



# H-2A Trends and Immigration Update

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WESTERN GROWERS  
LEGAL RESOURCES

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## Disclaimer

*Seminar materials and this presentation are not intended as legal advice and are not legal advice. These materials cannot substitute for legal advice. You should consult an experienced employment attorney if you have questions about your business, policies or your particular circumstances.*

# U.S. Statistics and Trends

1.5 million year-round or full-time equivalent (FTE) jobs in U.S. agriculture, including:

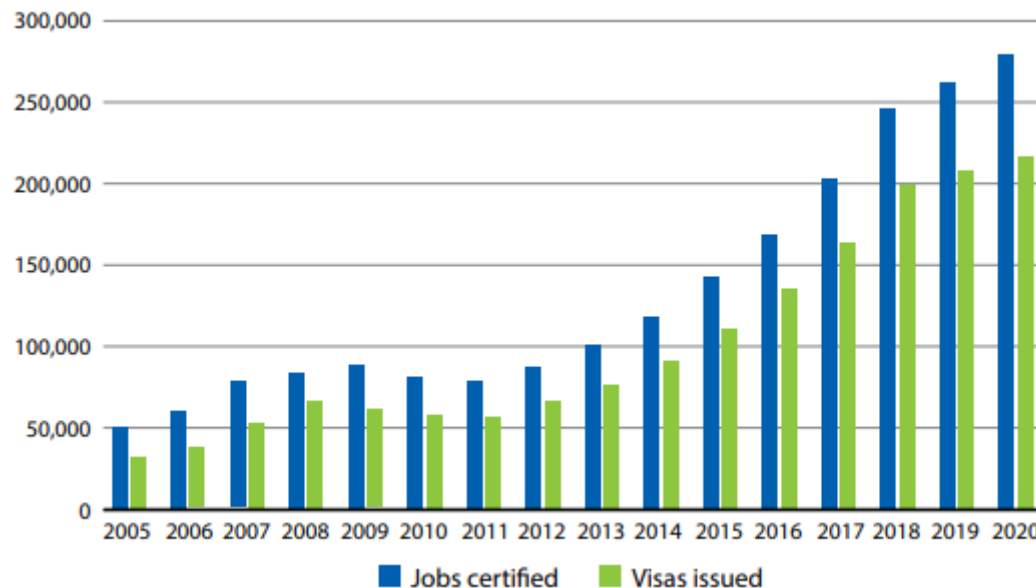
- 1.1 million in crop cultivation
- 400,000 in animal agriculture

H-2A workers:

- Reside in the United States an average of 6 months
- Account almost 10% of average employment in U.S. crop agriculture

# U.S. Statistics and Trends

Since 2000, the H-2A program has quadrupled in size



Sources: DOL OFLC 2021; U.S. Department of State 2020

	United States
Total jobs certified	275,430
Average number of jobs per certified application	20
Average length of employment: days	168
Average length of employment: weeks	24
Average anticipated hours per week	39
Average earnings (\$): U.S. AEWR \$13.29	\$12,711

Source: OFLC disclosure data.



# Why the Value of H-2A job offers and H-2A wages paid are approximate

- Only 80% of certified job orders result in the issuance of H-2A visas
- Workers may earn less than 100% of the contract value if a job finishes early.
- Workers could earn more than 100% of a contract's value if:
  - They work more hours than promised
  - They earn a piece-rate
  - They earn overtime wages and bonuses

# Proposed H-2A Changes Get Blocked

Shift from the current practice of setting one AEWR per state to setting separate AEWRs for each occupation or job title.

OFLC proposed to use earnings data from:

- U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) to set AEWRs for most farm jobs.
- DOL's Occupational Wage and Employment Statistics (OWES) program to set AEWRs for farm-related jobs.

# Proposed H-2A Changes Get Blocked (cont.)

September 30, 2020:

USDA cancelled the FLS, before DOL issued final regulations to:

- Implement proposed changes.

UFW sues and a federal judge intervened and ordered the USDA to:

- Resume the program
- Collect DOL's farmworker earnings data to set AEWRs.



# Proposed H-2A Changes Get Blocked (cont.)

November 5, 2020:

DOL published final regulation that:

- Froze AEWRs 2021 and 2022 at their 2020 levels.
- Ended reliance on the FLS to adjust these AEWRs in the future.

The same federal judge:

- Blocked the DOL from implementing this final regulation.

January 20, 2021:

Biden Administration withdraws the Final Regulation.

# Latest Notice of Proposed Rule Making

December 1, 2021:

DOL published NPRM: *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Workers*

- For the vast majority of H-2A job opportunities represented by 6 occupations comprising the field and livestock worker (combined) wages reported by USDA, the proposed regulations will rely on the FLS to establish the AEWs for these occupations (Same as existing rules)
  - Crop workers, livestock workers, graders and sorters, equipment operators

# Latest Notice of Proposed Rule Making

- For all other occupations (e.g., the Department proposes to use the Bureau of Labor Statistics' Occupational Employment Statistics survey to establish the AEWs for each occupation
  - On-farm construction, supervisors, hauling/truck driving
- If a job order includes duties under the OES wage survey, the highest applicable wage will be assigned for the position.
- So... this appears to be very much like the Trump proposed rule, minus the temporary AEW freeze.



