

# Economic Policy Institute

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Secretary, U.S. Department of State

Karen Ward  
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Bureau of Educational and Cultural Affairs  
U.S. Department of State  
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RE: U.S. Department State, [Exchange Visitor Program-Au Pairs](#), Notice of proposed rulemaking, RIN: 1400-AF12, Document Number: 2023-23650, 88 Fed. Reg. 88 FR 74071 (October 30, 2023)

Dear Secretary Blinken and Director Ward:

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 people, proposes public policies that protect and improve the economic conditions of low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals. EPI submits these comments to the U.S. Department of State (State) in response to their Notice of Proposed Rulemaking (NPRM) regarding the changes proposed to the J-1 Au Pair program.

EPI has researched, written, and commented extensively on the U.S. system for labor migration, including, in particular, the J-1 Exchange Visitor Program and other temporary work visa programs. EPI has published research on various deficiencies and labor standards protection gaps in the various J-1 programs, submitted public comments on proposed J-1 regulations, and has called for drastic reforms for the J-1 programs that authorize employment. EPI also continues to call for the U.S. Department of Labor (DOL) to take over management and oversight of the J-1 programs that authorize employment because sponsors have financial incentives to cover up wrongdoing in the program, and State has no expertise or mandate in labor standards enforcement and worker protections.

**EPI endorses and supports the written comments and recommendations submitted by the *Migration that Works* coalition and incorporates those comments and recommendations by reference into this comment. EPI is a cofounding member of the Migration that Works coalition, which include organizations that represent both U.S. workers and migrant workers, including J-1 au pair workers.**

While more detailed and comprehensive comments addressing many of the NPRM's provisions can be found in the comment submitted by the Migration that Works coalition, this comment should be considered an addendum to Migration that Works comment, which provides additional analysis and a more extensive recommendation with respect to the wage and compensation proposals in the NPRM.

## Table of Contents

<b>I. THE J-1 EXCHANGE VISITOR PROGRAM HAS STRAYED FAR FROM ITS ORIGINAL MISSION AND IS IN NEED OF SUBSTANTIAL REFORMS .....</b>	<b>2</b>
<b>II. DISCUSSION OF THE PROPOSED RULE’S SECTION ON WAGES, COMPENSATION, AND STIPENDS .....</b>	<b>6</b>
<i>A) The Au Pair wage rule should respect the highest standard at the local, state, or federal level, rather than create a new, confusing structure for which State has failed to explain the reasoning.....</i>	<i>6</i>
<i>B) State should use available data from the U.S. Department of Labor to set a more appropriate minimum hourly wage for au pair workers—by using the local average wage for childcare workers from the OEWS—rather than setting the Au Pair program’s minimum wage according to the four-tiered formula. ....</i>	<i>7</i>
<i>C) State should adjust au pair wage rates upward based on workload, number of children cared for, and other factors.....</i>	<i>10</i>
<i>D) If State retains the proposed four-tiered wage formula, the formula should be updated annually to reflect changes in minimum wage laws. ....</i>	<i>11</i>
<i>E) State should not permit any deductions from au pair salaries for room and board. ....</i>	<i>12</i>
<i>F) If State continues to allow deductions for room and board from au pair wages, it should prohibit any further deductions for any other items or services.....</i>	<i>13</i>
<i>G) We generally support State’s proposal to provide overtime pay to J-1 au pair workers in accordance with the highest amount required under local, state, or federal law.....</i>	<i>14</i>
<i>H) State should require that documentation of timesheets be primarily tracked by J-1 au pair workers, who are best situated to track their weekly hours and fill out the timesheets, rather than having the employer/host family keep records and provide it after the fact to au pair employees.....</i>	<i>15</i>

## **I. THE J-1 EXCHANGE VISITOR PROGRAM HAS STRAYED FAR FROM ITS ORIGINAL MISSION AND IS IN NEED OF SUBSTANTIAL REFORMS**

The J-1 Exchange Visitor Program was created to enhance diplomacy and foster cultural exchange, but it has strayed far from its original mission. As EPI’s first publication on the J-1 program in 2011 revealed, the various J-1 program categories that permit employment have transformed from programs designed to foster international goodwill into sources of cheap and exploitable labor for U.S. employers and families.<sup>1</sup> As a result, hundreds of thousands of workers arrive in the United States on J-1 visas each year without adequate protections and are underpaid, and as a result, the program puts downward pressure on labor standards in the industries where J-1 workers are employed.

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<sup>1</sup> Daniel Costa, [Guestworker diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market](#), Economic Policy Institute, July 14, 2011.

The history of the creation of the Au Pair program is an interesting one. In 1986, the U.S. Information Agency (USIA) created two pilot programs that established the first manifestation of the Au Pair category. In 1989, six more au pair programs were designated by the USIA based on the pilot programs, and then Congress enacted legislation temporarily continuing the programs. After an internal USIA review and an examination by the Government Accountability Office (GAO), it was determined that the category was not consistent with statutory requirements, but the organizations that sponsored au pair exchange visitors were able to lobby Congress directly and receive explicit authorization to continue the program under USIA's management.<sup>2</sup> The program was then reauthorized every few years by Congress until 1997,<sup>3</sup> and in that year, despite media reports of scandals involving au pairs,<sup>4</sup> Congress extended the program indefinitely.<sup>5</sup>

Thus, the Au Pair program's history of problems dates back to when it was still a pilot program decades ago, and its major flaws were identified at the time by government auditors.

