

EPI comments on DOL's proposed rule on “Improving Protections for Workers in Temporary Agricultural Employment in the United States”

Public Comments • By [Daniel Costa](#) • November 14, 2023

Submitted electronically on November 14, 2023 via <https://www.federalregister.gov/documents/2023/09/15/2023-19852/improving-protections-for-workers-in-temporary-agricultural-employment-in-the-united-states>

TO: Julie Su, Acting Secretary, U.S. Department of Labor

Attention:

Brian Pasternak
Administrator, Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW
Room N-5311
Washington, DC 20210

RE: *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, Proposed Rule by the Employment and Training Administration and the Wage and Hour Division, DOL Docket No. ETA-2023-0003, RIN: 1205-AC12, 88 Fed. Reg. 63750 (September 15, 2023)

Dear Acting Secretary Su and Administrator Pasternak:

Thank you for the opportunity to submit this comment in response to the invitation from the Department of Labor’s (DOL) Employment and Training Administration (ETA) for public comment on its Notice of Proposed Rulemaking (NPRM) entitled “Improving Protections for Workers in Temporary Agricultural Employment in the United States,” which proposes to amend many of the regulations governing the use of the H-2A temporary agricultural worker visa program.

The Economic Policy Institute (EPI) fully supports and endorses the written comments and recommendations submitted by Farmworker Justice, on behalf of a multitude of organizations that represent migrant and seasonal farmworkers, including H-2A workers. EPI is a signatory listed on the comments submitted by Farmworker Justice and incorporates those comments and recommendations by reference into this comment. The comments submitted herein should be considered a brief addendum to those comments, which provide additional analysis in support of DOL’s updates to require paying any applicable higher Adverse Effect Wage Rate at the time of its publication, and also offer recommendations to create a front-end screening process to prohibit lawbreaking employers from hiring through the H-2A program.

EPI also supports and endorses the written comments and recommendations submitted by the *Migration that Works* coalition, which EPI is a founding member of.

Introduction and about EPI:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve economic conditions and raise labor standards for low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals.

EPI has researched, written, and commented extensively on the U.S. system for labor migration, including in particular the H-2A and H-2B programs and other temporary work visa programs, as well as on farm labor issues, including labor standards enforcement in agriculture. EPI has also provided expert testimony about work visa programs and farm labor to both the U.S. Senate and House of Representatives, as well as state legislatures, and recently published a report examining the latest data on federal wage and hour enforcement in agriculture.

Given the numerous reports from advocates, news investigations, and even government audits over the years that have revealed how deeply flawed the H-2A program is when it comes to protecting the rights of both migrant farmworkers and U.S. farmworkers, EPI welcomes and appreciates the attempt by DOL to strengthen worker protections through this NPRM, by proposing to enhance transparency in disclosure of recruitment and job terms, and through broader access rights for key service providers and labor unions, stronger retaliation and wage protections, and stricter debarment processes to prevent utilization of the program by bad actors. EPI broadly supports most of the proposed

changes to the H-2A program and hopes that the administration will seriously consider the comments and recommendations submitted by Farmworker Justice and signatory organizations, and not delay in issuing a final rule. I also urge DOL to fiercely defend the new regulations in court if they are challenged by employer groups.

EPI supports DOL's updates to 20 CFR 655.120(b) because requiring employers to pay any higher, updated Adverse Effect Wage Rate upon the date of publication in the federal register will help ensure that farmworkers are paid appropriately for the work they perform and thereby protect U.S. labor standards in agriculture.

DOL has proposed a number of updates with respect to the advertisement and payment of wages to H-2A farmworkers, including the Adverse Effect Wage Rate (AEWR) which EPI generally supports. While the comment submitted by Farmworker Justice addresses piece rates and productivity standards and makes recommendations which EPI supports, this section is intended to also support the changes proposed at **20 CFR 655.120(b) AEWR determinations**, which would:

revise § 655.120(b)(2) to designate the effective date of updated AEWRs as the date of publication in the Federal Register, and to revise paragraph (b)(3) to state that the employer is obligated to pay the updated AEWR immediately upon publication of the new AEWR in the Federal Register. This change is intended to help ensure workers are paid at least the updated AEWR, as soon as it is published, for all work they perform, and thereby help to ensure the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.¹

Although this change is minor, as DOL suggests, it will help ensure that both H-2A workers and U.S. workers in corresponding employment will be paid appropriately for the work they perform.