# Farm Workforce Modernization Act (FWMA, or HR

**1603)**

March 1, 2021 U.S. House of Representatives, approved the bipartisan FWMA.

- Has three titles:
  - Legalization
  - H-2A streamlining
  - Verification
- Would turn many DOL's July 2019 AEWR proposals into law, including:
  - Setting AEWRs by job title
  - Freezing AEWRs
  - Limiting annual increases in AEWRs
- Provide an 8-year path to U.S. citizenship for domestic workers with a history and continued service in agriculture.

# FWMA

## By Title 1: Legalization

Undocumented farmworkers would become Certified Agricultural Workers (CAWs) if:

- They performed at least 180 days of farm work in the two previous years.

Benefits:

- Indefinite extension  
If the worker continues to work at least 100 days per year.
- Spouses and minor children would receive residence visas and work permit.

# FWMA

## By Title 1: Legalization (cont.)

CAWs' path to legalization:

Become permanent or legal immigrants if they have performed agricultural work in the US for:

- 10 years or more and continue to perform at least 100 days of farm work for four additional years
- 10 years or less and continue to perform at least 100 days of farm work for eight additional years.



# FWMA

## By Title 2: H-2A Streamlining

Streamline the H-2A program in four ways:

1. Electronic application process and job ads.
2. Introduce 3-year visas.
3. Allow 20,000 H-2A workers per year to be admitted for dairy and other farm jobs.
4. Add funding to build housing in agricultural areas.

# FWMA

## By Title 2: H-2A Streamlining (cont.)

AEWRs would be set by job title and frozen for a year.

- For the next 9 years: increases would be capped at 3.25%.

Portable Agricultural Worker (PAW) pilot program would allow:

- Up to 10,000 farm guest workers.

PAW's beneficiaries would be:

- Allowed to work in the U.S. farm labor market for 3 years.
- Required to being not unemployed more than 60 days a year.
- Protected from exploitative employers.

# FWMA

## Title 3: Verification

Would require all farm employers to:

- Use electronic verification (E-Verify)

Once the three titles of the FWMA are enacted, USDA and DOL would be required to study whether:

- Employment of H-2A workers has depressed the wages of U.S. farmworkers
- An AEWR is necessary to protect the wages of U.S. farmworkers
- Any changes are warranted in the methodologies used to calculate AEWRs



# Rising AEWRs

Between 2010 and 2020, AEWRs rose 4% average a year.

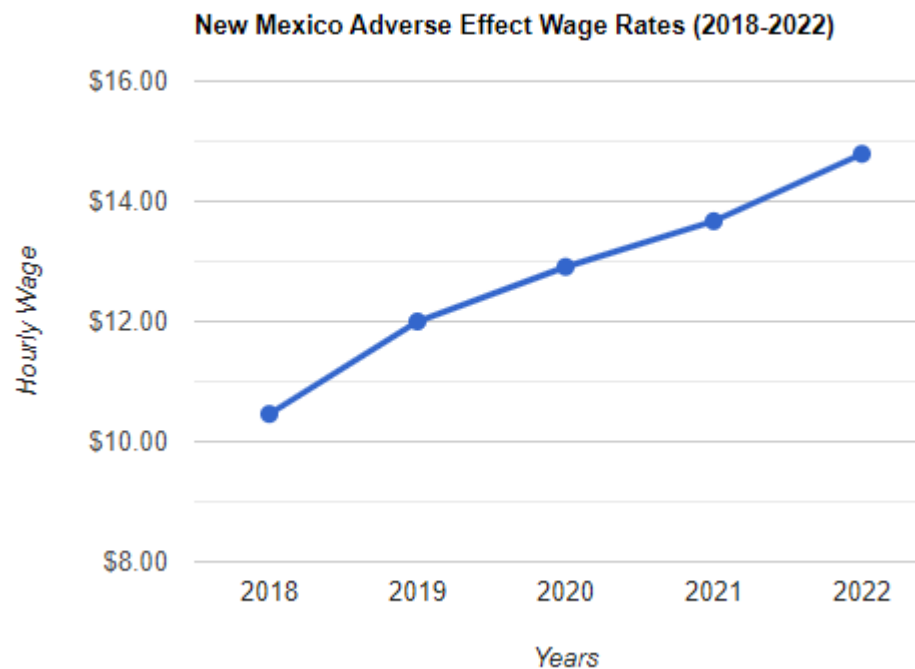
Farms employ an estimated of 50,379 U.S. workers and H-2A workers.

Freezing the estimated \$3.5 billion wage bill would save:

- Employers \$140 million a year.
- H-2A employers an additional \$29 million a year.
- Total savings at least \$169 million a year.

## New Mexico: Adverse Effect Wage Rates

- 2018: \$10.46
- 2019: \$12.00
- 2020: \$12.91
- 2021: \$13.67
- 2022: \$14.79



# Thank You!