In 1990 the Government Accountability Office (GAO) determined that the "au pair programs are essentially child care work programs that do not correlate with the qualifying categories mentioned in the J-visa statute."<sup>6</sup> GAO illustrates the basic reasoning behind this finding by quoting a Labor Department official who notes that working "a 40 hour week constitutes full-time employment, and as such, makes au pairs temporary foreign workers. These workers would normally have to receive certification from the Department of Labor that enough qualified U.S. workers were not available and that the wages and working conditions attached to job offers would not adversely affect similarly employed U.S. workers."<sup>7</sup> Despite this finding, the necessary reforms were never made, and little else has changed in the program 34 years later, except for an extension of authority granted by Congress to continue the program indefinitely as-is.<sup>8</sup>

Since then, the J-1 Au Pair program has been plagued by scandal, but industry lobbyists have managed to ensure its survival, and Congress has failed to conduct adequate oversight. There has been insightful and damning reporting on this: For example, an in-depth article in

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<sup>2</sup> Susan Epstein, *The Au Pair Program*, Congressional Research Service: Report 95-256, January 30, 1998.

<sup>3</sup> [An Act to Extend Au Pair Programs](#), Pub. L. No. 104-72, 109 Stat. 776 (December 23, 1995); State Department, "[Au Pair Statutory Authority](#)," Pub. L. No. 105-48, 111 Stat. 1165 (October 1, 1997); see also United States Information Agency, "Policy Statement on Au Pair Program," 22 C.F.R. Part 514 (March 4, 1996), last accessed May 27, 2011 but no longer available online, [http://dosfan.lib.uic.edu/usia/GC/GC\\_Docs/WhatsNew/ht3.txt](http://dosfan.lib.uic.edu/usia/GC/GC_Docs/WhatsNew/ht3.txt).

<sup>4</sup> Warren Cohen, "Home Wreckers: Congress's role in the au pair tragedy," *The New Republic*, November 24, 1997, last accessed May 27, 2011 but no longer available online, <http://wjcohen.home.mindspring.com/other-clips/aupair.htm>.

<sup>5</sup> State Department, "[Au Pair Statutory Authority](#)," Pub. L. No. 105-48, 111 Stat. 1165 (October 1, 1997).

<sup>6</sup> Government Accountability Office, *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas*, GAO/NSIAD-90-61, February 16, 1990.

<sup>7</sup> Government Accountability Office, *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas*, GAO/NSIAD-90-61, February 16, 1990.

<sup>8</sup> State Department, "[Au Pair Statutory Authority](#)," Pub. L. No. 105-48, 111 Stat. 1165 (October 1, 1997).

the *Washington Post* from 2016 and a follow-up podcast on *Reveal News* with the author,<sup>9</sup> as well as a report published by *Politico Magazine* in 2017, titled “They Think We Are Slaves,” exposing severe deficiencies in the program.<sup>10</sup> The *Politico Magazine* report obtained internal documents from the State Department and paints a picture of an agency with little interest in protecting participants, noting that thousands of complaints from J-1 au pairs over the years were often not “thoroughly investigated or even publicly reported” and that program regulations are ignored with impunity by many host families. And then more recently, there has been reporting by *AP*, *NPR*, and the *Washington Post* and others on the litigation and settlement agreement for \$65.5 million between a dozen former au pairs from Colombia, Australia, Germany, South Africa, and Mexico, who were brave enough to bring a lawsuit against the companies that recruited them to work in the United States and then vastly underpaid them.<sup>11</sup>

The broader J-1 program originally grew out of the Fulbright-Hays Act of 1961, with its noble goal of “increase[ing] mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange.”<sup>12</sup> While some of the J-1 programs live up to this language—for example, by allowing Fulbright Scholars and professors to study and teach in the United States—many of the J-1 programs are simply unregulated low-wage work programs. Beginning over 13 years ago, EPI explained in *Guestworker Diplomacy* and numerous commentaries how the J-1 visa is now mostly a temporary labor migration program disguised as a cultural exchange and administered by an agency—the State Department—that has no staff expertise in regulating, monitoring, or enforcing labor- and employment-law related issues.

While State has proposed some incremental reforms in this NPRM, the disastrously flawed overarching structure for the program remains in place, meaning that few improvements will result in practice, even if they look good on paper. Congress, for its part, has failed to propose any reforms or to ever hold any oversight hearing examining any aspect of the Au Pair program or the broader J-1 visa program—which includes the Summer Work Travel, Intern, Trainee, and Camp Counselor programs—despite numerous cases and reports of worker exploitation and human trafficking.<sup>13</sup> But State has the authority to reform the program so that it comports with basic human and labor rights, and so that it is consistent with international

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<sup>9</sup> Noy Thrupkaew, “[Are au pairs cultural ambassadors or low-wage nannies? A lawsuit enters the fray.](#)” *Washington Post*, November 3, 2016; *Reveal News*, “[Host of Problems](#),” November 5, 2016.

<sup>10</sup> Zack Kopplin, “[‘They Think We Are Slaves’: The U.S. au pair program is riddled with problems—and new documents show that the State Department might know more than it’s letting on.](#)” *Politico Magazine*, March 27, 2017.