Current practice requires that employers pay any updated, higher AEWR upon the effective date, which has the result of giving employers a grace period before updating the wage paid to their applicable migrant and U.S. farmworker employees. Farm operators and other farm employers like farm labor contractors are likely to argue that this de facto grace period is necessary so that they can have time to become aware of the newly applicable wage rates and make any necessary administrative changes. However, as DOL notes, there are adequate public sources of information that will allow employers to have notice of new wage rates even before they are published in the Federal Register, and DOL will publish a notice directing employers to those sources. (Although this will not be

available to “the employers of the small number of field and livestock workers [combined] job opportunities in States or regions, or equivalent districts or territories, for which the FLS does not report a wage [e.g., Alaska and Puerto Rico)].”²

And because DOL publishes the wage rates on a regular schedule, it is not unreasonable to require employers to check once or twice a year to confirm the appropriate wage they should be paying their employees whom they’ve hired through a government program.

But also, the proposed change is important because the required AEW rates are always one year behind, meaning H-2A farmworkers and those in corresponding employment are likely being underpaid compared to the true market rate. As DOL discusses, the AEW—which varies by state or region—is based on surveys of farm employers by the U.S. Department of Agriculture (USDA) in their *Farm Labor* report series, which is commonly referred to as the Farm Labor Survey or FLS, and reflects average wages surveyed for the previous year.

The average wages surveyed by USDA in a given state or region are used to set the AEW in the corresponding state or region *the following year*, without any adjustment upward for future inflation or wage growth. This means that the wages paid to H-2A farmworkers are always lagging behind what is likely being paid in the current farm labor market. This also impacts farmworkers who are already in the United States, since H-2A rules require that employers also pay their U.S. farmworkers no less than the AEW if they are similarly situated and working alongside H-2A employees (i.e., if they are in corresponding employment).

(While the AEW methodology was recently updated by DOL and is not the subject of this NPRM, relatedly, when setting the AEW, DOL should consider estimating future inflation and adjusting state AEWs to reflect it, so that AEWs no longer lag behind true market rates for farm labor.)

In addition to the AEW always being based on wages from the previous year, it must be noted that, despite the many claims made by agribusiness representatives to the contrary, the true value of the AEW has remained mostly flat over at least the past decade, after adjusting for inflation, and has even declined in a number of states in terms of its purchasing power.

To illustrate this, **Table 1** below shows the AEWs for H-2A farmworkers in all reported states between 2013 and 2022, in values that have been adjusted to constant 2022 dollars. The last three columns on the right show the calculated total real (inflation-adjusted) dollar change, as well as the total real percentage change, and the average annual real percentage change from 2013 to 2022, for each state and for all 50 states, including a total that is weighted by the number of H-2A workers. The AEWs listed are ranked by the number of H-2A workers, using data on approved petitions from United States Citizenship and Immigration Services as a proxy for the number of workers.

Let’s examine the top five states for H-2A employment, which together account for more than half of all H-2A employment nationwide (52%). The table shows that in Florida, the biggest state for H-2A farmworkers—where 15% of H-2A farmworkers are employed—the

value of the AEWR *decreased* by 17 cents between 2013 and 2022 (in constant 2022 dollars); that's a total decrease in value of 1.3% over the decade. In Georgia, the second-biggest state for H-2A employment—where 11% of H-2A farmworkers are employed, the value of the AEWR *decreased* by 35 cents over the decade, a total decrease of 2.8%, averaging a decrease of 0.3% per year.

The largest increase in the value of the AEWR (in constant 2022 dollars) was in California, which accounts for nearly 10% of H-2A employment. In California, the total real value of the AEWR increased by \$3.96 over the decade; a total percentage increase of 29.2%, which amounts to annualized percentage increase of 2.6% per year. An annual increase of 2.6% over a decade is hardly an unreasonable average yearly increase for a physically demanding, vitally needed occupation where employers claim there are severe labor shortages.

