and personal items.
  - i. Beds** or similar facilities must be **at least 36 inches apart**, both side-to-side and end-to-end, and must be **at least 12 inches** off the floor.
  - ii.** If double-deck bunkbeds are used, they must be at least 48 inches apart, both side-to-side and end-to-end. Minimum clearance between the lower and upper bunk must be at least 27 inches.
  - iii. At least 100 square feet per person must be provided in a room where workers cook, live, and sleep.** (29 CFR 1910.142(b)(9))

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## Can you explain the housing specs?

### C. Sufficient and Sanitary Cooking and Kitchen Facilities.

- i. Where stoves are shared, they must be provided in a ratio of at least **one stove per 10 persons or one stove per two families**.
- ii. Sanitary facilities must be provided for storing and preparing food. (29 CFR 1910.142(b)(10)).

### D. Heating, Cooking and Water Heating Equipment.

- i. A **water supply** is considered adequate if it can deliver **35 gallons per person per day** to the housing location at a peak rate of 2 1/2 times the average demand required each hour of the day. (29 CFR 1910.142(c)(2)).
- ii. **One or more drinking fountains must be provided for every 100 occupants**. If the number of occupants is between 101 to 200, an additional drinking fountain is required, and so on. Common drinking cups are prohibited. (29 CFR 1910.142(c)(4)).

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## **Can you explain the housing specs?**

### **E. Adequate and Sanitary Toilet, Laundry, Handwashing, and Bathing Facilities.**

- 1. Toilet facilities adequate for the capacity of the housing facility must be provided. (29 CFR 1910.142(d)(1))**
- 2. An adequate supply of toilet paper must be provided in each bathroom. (29 CFR 1910.142(d)(9))**
- 3. Bathrooms must be kept in a sanitary condition and must be cleaned at least daily. (29 CFR 1910.142(d)(10))**
- 4. Laundry, handwashing, and bathing facilities must be provided in the following ratio: one handwashing sink per family or one per six persons in shared facilities; one shower head for every 10 persons; one laundry facility for each 30 persons. (29 CFR 1910.142(f)(1))**
- 5. Bathroom floors must be of smooth finish but not slippery materials; they must be waterproof. Floor drains must be provided in all shower baths, shower rooms, or laundry rooms. (29 CFR 1910.142(f)(2))**

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## **Can you explain the housing specs?**

### F. Adequate and Sanitary Toilet, Laundry, Handwashing, and Bathing Facilities.

6. An adequate supply of hot and cold running water must be provided for bathing and laundry purposes. (29 CFR 1910.142(f)(3))
7. Every service building must be provided with equipment capable of maintaining a temperature of at least 70 degrees Fahrenheit during cold weather. (29 CFR 1910.142(f)(4))
8. Facilities for drying clothes must be provided. (29 CFR 1910.142(f)(5))
9. All service buildings must be kept clean. (29 CFR 1910.142(f)(6))

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## **Can you explain the housing specs?**

### **G. Sufficient Lighting.**

1. Where electricity is available, each habitable room must be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet.
2. Laundry and toilet rooms and rooms where people congregate must contain at least one ceiling- or wall-type light fixture.
3. Light levels in toilet and storage rooms must be at least 20 foot-candles 30 inches from the floor. In other rooms, including kitchens and living quarters, light levels must be at least 30 foot-candles 30 inches from the floor. (29 CFR 1910.142(g))

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## **Can you explain the housing specs?**

### H. Refuse disposal

1. Garbage containers must be kept clean. (29 CFR 1910.142(h)(2))
2. Garbage containers must be emptied when full, and at least twice a week. (29 CFR 1910.142(h)(3))
3. Effective measures must be taken to prevent animals, insect vectors, and pests from residing in or infesting the facility. (29 CFR 1910.142(j))

# Work Permits, Guest Laborers and the H-2A and H-2B Programs



## Do I withhold taxes from H-2A Paychecks?



**Foreign agricultural workers temporarily admitted into the United States on H-2A visas are exempt from U.S. Social Security and Medicare taxes on compensation paid to them for services performed in connection with the H-2A visa. This is true whether they are resident aliens or nonresident aliens. In addition, compensation paid to H-2A agricultural workers for services performed in connection with the H-2A visa is not subject to mandatory withholding of U.S. federal income tax unless backup withholding applies.**

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## How do Farm Employers determine Pay Rates?

H-2A wages are determined on a state-by-state basis by the U.S. Department of Labor (DOL) and are set at the highest of: the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage/piece rate, a collective bargaining wage, or federal/state minimum wage. Starting in 2026, the AEWR is based on the BLS Occupational Employment and Wage Statistics (OEWS) survey, **which often results in lower rates** than previous surveys.