<sup>11</sup> Colleen Slevin, “[About 10,000 au pairs to get paid in class-action settlement](#),” *AP*, July 18, 2019; Lydia DePillis, “[Au pairs provide cheap childcare. Maybe illegally cheap.](#)” *Washington Post*, March 20, 2015; Vanessa Romo, “[Au Pair Sponsor Agencies Settle Wage Lawsuit, Offer \\$65.5 Million In Back Pay](#),” *NPR*, January 9, 2019.

<sup>12</sup> [Fulbright-Hays Act of 1961](#), 22 U.S.C. ch. 33 § 2451 et seq. (Pub. L. 87–256, 75 Stat. 527).

<sup>13</sup> See for example, Ellen Wulforst, “[Foreign students recruited as au pairs face abuse in U.S.: report](#),” *Reuters*, August 21, 2018; Miriam Jordan, Kris Maher and Julie Jargon, “[Guest Worker Visa Troubles Visit McDonald’s](#),” *Wall Street Journal*, March 8, 2013; Holbrook Mohr, Mitch Weiss and Mike Baker, “[AP IMPACT: US fails to tackle student visa abuses](#),” *Associated Press*, December 6, 2010

standards and protections for domestic workers, including the provisions outlined in the ILO Domestic Workers Convention of 2011. State has repeatedly asserted that it has this authority, by noting in numerous proposed and final rules that State’s management of the J-1 program falls under the foreign affairs exception of the Administrative Procedure Act,<sup>14</sup> as it asserts once again in this NPRM.<sup>15</sup> Thus, State asserts that it is not even required to take the comments it receives from the public into account when it makes rules for the Exchange Visitor Program; in other words, State believes it can do almost whatever it wants because it claims it is conducting foreign affairs—despite the reality that it is running a low-wage temporary worker program within the territory of the United States.<sup>16</sup>

In our view, State has shown that it is wholly unqualified to manage the J-1 program. DOL has no formal role in any of the J-1 programs, leaving workers with little recourse when things go wrong, since the sponsor organizations tasked with protecting them are often profiting from the existence of the program, making them unlikely allies. The fact that sponsor organizations profit from the program but are also tasked with finding and satisfying employers and host families, and also primarily in charge of protecting the migrant workers who participate, is an obvious, scandalous, and unconscionable conflict of interest. Media reports and organizations that advocate on behalf of J-1 workers like Centro de los Derechos del Migrante and the Southern Poverty Law Center have reported real-life stories of how this arrangement results in a dysfunctional program where severe abuses and exploitation of young migrants are regular occurrences.<sup>17</sup>

There’s no question that child care is too expensive in the United States—EPI has shown how child care is unaffordable for most and one of the costliest expenses that families face.<sup>18</sup> If any progress can be made, large-scale solutions and federal involvement will be required. Families that have child care needs but can’t afford to pay for them deserve help. The J-1 lobby, knowing this, has successfully leveraged this reality with members of Congress to protect the J-1 Au Pair program from scrutiny. But the answer to America’s child care affordability crisis is not to have State run a program that allows migrant workers (the vast majority of whom are women) to be underpaid, abused, and exploited. The \$65.5 million settlement in Colorado was just the latest piece of evidence proving that the J-1 Au Pair program is, in reality, an unregulated low-wage work program veiled in the false noblesse of achieving America’s foreign policy goals.

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<sup>14</sup> See discussion in Daniel Costa, [Guestworker diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market](#), Economic Policy Institute, July 14, 2011.

<sup>15</sup> 88 Fed. Reg. 74084 (October 30, 2023).

<sup>16</sup> See discussion in Daniel Costa, [Guestworker diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market](#), Economic Policy Institute, July 14, 2011.

<sup>17</sup> Centro de los Derechos del Migrante, [Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program](#), August 2018; Meredith Stewart, [Culture Shock: The Exploitation of J-1 Cultural Exchange Workers](#), Southern Poverty Law Center, February 2, 2014.

<sup>18</sup> See for example, Economic Policy Institute, [“Child Care Costs in the United States,”](#) last updated October 2020.



## II. DISCUSSION OF THE PROPOSED RULE'S SECTION ON WAGES, COMPENSATION, AND STIPENDS

Despite the concerns related to protecting and enforcing labor standards that have already been highlighted in this comment, we nevertheless commend the State Department for proposing to raise the wage standard for J-1 au pairs from one based on the federal minimum wage, to one that at least acknowledges and attempts to reflect the more protective minimum wage and overtime pay laws that have been enacted in states, cities, and counties across the United States.

We wish to note that in this section we will refer compensation owed to J-1 au pairs as “wages,” not a “stipend,” because in fact, au pairs are being paid an hourly wage. This is evidenced by the fact that they are hourly employees and that the wage they earn is reflecting, as State notes, the wage rates that have been established for “the highest of the federal, state, or local minimum *wage*” (emphasis added). To refer to the wages paid to au pairs as a stipend is a legal fiction which State appears to engage in, in order to support State’s dubious claim with respect to the J-1 Au Pair program: namely, the shaky claim that the program is not a conventional work visa program and that it is not being used primarily to supply low-wage workers to parents with child care needs. There is no question that the Au Pair Program and other J-1 work programs like Summer Work Travel are primarily work programs that may happen to include some small cultural exchange component.