The AEWR increases over the decade in the next two biggest states for H-2A employment—Washington and North Carolina, respectively—were about half the value of the increase in California. The value of the AEWR in Washington increased by \$2.27 over the decade, a total increase of 15%, growing annually at an average of 1.4% per year. The value of the AEWR in North Carolina increased by \$1.95 over the decade, a total increase of 15.9%, growing annually at an average of 1.5% per year.

Table 1 shows that there were 20 states where the annual average real increase in the AEWR was less than 1%, with four of those states seeing a decline in the value of the AEWR. There were 25 states where the annual average increase in the AEWR was between 1% and 2%, and the AEWR only grew by more than 2% per year in three states (Colorado and Nevada at 2.1% in addition to California).

The average yearly percentage increase for all states combined over the decade was just over 1%, at 1.05%, and if weighted by the number of H-2A workers in each state, just under 1%, at 0.91%.

If we examine the change in the real value of the AEWR from 2021 to 2022, which **Table 2** shows below, we see that the aforementioned claims made by agribusiness about rapid AEWR growth are particularly spurious after adjusting for inflation. Table 2 shows that in all but six states, the real value of the AEWR declined in 2022, relative to the value in 2021. The real value of the AEWR increased by just \$0.35 in the four states that make up the USDA's Northeast II survey region, which include Delaware, Maryland, New Jersey, Pennsylvania, and increased by only 1 cent in the Mountain III region of Arizona and New Mexico. In all other states the value decreased by as much as 6.7% (six states saw decreases of over 6%).

Agribusiness representatives and other industry advocates will likely claim that H-2A wages are inflated and do not reflect the true reality of the farm labor market, and thus the changes proposed at 20 CFR 655.120(b) will be an additional, undue burden on them that results in even higher pay to farmworkers. DOL should reject such arguments and keep the proposed language in the final rule, given that H-2A wages are based on the wage rates paid that farm employers themselves report they are paying, and the AEWR for a given year is based on the wage rates reported the previous year, without adjustments for

Table **Real value of the AEW has changed little over the past decade**

Adverse Effect Wage Rates for H-2A farmworkers, total change and percentage change from 2013 to 2022, adjusted to constant 2022 dollars, and ranked by number of workers

State	Number of workers	Share of total H-2A workers	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Total real change
Florida	50,644	15.0%	12.58	12.73	12.62	13.09	13.32	13.20	12.91	13.27	13.06	12.41	-0.17
Georgia	37,720	11.1%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35
California	33,575	9.9%	13.55	13.66	14.04	14.54	15.05	15.41	15.98	16.74	17.35	17.51	3.96
Washington	29,783	8.8%	15.14	14.73	15.39	15.52	16.02	16.51	17.26	17.94	17.66	17.41	2.27
North Carolina	25,191	7.4%	12.21	12.25	12.79	13.11	13.50	13.40	14.07	14.36	14.21	14.16	1.95
Louisiana	12,841	3.8%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46
Michigan	12,382	3.7%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11
Arizona	12,141	3.6%	12.28	12.37	13.06	13.70	13.11	12.23	13.78	14.63	14.78	14.79	2.51
New York	9,368	2.8%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89
Texas	8,802	2.6%	12.84	13.48	12.82	13.64	13.88	13.88	14.04	14.36	14.08	13.88	1.04
Kentucky	7,417	2.2%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53
South Carolina	7,292	2.2%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35
Mississippi	6,932	2.0%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46
Idaho	5,696	1.7%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08
Tennessee	5,602	1.7%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53
Virginia	5,577	1.6%	12.21	12.25	12.79	13.11	13.50	13.40	14.07	14.36	14.21	14.16	1.95
Arkansas	5,364	1.6%	11.99	12.25	12.61	13.07	12.43	12.54	13.01	13.41	12.84	12.45	0.46
Iowa	4,553	1.3%	14.40	15.17	15.63	14.88	15.71	15.69	15.32	16.52	16.61	16.19	1.79
Indiana	4,249	1.3%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08
Ohio	3,767	1.1%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08
Oregon	3,679	1.1%	15.14	14.73	15.39	15.52	16.02	16.51	17.26	17.94	17.66	17.41	2.27
Colorado	3,528	1.0%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86
Illinois	3,418	1.0%	14.81	14.43	14.38	14.76	15.58	15.12	15.23	16.45	16.55	15.89	1.08
Minnesota	3,226	1.0%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11
Nevada	3,013	0.9%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86
Nebraska	2,778	0.8%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91
North Dakota	2,605	0.8%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91
Pennsylvania	2,560	0.8%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83
New Jersey	2,512	0.7%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83