# Work Permits, Guest Laborers and the H-2A and H-2B Programs

## What are the Applicable Pay Rates?

STATEWIDE HOURLY AEWRS DETERMINED UNDER § 655.120 (b)(1)(I) AND  
COMPENSATION ADJUSTMENT FOR H<sub>2</sub>A WORKERS ONLY

State	Skill level I (entry-level)	Skill level II (experience-level)	H-2A adverse compensation adjustment
Louisiana	9.59	14.84	-1.35
New Jersey	16.05	19.41	-2.28
Delaware	14.61	19.63	-1.85
Maryland	15.35	18.21	-2.31
Mississippi	9.74	14.92	-1.15

# Key Legal Cases Impacting Guest Labor Programs

# Louisiana Litigation on AEWR- *Teche Vermillion Sugar Cane Growers Association Inc. v. Su*, W.D. Louisiana 2025

## Victory for Harvesting and Hauling



## 2025 Phelps Dunbar LLP

### Legal Challenge to DOL Rule

Growers contested the 2023 DOL wage increase for H-2A sugarcane haulers.

### Wage Increase Controversy

Wages rose from \$13 to \$25 based on non-agricultural truck driver data.

### Court Ruling on Authority

Court ruled DOL exceeded authority by misapplying occupational data.

### Injunction and Precedent

Permanent injunction vacated the Final Rule, setting future AEWR precedents.

# Major Legislative Change after *Teche*

*See DOL Docket No. ETA – 2025 – 0008  
90 FR 47914*

*This rule is effective October 2, 2025. Interested persons are invited to submit written comments on this rule on or before December 1, 2025.*

# December 1, 2025 Interim Final Rule on AEWWR



## **Updated Wage Data Source**

The AEWWR calculation now uses the OEWS survey instead of the Farm Labor Survey for more accurate wage data.

## **Two-Tier Skill-Based Wages**

AEWWRs are split into Skill Level I for entry-level and Skill Level II for experienced workers.

## **Job Order Requirements**

Employers must specify job duties and qualifications to assign correct skill level in job orders.

## **Housing Adjustment Policy**

Wage adjustments are permitted for employer-provided housing but only apply to H-2A workers, not U.S. workers.

# December 1, 2025 Interim Final Rule on AEWWR

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# December 1, 2025 Interim Final Rule on AEW R

## What are the Changes to the AEW R Methodology?

1. The Department Will Use the OEWS To Determine Skill-Based AEW Rs for all Job Opportunities – the Farm Labor Survey is Gone!
2. The Department Will Determine the AEW Rs at Two Skill Levels To Better Reflect the Average Wages Paid to U.S. Workers Similarly Employed
3. The Department Will Assess the Duties and Qualifications of the Employer's Job Offer When Assigning the Most Applicable SOC Code(s) and Establishing the AEW R
4. The Department Will Determine a Single AEW R Covering the Five Most Common Field and Livestock Worker (Combined) Occupations
5. The Department Will Determine a SOC-Specific AEW R for all Other Occupations
6. The Department Will Establish a Standard AEW R Adjustment To Account for Non-Wage Compensation Benefits Provided to H-2A Workers
7. The Department Will Publish OEWS-Based AEW Rs To Coincide With the BLS Publication Schedule

# December 1, 2025 Interim Final Rule on AEWB

## How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

1. Consideration of Duties Performed for the Majority of the Workdays During the Contract Period
  - a. SOC code(s) based on the duties performed for the majority (meaning more than 50 percent) of the workdays during the contract period, including those duties closely and directly related, and qualifications contained in the employer's job offer.
  - b. When the employer identifies on the H-2A job order (Form ETA-790A) the duties that it expects workers to perform for the majority of the workdays during the contract period, the SWA and CO will assess such duties and, in combination with any necessary job qualifications, assign the SOC code that best represents the employer's job opportunity.

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity
  - a. The DOL Gave the “Inside Baseball” on How it will Assign SOC codes and Wages – primary duties, related duties, qualifications.

To address the need for consistent occupational coding related to an employer's job opportunity, the Department is providing additional guidance regarding the methods by which the CO will assign H-2A job opportunities to one or more SOC occupation codes based on an assessment of the **duties that employers expect workers to perform for the majority of the workdays during the contract period**, including those **duties closely and directly related**, and **qualifications contained in the employer's job order** seeking temporary agricultural labor certification to employ H-2A workers. When determining the AEW, the SWA and the CO must first determine the appropriate occupational classification, or SOC code(s), for the employer's job opportunity by **comparing** the duties and requirements contained in the employer's **job order to** the SOC definitions, skill requirements, and tasks that are listed in **O\*NET**. The Department is taking the opportunity in this rulemaking to **clarify** how the CO and SWA will evaluate the scope of duties identified within an employer's job offer for purposes of determining the applicable **SOC code(s)**, particularly **as it relates to certain driving, supervisory, and other farm maintenance duties** performed by workers.