***A) The Au Pair wage rule should respect the highest standard at the local, state, or federal level, rather than create a new, confusing structure for which State has failed to explain the reasoning.***

State has created a new “four-tiered au pair compensation mechanism based on the highest of the federal, state, or local minimum wage” that is in effect in the employer/host family’s city. While the proposed formula would undoubtedly benefit some au pairs who live in a jurisdiction that has a minimum wage at the lower end of the tier—because they would be paid the wage at the top of the tier—we nevertheless question State’s proposal to introduce the complexity of the formula. State has failed to adequately explain why this formula should be used instead of simply establishing and explicitly stating that all local, state, and federal wage and hour laws apply to au pair workers, and that they should be paid the highest applicable wage in the jurisdiction in which they will be employed.

In fact, State’s formula could conflict with local and state laws and will create confusion as to which law applies. Sponsors and employer/host families will now need to consider the applicable city, county, state, and/or federal minimum wage, as well as an additional applicable minimum wage that would be set by State in this proposed rule. The rule will also create confusion for labor standards enforcement officials, who will be unsure as to which law applies and how to enforce it. Instead, the simplest and easiest method for determining the lowest wage that an au pair worker could be paid, should be the already-existing local, state, or federal minimum wage. (Although, it’s worth noting that nothing in the rule would prevent the employer/host family from paying a higher wage than the highest applicable minimum to their au pair employee.)

Simply requiring that the highest of the local, state, or federal minimum wage applies to J-1 au pair workers would also make the au pair wage rule consistent with the biggest J-1 work program, Summer Work Travel. The Summer Work Travel's regulation on "participant compensation" at 22 CFR § 62.32(i) requires that:

**(1)** *Sponsors must inform program participants of Federal, State, and Local Minimum Wage requirements, and ensure that at a minimum, participants are compensated at the higher of:*

- (i)** *The applicable Federal, State, or Local Minimum Wage (including overtime); or*
- (ii)** *Pay and benefits commensurate with those offered to their similarly situated U.S. counterparts.*

Note that not only does the Summer Work Travel program require that the highest of the local, state, or federal minimum wage, but also requires that J-1 SWT workers receive pay and benefits that are "commensurate with those offered to their similarly situated U.S. counterparts." State has offered no justification for why the wage rule for au pairs should not be the same. In addition, the following section addresses how State could set the J-1 au pair wage at a level that is commensurate with what other au pairs are earning in the local region.

***B) State should use available data from the U.S. Department of Labor to set a more appropriate minimum hourly wage for au pair workers—by using the local average wage for childcare workers from the OEWS—rather than setting the Au Pair program's minimum wage according to the four-tiered formula.***

While State has taken a step in the right direction by acknowledging and attempting to reflect local and state minimum wage laws in setting wages for the Au Pair program, we nevertheless do not believe that the hourly minimum wage—whether it be the city, country, state, or federal minimum wage—is the wage that should set the Au Pair program wage. The minimum wage is an inadequate comparison here because it does not correspond to what *child care workers* earn in jurisdictions across the United States, as evidenced by available public data sets from the U.S. Census and the U.S. Department of Labor (DOL). Given that the Au Pair program is a de facto temporary worker program, State should take a page from the administration of other U.S. temporary work visa programs when setting Au Pair program wages.

EPI published a report in late 2021 showing that child care and home health care workers are deeply undervalued and underpaid, and as the report authors explain, the devaluation of the care sector is fundamentally intertwined with historical and current ableism, sexism, xenophobia, and racism.<sup>19</sup> State's Au Pair program wage rule must not perpetuate these realities and disparities, and instead should look to lift standards for child care workers by setting an appropriate hourly wage. The EPI report presented a set of benchmarks for setting higher wages for child care and home health care workers and estimated what fair and equitable wages would look like in the care sectors, finding that care workers should be paid

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<sup>19</sup> Asha Banerjee, Elise Gould, and Marokey Sawo, [Setting higher wages for child care and home health care workers is long overdue](#), Economic Policy Institute, November 18, 2021.

on average nationwide, at minimum, an hourly wage between \$21.11 and \$25.95 (in 2022), depending on the benchmark applied.<sup>20</sup>

While we ask that State review and apply the benchmarks considered by the EPI authors, at a minimum we urge that State require that employer/host families be required to pay a wage that is no less than the local average wage that is being paid to other child care workers in the area where the employer/host family resides.

There are two main data sets that can be looked to for setting the minimum for child care workers. First, are data from the U.S. Census, specifically the Current Population Survey (CPS). While the CPS is a useful data set that can be used to tie the surveyed wages paid to child care workers to other demographic information, unfortunately those data are not always readily available for every locality and the sample sizes may be too small to be reliable in smaller states and localities.

The other data set is the Occupational Employment and Wage Statistics (OEWS), which publishes survey data for virtually every occupation with a corresponding Standard Occupational Classification code and for every local region in the United States, whether it be a county, metropolitan statistical area, or a nonmetropolitan statistical area.<sup>21</sup> The OEWS has data on employment and wages and major industries for child care workers at the page on its website for “39-9011, Childcare Workers”<sup>22</sup> (39-9011 is the SOC code for child care workers). The OEWS page for child care workers specifies that it covers workers who attend to children in private households, and excludes preschool teachers and teaching assistants. Thus, the OEWS data for 39-9011, Childcare Workers is adequately specific to the work that J-1 au pairs will be doing in the United States and should be used to set the lowest permissible wage rates in the Au Pair program.