Table 1 (cont.)

State	Number of workers	Share of total H-2A workers	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Total real change	
South Dakota	2,145	0.6%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	
Wisconsin	2,132	0.6%	14.26	14.26	14.32	14.70	15.27	15.27	15.55	16.32	15.91	15.37	1.11	
Alabama	1,940	0.6%	12.34	12.41	12.39	12.95	12.72	12.80	12.78	13.27	12.77	11.99	-0.35	
Missouri	1,900	0.6%	14.40	15.17	15.63	14.88	15.71	15.69	15.32	16.52	16.61	16.19	1.79	
Kansas	1,786	0.5%	15.56	16.64	16.84	16.88	16.52	15.95	16.51	16.99	17.18	16.47	0.91	
New Mexico	1,634	0.5%	12.28	12.37	13.06	13.70	13.11	12.23	13.78	14.63	14.78	14.79	2.51	
Utah	1,614	0.5%	12.72	13.51	14.09	13.78	13.17	12.50	15.08	16.16	16.02	15.58	2.86	
Connecticut	1,287	0.4%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
Oklahoma	1,276	0.4%	12.84	13.48	12.82	13.64	13.88	13.88	14.04	14.36	14.08	13.88	1.04	
Maryland	1,262	0.4%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	
Montana	1,244	0.4%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08	
Maine	1,152	0.3%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
Delaware	721	0.2%	13.71	13.73	13.99	14.26	14.60	14.09	15.10	15.12	15.19	15.54	1.83	
Wyoming	562	0.2%	12.60	13.27	13.80	14.37	13.96	13.60	15.48	15.43	15.73	14.68	2.08	
Massachusetts	497	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
Vermont	496	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
New Hampshire	268	0.1%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
West Virginia	268	0.1%	12.36	12.53	12.74	13.27	13.08	13.08	13.35	14.05	14.01	13.89	1.53	
Hawaii	212	0.1%	16.05	16.02	16.08	15.46	15.74	16.80	16.91	16.88	16.82	16.54	0.49	
Rhode Island	4	0.0%	13.77	13.92	13.95	14.36	14.83	15.00	15.21	16.19	16.20	15.66	1.89	
												<i>Average</i>	<i>1.51</i>	
													<i>Weighted average</i>	<i>1.33</i>

Notes: All values have been adjusted to constant 2022 dollars using the Consumer Price Index (CPI-U).

Source: Author's analysis of Adverse Effect Wage Rates for various years from the Employment and Training Administration, U.S. Department of Labor. Number workers is derived from the number of approved petitions for United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2A Data Hub](#), fiscal year 2021 data file.

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inflation that will occur during the current year—making them lag behind in terms of wage growth—and as the data presented here show, the real value of the AEWR has changed little over the past decade, and H-2A farmworkers are paid relatively low wages in every state, making any additional burden minimal on farm operators as compared to current practice.