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

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# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity

- c. The FLS is Gone. The 2023 Assigned the Highest Wage Applicable to a Combination of Duties. Now, the DOL will focus on the characteristic of the job at issue using the ONET “core” duties as a guideline.

Prior to the 2023 AEWB Final Rule, all job opportunities were issued an FLS-based AEWB covering the field and livestock workers (combined) occupations. The assignment of SOC codes became more significant under the 2023 AEWB Final Rule, which specified that when the employer's job requires **encompassed a combination of duties**, the employer must pay the highest AEWB for the applicable SOC codes. This made **harvesting and hauling** duties subject to very high wages that were overcome in the lawsuit. Now, the DOL will focus on the term **“qualification”** to mean a **characteristic**, excluding the job duties or work tasks to be performed, that is **necessary to** the individual's ability to perform **the job in question**. Such characteristics include, but are not limited to, **the ability to use specific tools, vehicles, or equipment as well as any education or training required** for the employer's job opportunity. In determining the SOC code, the DOL will use a **case-by-case approach** using O\*NET's SOC-core duties scale.

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity

- d. To assign a low wage for driving jobs, the DOL will focus on the type of truck, on or off-farm locations, and certifications like CDLs.

A worker engaged in harvesting who also drives a heavy tractor-trailer (at least 26,001 Gross Vehicle Weight) to haul cane, and does not require a CDL can have an SOC 45-2091 (Agricultural Equipment Operator) “**where the work tasks presented in an employer's job order require workers to be engaged in agricultural work for the majority of the workdays during the contract period and perform driving duties using any of the types of equipment identified without the requirement for formal education, training, or credentialing and possess three months or less of related experience.**”

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity
  - e. The harvesting and hauling model that now exists through Agricultural Associations must be changed to obtain the low wage.

In contrast, a H-2A job opportunity that requires a worker to **possess a CDL** with more than **three months** to one year of related experience and whose duties, including those duties closely and directly related, for the majority of the workdays during the contract period involve **driving a heavy tractor-trailer** combination to deliver agricultural **products over public roads through weigh stations** to storage or market, including other essential work tasks such as **checking all load-related documentation for completeness and accuracy, operating Citizen Band radios or Global Positioning System equipment to exchange necessary information with supervisors or other drivers, coupling and uncoupling trailers, maintaining vehicle logs, and obtaining customer signatures for delivery of goods**, may be assigned **SOC code 53-3032 (Heavy and Tractor-Trailer Truck Drivers)** even if such worker is also expected to perform some hand-harvesting work during a minor portion of the work contract period.

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity

f. Chauffeurs who drive other H-2A workers are able to obtain the low wage.

Job opportunities that involve **driving farmworkers** can have the low wage. The vehicles typically would need to have a **capacity of less than 13 tons** and **cannot require the equivalent of a CDL** to operate on or off the farm properties. If this criteria is met, the driving duties associated with these types of qualifications will fall within the five SOC codes comprising field and livestock worker occupations (combined). In addition, the fact the workers may also use these same vehicles, at their discretion, to transport themselves to the grocery store, bank, or laundry facilities, is not a relevant factor that would warrant the CO and SWA assigning another SOC code outside of the five SOC codes comprising field and livestock worker occupations (combined).

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity

g. Supervisor rates are flexible and depend on skill associated with the job.

For job opportunities involving supervisory duties, O\*NET core and supplemental work tasks associated with the five SOC codes comprising field and livestock worker occupations (combined) provide a reasonable degree of **flexibility** for workers to direct, monitor and oversee the work of other workers employed in the job opportunity **without the higher-skills and requirements associated with formal supervision**. Therefore, where the work tasks presented in an employer's job opportunity require workers to be engaged in field and livestock related work for the majority of the workdays during the contract period and perform other supervisory related duties, the CO and SWA will, absent additional job details that might indicate otherwise, assign one or the five SOC codes comprising field and livestock worker occupations (combined) that best represents the employer's job opportunity and subject to a single AEW. But if the job supervised requires one to two years of experience or high skills, a high wage would apply to the supervisory role.

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity

- h. Maintenance work associated with planting, harvesting, or hauling is not necessarily classified as high wage. Construction work, that requires 1 year of experience will draw a high wage.