As State may already be aware, the wages published in the OEWS are used to set the prevailing wage rates for two of the other major U.S. temporary work visa programs, the H-2B and H-1B programs. When applying for approval of a temporary labor certification application or a labor condition application, employers must first visit the Foreign Labor Certification Data Center website, at FLCdatacenter.com.<sup>23</sup> At that website, employers obtain the appropriate wage for the occupation and local area where the H-2B or H-1B worker will be employed. The FLCdatacenter.com website is public, free, simple and easy to use, and is based on the OEWS wages surveyed by DOL. Employer/host families could simply visit the website, select the “FLC Wage Search Wizard,” and then select the location where they reside and where the au pair worker will be employed, and then select the occupation of 39-9011, Childcare Workers. The website will generate a page that lists four wage “levels” which represent different percentiles

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<sup>20</sup> See benchmarks at Table 1 in Asha Banerjee, Elise Gould, and Marokey Sawo, [Setting higher wages for child care and home health care workers is long overdue](#), Economic Policy Institute, November 18, 2021.

<sup>21</sup> See Occupational Employment and Wage Statistics, “[Overview](#),” U.S. Bureau of Labor Statistics, U.S. Department of Labor (Last Modified Date: April 25, 2023).

<sup>22</sup> Occupational Employment and Wage Statistics, “[39-9011 Childcare Workers](#),” U.S. Bureau of Labor Statistics, U.S. Department of Labor (May 2022).

<sup>23</sup> The FLCdatacenter.com website is developed and maintained by the State of Utah under contract with the DOL’s Office of Foreign Labor Certification.



of wages surveyed—which are used to set H-1B wages and would not be relevant for au pairs—and it lists the mean wage (i.e. the average wage) of the wages surveyed for that specific occupation and location.

The required au pair minimum wage should never be any lower than the local average (mean) wage for child care workers as listed in the FLC Data Center website. In almost all cases, the local average wage for child care workers will be higher than whatever the local, state, or federal minimum wage requires in that jurisdiction. This is because most child care workers do not earn the minimum wage, they earn a wage that is slightly higher. If State only requires that employer/host families pay the local, state, or federal minimum wage—they will by definition, be putting downward pressure on local wages and labor standards for child care workers. State should refrain from causing this outcome and do everything in its power to protect local labor wages and rise above the bare minimum of local labor standards, especially given the fact that real enforcement and DOL involvement is lacking in the program. Having a higher wage standard is not a substitute for DOL involvement and real labor standards enforcement, but it is the absolute least that State can do to protect wage standards for au pairs and other child care workers.

Here we'll provide two examples to illustrate where the local average au pair wage would be higher than the applicable minimum wage. In Merced, California, an area where housing costs are relatively much lower than in the rest of the state, the applicable minimum wage is the California state minimum wage of \$16 per hour. According to FLCdatacenter.com, the current average wage for child care workers in Merced is \$17.53 per hour.<sup>24</sup> Thus, in Merced, California, the minimum au pair wage should be set at \$17.53 per hour, since that is what child care workers earn on average in the local area.

Now let's look at Savannah, Georgia. In Savannah, there is no city or country minimum wage law, and Georgia has a state minimum wage law setting an amount that is lower than the federal minimum wage, meaning that the federal minimum wage of \$7.25 an hour applies as the default minimum wage law for workers in Savannah. Under State's proposed formula, au pair workers would be paid \$8 per hour because Savannah would fall under Tier 1. But the OWES data at FLCdatacenter.com shows that the local average wage for child care workers in Savannah is \$12.15 per hour.<sup>25</sup> An hourly wage of \$12.15 an hour represents a 68% increase from the federal minimum wage that would otherwise apply, and represents a 52% increase from what the Tier 1 wage in State's formula would require. Thus, using State's formula, J-1 au pair workers in Savannah would continue to be vastly underpaid vis-à-vis the going rate for child care workers in the Savannah area, and employer/host families would get significant savings on labor costs compared to hiring a child care worker in the Savannah area. This of course, would result in putting downward pressure on local wages and labor standards.

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<sup>24</sup> "Childcare Workers" data for Savannah, Georgia, U.S. Department of Labor: [Foreign Labor Certification \(FLC\) Data Center Online Wage Library](#), retrieved January 18, 2023.

<sup>25</sup> "Childcare Workers" data for Savannah, Georgia, U.S. Department of Labor: [Foreign Labor Certification \(FLC\) Data Center Online Wage Library](#), retrieved January 18, 2023.

Finally, another justification for the use of the local average wage to set J-1 au pair wage rates is that “Under paragraph (t)(1)(d), the Department of State proposes to preempt all state unemployment insurance taxes and the employment training taxes” from the Au Pair program.<sup>26</sup> Doing so gives a further financial incentive to host families to hire J-1 au pairs instead of local workers, and denies local, state, and federal coffers the funds they would otherwise receive to administer unemployment insurance and other key programs that benefit all workers. This preemption gives employer/host families an exemption from paying certain taxes that most employers have to pay on behalf of their workers. This additionally puts downward pressure on wages and labor standards by making J-1 au pairs even less expensive to hire than locally available child care workers. State says this almost explicitly when it notes that this exemption results from its “concern[ ] about burdening au pair programs with the payment of additional general welfare taxes so as to further restrict affordability of the program.”<sup>27</sup>

Given this exemption and its impact, it is even more important that State recognize the impact this will have on labor standards for child care workers in the United States, and in response, State should require that child care workers be paid no less than the local average wage as set by the OEWS.