Table 2

Value of the Adverse Effect Wage Rate for H-2A farmworkers declined in nearly all states in 2022

Adverse Effect Wage Rates for all U.S. states, real change and percentage change from 2021 to 2022, adjusted to constant 2022 dollars, and ranked by number of workers

State	Number of workers	Share of total H-2A workers	2021	2022	Real change	Real % change
Florida	50,644	15.0%	\$13.06	\$12.41	-\$0.65	-5.0%
Georgia	37,720	11.1%	\$12.77	\$11.99	-\$0.78	-6.1%
California	33,575	9.9%	\$17.35	\$17.51	\$0.16	0.9%
Washington	29,783	8.8%	\$17.66	\$17.41	-\$0.25	-1.4%
North Carolina	25,191	7.4%	\$14.21	\$14.16	-\$0.05	-0.4%
Louisiana	12,841	3.8%	\$12.84	\$12.45	-\$0.39	-3.0%
Michigan	12,382	3.7%	\$15.91	\$15.37	-\$0.54	-3.4%
Arizona	12,141	3.6%	\$14.78	\$14.79	\$0.01	0.1%
New York	9,368	2.8%	\$16.20	\$15.66	-\$0.54	-3.4%
Texas	8,802	2.6%	\$14.08	\$13.88	-\$0.20	-1.5%
Kentucky	7,417	2.2%	\$14.01	\$13.89	-\$0.12	-0.8%
South Carolina	7,292	2.2%	\$12.77	\$11.99	-\$0.78	-6.1%
Mississippi	6,932	2.0%	\$12.84	\$12.45	-\$0.39	-3.0%
Idaho	5,696	1.7%	\$15.73	\$14.68	-\$1.05	-6.7%
Tennessee	5,602	1.7%	\$14.01	\$13.89	-\$0.12	-0.8%
Virginia	5,577	1.6%	\$14.21	\$14.16	-\$0.05	-0.4%
Arkansas	5,364	1.6%	\$12.84	\$12.45	-\$0.39	-3.0%
Iowa	4,553	1.3%	\$16.61	\$16.19	-\$0.42	-2.5%
Indiana	4,249	1.3%	\$16.55	\$15.89	-\$0.66	-4.0%
Ohio	3,767	1.1%	\$16.55	\$15.89	-\$0.66	-4.0%
Oregon	3,679	1.1%	\$17.66	\$17.41	-\$0.25	-1.4%
Colorado	3,528	1.0%	\$16.02	\$15.58	-\$0.44	-2.7%
Illinois	3,418	1.0%	\$16.55	\$15.89	-\$0.66	-4.0%
Minnesota	3,226	1.0%	\$15.91	\$15.37	-\$0.54	-3.4%
Nevada	3,013	0.9%	\$16.02	\$15.58	-\$0.44	-2.7%
Nebraska	2,778	0.8%	\$17.18	\$16.47	-\$0.71	-4.1%
North Dakota	2,605	0.8%	\$17.18	\$16.47	-\$0.71	-4.1%
Pennsylvania	2,560	0.8%	\$15.19	\$15.54	\$0.35	2.3%

Table 2
(cont.)

State	Number of workers	Share of total H-2A workers	2021	2022	Real change	Real % change
New Jersey	2,512	0.7%	\$15.19	\$15.54	\$0.35	2.3%
South Dakota	2,145	0.6%	\$17.18	\$16.47	-\$0.71	-4.1%
Wisconsin	2,132	0.6%	\$15.91	\$15.37	-\$0.54	-3.4%
Alabama	1,940	0.6%	\$12.77	\$11.99	-\$0.78	-6.1%
Missouri	1,900	0.6%	\$16.61	\$16.19	-\$0.42	-2.5%
Kansas	1,786	0.5%	\$17.18	\$16.47	-\$0.71	-4.1%
New Mexico	1,634	0.5%	\$14.78	\$14.79	\$0.01	0.1%
Utah	1,614	0.5%	\$16.02	\$15.58	-\$0.44	-2.7%
Connecticut	1,287	0.4%	\$16.20	\$15.66	-\$0.54	-3.4%
Oklahoma	1,276	0.4%	\$14.08	\$13.88	-\$0.20	-1.5%
Maryland	1,262	0.4%	\$15.19	\$15.54	\$0.35	2.3%
Montana	1,244	0.4%	\$15.73	\$14.68	-\$1.05	-6.7%
Maine	1,152	0.3%	\$16.20	\$15.66	-\$0.54	-3.4%
Delaware	721	0.2%	\$15.19	\$15.54	\$0.35	2.3%
Wyoming	562	0.2%	\$15.73	\$14.68	-\$1.05	-6.7%
Massachusetts	497	0.1%	\$16.20	\$15.66	-\$0.54	-3.4%
Vermont	496	0.1%	\$16.20	\$15.66	-\$0.54	-3.4%
New Hampshire	268	0.1%	\$16.20	\$15.66	-\$0.54	-3.4%
West Virginia	268	0.1%	\$14.01	\$13.89	-\$0.12	-0.8%
Hawaii	212	0.1%	\$16.82	\$16.54	-\$0.28	-1.7%
Rhode Island	4	0.0%	\$16.20	\$15.66	-\$0.54	-3.4%