For job opportunities involving farm maintenance duties, the DOL will permit a worker primarily engaged in performing field and livestock related work to also perform other relevant and important tasks such as “adjust, repair, and service farm machinery and notify supervisors when machinery malfunctions,” which is encompassed by SOC code 45-2091 (Agricultural Equipment Operators); Therefore, **where the work tasks presented in an employer's job opportunity require workers to be engaged for the majority of the workdays during the contract period in field and livestock related work and perform related maintenance duties, including building minor agricultural structures and fencing around the property, using any of the types of equipment identified and without the requirement for formal education, training, or extensive work-related experience, the CO and SWA will, absent additional job details that might indicate otherwise, assign one or the five SOC codes comprising field and livestock worker occupations (combined)** that best represents the employer's job opportunity and subject to a single AEW. But **construction will draw a high wage.**

# How will the DOL Judge Duties and Qualifications to Assign SOC Codes for Wages?

## 3. Housing Costs are available for Deduction from H-2A Worker Pay

The DOL recognizes employers provide H-2A employees with housing, free of cost. Americans (who are corresponding workers) do not receive any housing credit or offset pay. Accordingly, the DOL will allow farm employers to deduct housing costs from H-2A worker pay as a means of fairness to American workers.

# December 1, 2025 Interim Final Rule on AEWWR

## What are the Applicable Pay Rates?

STATEWIDE HOURLY AEWRS DETERMINED UNDER § 655.120 (b)(1)(I) AND  
COMPENSATION ADJUSTMENT FOR H<sub>2</sub>A WORKERS ONLY

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Mississippi	9.74	14.92	-1.15

Farm Workforce Modernization  
Act of 2025 (H.R. 3227),  
Reintroduced on May 7, 2025

# Farm Workforce Modernization Act of 2025 H-2A/H-2B Program Expansion – Policy and Scope



## **Shift to Legal Guest Labor**

Increased enforcement of undocumented labor leads to higher use of H-2A and H-2B programs.

## **Programs Supporting Agriculture**

H-2A and H-2B provide legal pathways for seasonal and non-seasonal agricultural jobs.

## **Addressing Labor Shortages**

Programs help fill labor gaps and maintain agricultural productivity legally and efficiently.

## **Compliance with Regulations**

H-2A and H-2B programs ensure compliance with immigration and labor laws.

# Farm Workforce Modernization Act of 2025 – Policy and Scope



## **Legalization Pathway**

Provides Certified Agricultural Worker status for undocumented farmworkers and their families.

## **H-2A Program Reforms**

Expands access to year-round agricultural jobs including dairy and non-seasonal sectors.

## **Worker Protections**

Improves wage standards and housing requirements for agricultural workers.

## **Employment Verification**

E-Verify use promoted to confirm employment eligibility for farm employers.

# Worker Flexibility Enhancements – October 2, 2025



## **Grace Periods Established**

New rule provides 10-day, 30-day, and 60-day grace periods around employment for planning and transition.

## **60-Day Transition Period**

Workers have 60 days post-employment to find new jobs or prepare departure without work authorization.

## **Employment Portability**

Workers can start new jobs immediately after filing petitions, improving mobility and labor market response.

## **Empowering Workers**

Flexibility changes give workers more control and promote a dynamic, fair labor system, but imposes whistleblower protections.

# H-2A Worker Protection Rule Changes

# H-2A Worker Protection Specifics



## **Fee Prohibition and Penalties**

Recruitment, visa, and contract fees for H-2 workers are now banned to prevent exploitation. Violations lead to petition denials up to three years.

## **Extended Whistleblower Protections**

H-2 workers receive whistleblower protections to report violations without fear of retaliation, enhancing workplace safety.

## **DHS Inspection Authority**

DHS is authorized to conduct site inspections and compliance reviews to enforce program rules effectively.

# Worksite Enforcement Since January 20, 2025, EO

# Practical guidance to avoid/resolve a worksite raid

## New DOJ Program Offers Incentives for Immigration Tips, Increasing Employer Exposure

- On January 20, 2025, the Department of Homeland Security (DHS) rescinded the Biden Administration's guidelines for Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) enforcement actions in or near "sensitive" areas through two directives: The first directive rescinds the Biden Administration's October 27, 2021, Guidelines for Enforcement Actions in or Near Protected Areas. The second directive narrows the scope of humanitarian parole and returns the humanitarian parole program to a case-by-case basis.
- ***"This action empowers the brave men and women in CBP and ICE to enforce our immigration laws and catch criminal aliens—including murders and rapists—who have illegally come into our country. Criminals will no longer be able to hide in America's schools and churches to avoid arrest. The Trump Administration will not tie the hands of our brave law enforcement and instead trusts them to use common sense."***

# Worksite Enforcement and Immigration Policy



## **Declassification of Sensitive Locations**

Sensitive locations like schools, hospitals, and churches are now subject to immigration enforcement actions.

## **Increase in ICE Raids**

There has been a rise in immigration raids following policy changes redefining enforcement priorities.

## **Elimination of Employment Authorization**

Employment authorization programs were removed, limiting legal work permits for undocumented workers.

## **Increased Employer Compliance Pressure**

Employers face greater scrutiny and pressure to adhere to immigration laws and labor regulations.

# Q&A

Thank you!



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