***C) State should adjust au pair wage rates upward based on workload, number of children cared for, and other factors.***

In order to account for the reality that some J-1 au pair workers will be required to complete more child care tasks as a routine part of their employment with employer/host families—In addition to requiring that J-1 au pair workers be paid the local average wage for childcare workers based on wages in the OWES—State should develop and implement a workload adjustment formula, where certain factors would automatically trigger a higher base salary.<sup>28</sup> For example, each additional child beyond one child should trigger an increase in the base salary.

Employer/host families gain significantly in terms of financial/labor cost savings by hiring an au pair when they have more than one child; sending multiple children to a child care center would increase their costs by a factor of 100% for each additional child. State should not run the Au Pair program as a labor program that undercuts labor standards with a race to the bottom in term of wages and salaries. But State will be doing exactly that if they do not increase base pay for J-1 au pairs significantly for each additional child they must care for beyond a single child. In addition, with respect to children who have special needs, if a family attempts to find specialized child care for children with disabilities or other needs in the open market, they will likely incur additional costs because specialized care requires additional skills, care, and effort. State should not undercut labor standards for special-needs child care workers either; thus, J-1 au pairs who care for children with special needs should also be

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<sup>26</sup> 88 Fed. Reg. at 74081 (October 30, 2023).

<sup>27</sup> 88 Fed. Reg. at 74082 (October 30, 2023).

<sup>28</sup> See discussion in Victoria Bejarano Hurst Muirhead, “[‘I’d never let my sister do it’: Exploitation Within the U.S. Au Pair Program](#),” *Lewis & Clark Law Review*, Notes and Comments, Vol. 26, January 2022, at page 271.

entitled to an automatic base salary increase. State should conduct market research to determine the amounts of increases merited by caring for multiple children and children with special needs, as well as research to determine additional factors that would justify increases in base pay, and what the amounts should be for each.

***D) If State retains the proposed four-tiered wage formula, the formula should be updated annually to reflect changes in minimum wage laws.***

We have argued in this section that State should not utilize the currently proposed four-tiered wage formula and should set a higher wage standard based on the surveyed OEWS wage rates. With that said, if State nevertheless finalizes the rule with the four-tiered wage formula in place as proposed, then we would urge State to update the formula every year to reflect changes in local and state minimum wage laws, rather than every three years as proposed.

Updating the formula every three years will not actually reflect local and state minimum wage laws, which are often updated annually. Updating every three years may not even reflect the federal minimum wage, if it were to be increased by Congress and indexed to inflation,<sup>29</sup> if State does not schedule an update to the formula in the same year that the law goes into effect.

According to EPI's Minimum Wage Tracker website, 30 states and the District of Columbia have minimum wage laws that require a higher minimum wage than the federal minimum wage, and 58 localities that have adopted minimum wage laws requiring an hourly wage that is higher than the wage required by minimum wage law in the state.<sup>30</sup> There are only eight states that have no minimum-wage law or a minimum wage that is set below the federal minimum wage, and where as a result, the federal minimum wage applies.<sup>31</sup>

In the states, cities, and counties that have higher minimum wages than the federal minimum wage, many are adjusted every year, either according to a formula set in statute or to account for inflation. In fact, EPI has reported that 23 states increased their minimum wage rates in late 2023 early 2024, and 38 cities and counties increased their minimum wage rates on January 1, 2024.<sup>32</sup> These increases will impact 10 million workers. Au pairs should not be exempted from these minimum wage increases because of State's failure to update the four-tiered formula on an annual basis. Delaying the necessary annual increases to the formula based on increases in state and local minimum wage laws will also have the effect of preempting state and local minimum wage laws—something State suggests it is trying to avoid—and it will cause greater confusion for all stakeholders.

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<sup>29</sup> For example as proposed in the Raise the Wage Act. See Economic Policy Institute, "[Why the U.S. needs at least a \\$17 minimum wage: How the Raise the Wage Act would benefit U.S. workers, their families, and entire communities](#)," Fact Sheet, July 31, 2023.

<sup>30</sup> Economic Policy Institute, "[Minimum Wage Tracker](#)," values current as of January 1, 2024.

<sup>31</sup> Economic Policy Institute, "[Minimum Wage Tracker](#)," values current as of January 1, 2024.

<sup>32</sup> Sebastian Martinez Hickey, "[Twenty-two states will increase their minimum wages on January 1, raising pay for nearly 10 million workers](#)," *Working Economics* blog (Economic Policy Institute), December 21, 2023.

By only updating the formula every three years, and without further guidance on how the formula should be updated, State will not only be prohibiting au pairs from getting the minimum wage increases they may be entitled to, but will also give future administrations the leeway to slow-walk any future increases. This will make au pair wages fall even further behind the minimum wage standards that are in force. A future administration would only be required to update the wage formula once during its term, and since State has not proposed an explicit requirement that the update ensure that the new wage rates correspond to the highest wage rates required by state and local minimum wage laws, future administrations will not be compelled to do so. State only offers an example saying that updating the formula to correspond to local and state minimum wage laws is *one* of the possible methodologies to use for increasing the wages required in the formula, but it is not an explicit requirement.