Notes: All values have been adjusted to constant 2022 dollars using the Consumer Price Index (CPI-U).

Source: Author's analysis of Adverse Effect Wage Rates for fiscal years 2021 and 2022 from the Employment and Training Administration, U.S. Department of Labor. Number of workers is derived from the number of approved petitions for United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2A Employer Data Hub](#), fiscal year 2021 data file.

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DOL should create a front-end screening process to prohibit employers that violate wage and hour and labor laws from recruiting and hiring through the H-2A program.

This section discusses a topic that was not addressed in the NPRM, but which EPI and other advocates have proposed, and which the Employment and Training Administration should consider, given the current funding and staffing challenges at DOL. In short, DOL

should consider a front-end screening process to prohibit employers with track records of wage and hour, labor, and other legal violations from hiring through the H-2A program. At present, even some of the worst violators of the law are allowed to recruit and hire H-2A workers. And then after they violate the law, by, for example, robbing wages from their H-2A workers, the H-2A employees are afraid to complain because their immigration status is tied to their employer, and even if they are brave enough to lodge a complaint, the Wage and Hour Division (WHD) may lack the resources to investigate and hold the employer accountable. This section discusses the rationale for a front-end screening process and how it could function in practice.

As EPI research recently showed, there has been a clear downward trend in the number of closed WHD investigations of agricultural employers over the past two decades, from more than 2,000 a year in the early 2000s to 1,000 or fewer a year during the last two fiscal years, i.e., during the Biden administration. In 2022, WHD closed only 879 investigations of agricultural employers—a record low during the 2000 to 2022 period—amounting to an average of 73 a month. 879 investigations in 2022 is just over a third of the 2,431 agricultural investigations closed in 2000, the peak year for WHD agricultural investigations.³ The low number of investigations means that most farms are never investigated by WHD; in fact fewer than 1% of agricultural employers are investigated per year. Since farm operators know there is a very low likelihood that they will ever be investigated, some may feel emboldened to have a business model that relies on wage theft and other forms of lawbreaking.

However, despite the low and declining number of investigations, when WHD investigators do inspect an agricultural employer, they nearly always detect violations of wage and hour laws. As a report I coauthored in 2020 showed, WHD detects violations 70% of the time they conduct an investigation—a sign that many agricultural employers are violating the law. Among the 70% of investigations that detected violations between 2005 and 2019, almost 40% found one to four violations on the farm and 31% found five or more.⁴

Why are there so few investigations of agricultural employers? A major reason is too little funding and staffing, as EPI research has pointed to in various reports.⁵

But while funding for WHD is flat and may even decline due to Congress being unwilling to increase funding, there's no question that the need for enforcement in H-2A is greater than ever. One piece of strong evidence comes from WHD's own enforcement data: A coauthor and I recently found that violations of H-2A rules account for much higher shares of back wages owed and civil money penalties (CMPs) assessed than violations of other laws on farms, and now account for an overwhelming share of the back wages owed and CMPs assessed in agriculture that are the result of closed investigations.⁶

Table 3 below shows the shares of total back wages owed and CMPs assessed (combined) by type of legal violation for the 2000–2022 period. H-2A violations accounted for nearly half (46%) of all back wages owed to farmworkers and CMPs assessed over the 23-year period, but their share rose sharply during the two years of the Biden administration. As the table shows, WHD investigations during the Trump administration found that H-2A violations accounted for roughly half of the back wages

and CMPs owed by farm employers during 2017–2020, but the H-2A share rose to 73%, almost three-fourths, during the Biden administration. As a result, WHD investigations that find H-2A violations now account for the vast majority of back wages owed and CMPs assessed.

