

DOL H-2A Modernization Proposed Rule

Wage Rates / Surety Bond

Existing H-2A Program	Proposed NPRM Changes
Employer must pay highest applicable wage rate: AEW, prevailing rate, CBA rate, or state/federal minimum; wage increases mid-contract.	Retains current “highest applicable” rule; mid-contract increases take effect 14 days after publication; mid-contract decreases are <u>not available</u> - employers must continue to pay the rate advertised.
USDA NASS surveys wages on regional basis (CA or FL or multiple states); Weighted average of gross earnings of crop and livestock workers (excluding supervisors and managers); Includes piece-rate, bonus, and OT pay; Same wage for all agricultural workers in that region.	Disaggregated by occupation groups, using USDA data as primary source, backed up by BLS data where necessary, but using nationwide data where regional-level data not available; efforts with USDA to obtain wage-only rates (not piece-rate, OT, etc.). <i>DOL requests comments on all aspects of the proposed wage-setting method.</i>
Prevailing wage rate determined by SWAs under ETA Handbook 385 dating back to early 1980s.	Replaces Handbook 385 with concrete controls on SWA prevailing wage survey data, requiring specific minimum response rates before finding a SWA survey to be valid/enforceable.
H-2A labor contractors surety bonds to guarantee wages based on adverse effect wage rate for region (“AEWR”); employers submit scanned bonds.	H-2A labor contractors surety bonds to guarantee wages based on average annual nationwide wage. Allows for electronic surety bonds.

Transportation / Housing

Existing H-2A Program	Proposed NPRM Changes
Employer pays for inbound travel costs from “place of recruitment”; litigation over where that occurs.	Return to earlier interpretation that inbound travel costs run from consulate not from worker’s home.
Rules call for reimbursement at 50% point of contract; FLSA interpretation under <i>Arriaga</i> requires reimbursement in first pay period, instead.	Retains current rule; no specific reference to <i>Arriaga</i> decision, but explicit reference to employer’s separate FLSA obligations.
Local transportation must meet applicable local/state/federal standards and MSPA insurance rules.	Specifically applies all MSPA standards for transportation. <i>Invites comments on further modifications to improve transportation safety.</i>
Employer must provide free housing for H-2A workers and remote U.S. workers; SWA must inspect before certification.	Retains requirement of free housing and pre-certification inspection, but allows government officials other than SWAs to conduct inspection; specific rules for

	rental/hotel housing.
Annual inspections.	Multi-year inspections, employer self-inspection and self-certification in Year 2.

Recruitment / Start Date

Existing H-2A Program	Proposed NPRM Changes
Print newspaper advertisements, once on a Sunday and once on another day.	TBD – proposal to replace print ads with online advertising only; separate final rule to be announced soon.
Requirement to contact U.S. workers employed in the previous year.	Same, but now states employer must contact FLC's U.S. employees, as well.
Advertise out-of-state where OFLC considers "labor supply" states.	Requires specific analysis by OFLC of out-of-state referrals before finding that a particular state is a "labor supply" state.
Employers required to hire all eligible workers through 50% of work period.	Employers required to hire all eligible workers through later of first 30 days or until end of "staggered entry" period.
All workers covered by job order must begin on start date listed.	Allows for: (1) actual start of work within 14 days of "anticipated" first date of need; and (2) "staggered entry" at employer's discretion over first 120 days of contract.
No requirement for SWA to check work-authorization of referrals.	Retains (verbatim) current rule. No discussion in preamble.
Jobs limited to single area-of-intended employment; unwritten policy of limiting to 60-mile radius.	"Minor amendment" to replace "place of the job opportunity" and "worksite" with "place(s) of employment"; specific allowance of central "pick-up" point; <i>invites comments on definition and possible use of objective factors.</i>

Application / Certification Process and Fees

Existing H-2A Program	Proposed NPRM Changes
Employers can file electronic or paper applications.	Employers <u>must</u> file electronically.
Requires original "wet" signatures.	Allows scanned or electronic signatures.
DOL and DHS separately determine whether a job is "temporary" or "seasonal."	Single agency determination; <i>invites comments on which agency should make that adjudication.</i>
File with SWA 75-60 days before start date; file with CNPC at least 45 days before start date; CNPC to certify at least 30 days before start date.	File with CNPC in 75-60 window, but then sent to SWA for review; 45-day filing with CNPC; timelines for SWA and CNPC review; steps to commit to certification at least 30 days prior to first date of need, but no specific guarantee.
Emergency filing waives 45-day	Retains current rule.

requirement and allows for concurrent SWA/CNPC processing under “Act of God” situations or first-time filers.	
Certification fee of \$100 plus \$10 for each position certified up to \$1000 max with joint-employer association paying \$100/employer, \$10/job, \$1000 max	Retains current rule.
Appeal from denial must be filed within 7 calendar days; employer specifies whether requesting <i>de novo</i> review or administrative record review.	Appeal from denial must be received by OALJ within 10 calendar days; if employer does not specify <i>de novo</i> review requested, OALJ will automatically treat as request for administrative record review.

Post-Certification Modifications

Existing H-2A Program	Proposed NPRM Changes
Once DOL certifies the job order, no changes to number of workers or places where work will be performed are allowed.	Post-certification modifications permitted as to number of workers, work period, and places of work, under certain conditions and within certain limits.
Early contract termination only for “contract impossibility”/ <i>force majeure</i> .	Early termination with agreement of employer/employees and CNPC approval.

Eligibility

Existing H-2A Program	Proposed NPRM Changes
Uses FLSA, IRC, MSPA definitions of “agriculture,” excludes reforestation, pine straw gathering, and dairy.	Adds pine straw and reforestation (not including utility or right-of-way spraying). <i>Invites comments on definition of “seasonal” to include dairy.</i>
Informal guidance on “special procedures” for itinerant animal shearing, beekeeping, and custom harvesting.	Codified notice-and-comment rules for itinerant shearing, beekeeping, custom harvesting, and reforestation.
Ability to petition for future “special procedures” as needed.	Eliminates informal “special procedures,” citing <i>Mendoza v. Perez</i> .

Enforcement

Existing H-2A Program	Proposed NPRM Changes
References to joint employment, but caselaw has been inconsistent.	Proposes specific joint-employment test that tracks current Wage & Hour Division rulemaking and common-law agency definitions; specifically states that FLSA/MSPA definition of J/E “neither apply nor are relevant to” determining H-2A joint employment.
DOL can collect back wages and/or CMPs from any or all joint employers.	DOL will consider whether association or other joint employers received financial

	benefit from other employer's violation, and reduce CMPs accordingly.
Civil money penalties for violations; debarment for certain substantial violations.	Increases to certain penalties; no change on debarment as remedy.
Requirement to provide same wages and benefits to any U.S. workers in "corresponding employment," i.e., performing any part of job duties.	No change from current law. No discussion in preamble.
Separate enforcement by OFLC, WHD, DOJ, and DHS.	Coordinated enforcement, with shared authority of OFLC and WHD, referrals to other agencies for enforcement.
Debarment for work outside of job duties/locations listed in certification.	No change.