Again, we wish to reiterate that it would be much simpler and fairer if State simply required that au pairs be paid no less than the local average wage for child care workers as determined by the OEWS. But if State refuses to take this recommendation to protect wage standards for child care workers, then the highest applicable local, state, or federal minimum wage should apply to au pairs. Both of these options will be much simpler for stakeholders and render the four-tiered formula unnecessary.

#### ***E) State should not permit any deductions from au pair salaries for room and board.***

We are disappointed that in the proposed rule, State proposes to continue allowing deductions from the wages of J-1 au pair workers based on the deductions State argues are permitted in the Fair Labor Standards Act (FLSA), calculated as percentages of the federal minimum wage of \$7.25 per hour. We believe that these deductions should not be permitted.

The FLSA regulations that State cites at 29 CFR § 552.100 permit deductions for meals and lodging for live-in domestic service employees, and State uses those guidelines to calculate the permissible maximum weekly deductions, which in total amount to \$130.54. However, we do not believe that J-1 au pair workers should have those amounts deducted from their wages because the meals and lodging provided are for the primary benefit and convenience of the *employer*.<sup>33</sup> The J-1 au pair worker's ability to live and eat in the employer/host family's home is what allows the au pair to be close to the children they are taking care of virtually at all times or when called upon. If they did not live in the family's home, it would be practically impossible to provide round-the-clock child care, which is what the families that participate in the Au Pair program are hoping to get in return for the fees and salary they are paying.

In addition, the families that are participating in the Au Pair program, by definition, must have substantial means to participate in the Au Pair program. They must, for example, have at least roughly \$20,000 dollars of disposable income to spend on Au Pair program fees and salary, and have a home large enough to have an extra room where the au pair worker will reside, which is itself a sign of at least moderate to significant economic comfort. It is unreasonable to put the burden of room and board on the much lower-paid J-1 au pair, rather than putting

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<sup>33</sup> See discussion of FLSA section 203(m) in Wage and Hour Division, "[Credits Toward Wages under Section 3\(m\) Questions and Answers](#)," U.S. Department of Labor.

that cost on the wealthy families who are benefitting from worker-provided full-time, live-in child care in their home.

Even if a family that is participating in the Au Pair program paid the full amount allowed for weekly deductions for room and board for an entire year, the maximum they would be required to pay towards the au pair's room and board would be \$6,788.08 (\$130.54 x 52 weeks). It is reasonable to require families in the Au Pair program to be required to cover this amount in exchange for the extensive services they receive, rather than taking cuts out of the paychecks of the minimum wage-earning employees living in their homes .

In the H-2A visa program, for migrant farmworkers, employers are required by statute to provide room and board to their H-2A employees at no cost to the employees. When Congress created the program, their rationale for this was that migrant farmworkers earning low wages should not be required to pay for their own room and board. Because they will be living on the farms where they will work, it is obvious that farm owners are the ones who primarily benefit from having farmworkers reside onsite, in close proximity to their worksite. H-2A farmworkers, it should be noted, earn an hourly salary that is higher than the minimum wage, which is called the Adverse Effect Wage Rate, which is based on the average salaries of farmworkers in their region, as surveyed by the U.S. Department of Agriculture. J-1 au pair workers, in comparison, do not earn the average wage for their occupation in the local area, they simply earn the minimum wage. Thus, despite rules establishing that J-1 au pairs have a lower hourly minimum wage than H-2A farmworkers in the same region who are provided room and board, State is exposing J-1 au pairs to deductions of a significant amount of their salary for room and board.

As discussed above, in the J-1 Au Pair program, Congress merely authorized the program but did not construct it. The J-1 program is entirely a creature of regulation developed by State, an agency with no expertise or mandate related to labor standards, and arguably the program stretches the bounds of what the Fulbright Hays Act authorizes. Nevertheless, it is clear that State did not take into consideration these issues regarding compensation and deductions for room and board when developing the program. State now has an opportunity to fix the program by requiring families to cover the costs of room and board for au pairs.

***F) If State continues to allow deductions for room and board from au pair wages, it should prohibit any further deductions for any other items or services.***

If State decides not to accept our recommendation about deductions for room and board and modify the program accordingly, then we strongly urge State to prohibit any further deductions than the ones proposed for room and board. The proposed rule at page 74079 discusses J-1 au pairs being “charged for in-kind benefits (e.g., gym membership, cell phones) only as the au pair and host family agreed in the Host Family Agreement.” In other words, employer/host families would be permitted to deduct the cost of goods and services like phones and gym memberships from the already too-low minimum wage salaries of J-1 au pair workers—as long as those deductions are included in the Agreement. This would be in addition to the \$130.54 that is already being deducted from J-1 au pairs for room and board in



most cases. We believe this is unreasonable and unfair to J-1 au pairs, and that State should prohibit these additional deductions.