Another problem that was recently identified is that even when WHD detects and can confirm employer violations, as a recent report from *Bloomberg Law* revealed, it “cannot litigate every case due to resource issues.”⁷ When it comes to health and safety violations, new reporting just published this week by *ProPublica* suggests that workers are unwilling to come forward to report employer violations because of a perception that OSHA doesn’t have the resources to investigate small farms.⁸ These realities and perceptions further embolden lawbreaking employers.

Yet another one of the major flaws with the rules and enforcement regime governing the H-2A program is that employers that violate the law—whether it be wage and hour, labor, health and safety, discrimination, or civil rights laws—are allowed to hire through the H-2A program. As numerous investigative reports have shown, even some of the worst violators are allowed to keep hiring, even after they have been sanctioned for lawbreaking and extreme abuses of their workers.

For example, a *BuzzFeed News* investigative report from 2015, titled “The Pushovers,” reported on this, showing how even the worst employers can continue hiring H-2A and H-2B workers.⁹ Just last month, a new investigation on H-2A sheepherders by *High Country News* also reported on how some of the worst and most abusive violators of H-2A laws continue to be allowed to hire through the H-2A program. The report found that:

“Despite the lack of resources, the WHD has managed to investigate some ranchers. According to the agency’s publicly available data, at least 80 sheep industry employers have violated their workers’ H-2A contracts in the past decade. But, like most abusive H-2A employers, the ranchers who committed these violations are almost always allowed to continue operating. An analysis of WHD and U.S. Citizenship and Immigration Services (USCIS) data found that about 80% of the sheep industry employers that investigators caught violating their workers’ rights in the past 10 years were allowed to continue bringing H-2A workers into the country.”¹⁰

In addition, farm employers that are repeat violators—in terms of both H-2A rules but also the other major workplace laws that cover farmworkers (MSPA and FLSA)—are in fact quite common, as we found in our report from 2020, which analyzed WHD enforcement data.¹¹

Considering the stagnant and even possibly declining funding for WHD staffing, operations, and litigation—and little chance that Congress will reverse this trend in the near or medium term—as well as the increasing share of H-2A violations on farms, and the prevalence of repeat violators in agriculture—DOL should create a front-end screening process to prohibit employers from hiring through H-2A if they have a track record of violating wage and hour and labor laws. This mechanism could make a significant impact and lessen the burden on WHD’s investigators.

Table 3

Violations of the H-2A visa program account for most of the back wages owed and civil money penalties assessed in agriculture

Share of total back wages owed and civil money penalties assessed by the Wage and Hour Division against agricultural employers, by type of legal violation, fiscal years 2000–2022

Fiscal Year	H-2A	MSPA	FLSA et al.
2000	8%	36%	54%
2001	24%	37%	36%
2002	12%	36%	49%
2003	19%	24%	55%
2004	11%	42%	41%
2005	27%	29%	42%
2006	11%	31%	56%
2007	11%	29%	58%
2008	31%	31%	37%
2009	27%	42%	30%
2010	17%	23%	59%
2011	33%	27%	37%
2012	52%	18%	30%
2013	70%	10%	20%
2014	41%	22%	36%
2015	59%	16%	25%
2016	44%	20%	36%
2017	49%	20%	30%
2018	47%	31%	22%
2019	42%	34%	23%
2020	52%	17%	30%
2021	73%	10%	17%
2022	73%	11%	16%
TOTALS	46%	22%	31%

Note: Values represent the share of total back wages and civil money penalties assessed by the Wage and Hour Division (WHD) in the U.S. Department of Labor in a given fiscal year, according to the three broad categories of laws listed by WHD. "H-2A" represents violations of the laws and regulations governing the H-2A visa program; "MSPA" represents the Migrant and Seasonal Agricultural Worker Protection Act (commonly referred to as MSPA), which is the major federal law that protects U.S. farmworkers, and "FLSA et al." represents the Fair Labor Standards Act (FLSA), which WHD data group with all other wage and hour laws that WHD enforces. FLSA is the U.S.' main worker protection law that

Table 3
(cont.)

requires minimum wages and overtime pay and regulates the employment of workers younger than 18.

Source: Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#) (last accessed February 26, 2023).

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Given the high prevalence of wage and hour violations on farms discussed above, there is a strong case for this. To do it, DOL should require employers to register for eligibility to use the program, so their records on compliance with labor and employment laws can be screened up front. To break established patterns of abuse, employers that have violated any labor, employment, wage and hour, civil rights, disability, anti-trafficking or anti-discrimination laws should be prohibited from hiring H-2A workers. Given the present and likely future reality that WHD will continue to be vastly underfunded and understaffed, such a screening process on the front end of the H-2A application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through lengthy and costly investigations on the back end, after workers have arrived in the United States and been robbed or otherwise exploited. (This should also be adopted for the H-2B and H-1B programs, as EPI has argued before).¹² DOL could also provide certain benefits to employers with clean records to incentivize compliance, such as faster processing or flexibility in H-2A, or in H-2B, by allowing employers to hire more workers under the H-2B cap, for example.

The start of one possible model that could be adapted by DOL is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through another visa program, H-1B, for specialty occupations. USCIS describes the H-1B Electronic Registration Process as a system whereby employers “and their authorized representatives, who are seeking to employ H-1B workers subject to the cap, complete a registration process that requires only basic information about the prospective petitioner and each requested worker.”¹³ After that, USCIS takes the “properly submitted electronic registrations” and “[o]nly those with selected registrations will be eligible to file H-1B cap-subject petitions.”¹⁴

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers and manage the H-1B numerical cap, the model could be adapted by DOL as part of the application process at the labor certification stage. For example, DOL could set up a registration process in which employers list basic information about their business and the purported need for H-2A workers (as is already done via the DOL labor certification attestation forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through H-2A, that they have not been found to have violated any labor, employment, wage and hour, civil rights, disability, anti-trafficking or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records, and ultimately certify employers that have not been found to have violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.¹⁵

Thank you again to DOL for considering these comments and recommendations. EPI looks forward to the implementation of the final rule, as well as any further improvements that

the Biden administration can make to H-2A and other visa programs that will improve labor standards for both U.S. workers and migrant workers.

Best regards,
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1. 88 Fed. Reg. 63754 (2023).
2. 88 Fed. Reg. 63773-4 (2023).
3. Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
4. Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Economic Policy Institute, December 2020.
5. See for example, Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
6. Daniel Costa and Philip Martin, *Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*, Economic Policy Institute, August 22, 2023.
7. Rebecca Rainey, “Inadequate Labor Department Resources Stymie Enforcement Efforts,” *Bloomberg Law*, November 7, 2023.
8. Melissa Sanchez and Maryam Jameel “OSHA Investigates Small Dairy Farms So Rarely That Many Worker Advocates Don’t Bother to Report Deaths and Injuries,” *ProPublica*, November 13, 2023.
9. Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, “The Pushovers: Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More.” *BuzzFeed News*, May 12, 2023.
10. Teresa Cotsirilos, “The dark side of America’s sheep industry: Shepherders face wage theft, isolation, hunger and alleged abuse.” *High Country News*, October 2, 2023.
11. Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Economic Policy Institute, December 2020.

12. See for example, discussion of a similar proposal for a front-end screening process of employers in the H-2B visa program in Daniel Costa, *As the H-2B Visa Program Grows, the Need for Reforms That Protect Workers Is Greater Than Ever: Employers Stole \$1.8 Billion from Workers in the Industries That Employed Most H-2B Workers over the Past Two Decades*, Economic Policy Institute, August 18, 2022.

13. USCIS, “H-1B Electronic Registration Process,” U.S. Department of Homeland Security.

14. USCIS, “H-1B Electronic Registration Process,” U.S. Department of Homeland Security.

15. This process could also take place at the USCIS petition stage like the H-1B Electronic Registration Process, but that would cause DOL to certify H-2A jobs that would not be able to be filled if employers were later prohibited from filing H-2A petitions, and DOL likely has access to the relevant enforcement data for verifying employer attestations, making DOL the ideal agency to conduct the registration process.