The low, minimum wage salaries that J-1 au pairs earns are too low to be a living wage. The unreasonable amounts already being deducted for room and board from those low salaries lower their pay to shockingly low levels—levels that would not allow a single person to survive in even the lowest-cost regions of the United States. For example, for one adult with no children to live comfortably in Sioux Falls, South Dakota—which was named the most affordable city to live in the United States<sup>34</sup>—that adult would need to earn \$34,092 per year.<sup>35</sup> Given South Dakota’s state minimum wage of \$11.20 per hour, an au pair working in Sioux Falls would be entitled to the proposed Tier 2 wage of \$12 an hour. A J-1 au pair who worked an entire year for 40 hours per week at \$12 an hour would earn \$24,960, before deductions for room and board. After a year’s worth of room and board deductions are subtracted, the J-1 au pair would earn roughly \$18,172. Therefore, allowing further deductions for basic items like cell phones from J-1 au pairs who are already earning extremely low wages would be unconscionable.

In addition, every allowance for an additional deduction also creates more opportunities for wage theft. Though the costs need to be documented, employer/host families can easily lie, misrepresent, or overcharge for such items. Au pairs may often be unable to verify the costs by looking at monthly bills for cell phones and gym memberships, and other goods and services. In the case of cell phones in particular, an au pair having a cell phone would primarily benefit employer/host families by allowing them to be in constant contact with au pairs. For this reason, State should specifically prohibit employer/host families from making deductions for the cost of cell phones that they provide to J-1 au pairs.

***G) We generally support State’s proposal to provide overtime pay to J-1 au pair workers in accordance with the highest amount required under local, state, or federal law.***

We commend State for proposing to require that employer/host families adhere to the highest amount required under the overtime laws of the local, state, or federal law that applies where the employer/host family resides. We agree that the best rule for overtime is to require that au pairs “be compensated for those excess [overtime] hours at the hourly rate of the applicable tier identified in proposed paragraph (n)(4)(ii) of the regulations, and they must also be paid any overtime premium due under applicable federal, state, or local law. In addition, under the proposal, au pairs must be paid any other overtime premiums due under applicable federal, state, or local law for other hours worked.”<sup>36</sup> And we commend State for explicitly stating that J-1 Au Pair “regulations would not preempt state and local laws regarding overtime pay.”<sup>37</sup>

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<sup>34</sup> Laura Begley Bloom, “[20 Most Affordable Places To Live In The U.S., According To A New Report](#),” *Forbes*, October 31, 2023,

<sup>35</sup> See EPI’s Family Budget Calculator for estimates on “the income a family needs in order to attain a modest yet adequate standard of living.” Even in a low-cost area like Baton Rouge Louisiana

<sup>36</sup> 88 Fed. Reg. at 74079 (October 30, 2023).

<sup>37</sup> 88 Fed. Reg. at 74081 (October 30, 2023).

While we believe that State is taking the appropriate action with respect to applicable overtime pay laws, the proposal serves as a reminder that State should be proposing to do the same with respect to the minimum wage laws. In other words, instead of creating a complicated four-tier formula that supersedes the hourly minimum wage rate that would be “due under applicable federal, state, or local law,” and which is unlikely to keep pace with the U.S. states and localities that regularly update their required minimum wage rates (as discussed above), State should apply the same logic to the minimum wage section of the regulation as it does to the overtime section of the regulation, by specifying that the highest applicable local, state, or federal minimum wage law applies in all cases with respect to wage rates.

By not preempting some wage and hour laws, but then preempting others, State risks creating a confusing patchwork of rules that will confuse all stakeholders. State should simplify the regulation by respecting and requiring adherence to the highest applicable labor standards in every aspect of the program.

***H) State should require that documentation of timesheets be primarily tracked by J-1 au pair workers, who are best situated to track their weekly hours and fill out the timesheets, rather than having the employer/host family keep records and provide it after the fact to au pair employees.***

In order to prevent employer/host families from manipulating timesheets and not adequately tracking all hours worked by J-1 au pairs, the au pairs should be the primary trackers of the hours on their weekly timesheets. J-1 au pairs are best situated to know how many hours they worked and on which days, as well as how many meals they ate each day that will result in a deduction in pay.

There are available electronic tools that can be used by both employer/host families and J-1 au pair employees. One is the DOL’s “Timesheet App,” which allows both workers and employers to easily record hours worked and calculate pay.<sup>38</sup> State should encourage J-1 au pair workers to use the Timesheet App and keep their own records in case a dispute arises.

Timesheets could also be kept in a shared document in the cloud, such as a Google doc or a Sharepoint file. This way, both employer/host families and J-1 au pair employees could input what they have tracked as the number of hours worked, and they could include comments, explanations, and evidence with respect to certain entries if there is a dispute, and these could later be reviewed by sponsors or State if the disputes are not resolved between the employer and employee.

In any case, we again reiterate that J-1 au pair workers should be primarily responsible for approving the tracking of hours and keeping timesheets—not employer/host families—and the timesheets should never be approved or submitted to sponsors without J-1 au pairs having

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<sup>38</sup> See Wage and Hour Division, “[Track Your Hours: Just Tap the App](#),” U.S. Department of Labor [last accessed on January 18, 2024]; U.S. Department of Labor, “[Introducing the DOL-Timesheet App](#),” YouTube.com [last accessed on January 18, 2024].

the opportunity to review and approve the timesheets before they are finalized and shared with sponsors.

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Thank you again to the State Department for considering these comments and recommendations. EPI looks forward to the Biden administration implementing the final rule in a manner that integrates the improvements suggested here and in the comment submitted by the Migration that Works coalition, as well as making any and all other regulatory and subregulatory improvements that the administration can make to protect workers and improve labor standards in the J-1 Exchange Visitor Program.

Best regards,

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