



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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November 18, 2020

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Employment and Training Administration: Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Employment and Training Administration (ETA) entitled "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States" (RIN: 1205-AB89). We received the rule on November 5, 2020. It was published in the *Federal Register* as a final rule on November 5, 2020. 85 Fed. Reg. 70445. The stated effective date of the rule is December 21, 2020.

According to ETA, the final rule amends its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status (H-2A workers). Specifically, ETA states that it is amending its regulations to revise the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range agricultural occupations using wage data reported by the U.S. Department of Agriculture's Farm Labor Survey and the Department of Labor's Bureau of Labor Statistics Occupational Employment Statistics survey. According to ETA, this final rule improves the consistency and accuracy of the AEWRs based on the actual work being performed by H-2A workers, and establishes better stability and predictability for employers to comply with their wage obligations. ETA also states the amended regulations are consistent with the Secretary of Labor's statutory responsibility to certify that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress,

whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). According to ETA, it has determined it has good cause to shorten the delay in effective date to 45 days because it found the full 60-day waiting period to be unnecessary and stated it could potentially cause confusion and disruption among affected parties. ETA states that a delay in the effective date of this rule would require the agency to calculate and publish its annual AEWRS for 2020 using outdated methodology, then, shortly after its publication, adjust the AEWRS to align with the new methodology resulting from this final rule. According to ETA, this would likely lead to significant confusion for the regulated entities. ETA also states the 60-day delay is unnecessary because the effective date of the rule will not precipitate an immediate impact on the interest or obligations of affected parties and because the rule gives parties time to assess and understand the rule even after it takes effect.

Enclosed is our assessment of ETA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.



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Enclosure

cc: Sherril Hurd
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Department of Labor

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION
ENTITLED
"ADVERSE EFFECT WAGE RATE METHODOLOGY FOR THE
TEMPORARY EMPLOYMENT OF H-2A NONIMMIGRANTS IN
NON-RANGE OCCUPATIONS IN THE UNITED STATES"
(RIN: 1205-AB89)

(i) Cost-benefit analysis

The Department of Labor, Employment and Training Administration (ETA) estimates that the final rule will result in costs and transfer payments. ETA expects this rule to have an annualized cost of \$70,000 and a total 10-year quantifiable cost of \$460,000 at a discount rate of 7 percent; annualized cost of \$50,000 and a total 10-year quantifiable cost of \$460,000 at a discount rate of 3 percent. ETA states the costs of the final rule are attributed to the need for employers to familiarize themselves with the new rule. ETA further estimates this final rule will result in annual transfer payments from H-2A employees to H-2A employers of \$170.68 million and total 10-year transfer payments of \$1.19 billion at a discount rate of 7 percent; annual transfer payments of \$169.10 million and a total 10-year transfer payments of \$1.44 billion at a discount rate of 3 percent; and undiscounted total 10-year transfer payments of \$1.68 billion. According to ETA, the final rule is expected to provide qualitative benefits including better protection against adverse wage effects on an occupation basis.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

ETA prepared a Final Regulatory Flexibility Analysis. The analysis included (1) objectives of and legal basis for the final rule; (2) ETA's response to public comments; (3) ETA's response to comments by the Chief Counsel for Advocacy of the Small Business Administration; (4) description of the number of small entities to which the final rule will apply; (5) projected reporting, recordkeeping, and other compliance requirements of the final rule; and (6) steps ETA has taken to minimize the significant economic impact on small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

According to ETA, this final rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and state governments are reimbursed for performing activities required under the program. ETA states the requirements of the Act do not apply and, therefore, it has not prepared a statement under the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On July 26, 2019, ETA published a proposed rule requesting public comments on proposals to modernize and streamline the process by which ETA's Office of Foreign Labor Certification reviews employers' job orders and the applications for temporary agricultural labor certifications. 84 Fed. Reg. 36168. The proposed rule included proposed amendments to the AEWR methodology regulations. 84 Fed. Reg. 36168, 36171. According to ETA, it received a total of 83,532 public comments in response to the proposed rule, and thousands of the comments specifically related to the proposed changes to the methodology of setting the AEWRs. The comments were from a wide range of stakeholders interested in the H-2A program, including farmworkers, farm owners, agricultural and trade associations, federal elected officials, state officials, state workforce agencies, recruiting companies, law firms, immigration and worker advocacy groups, labor unions, academic institutions, public policy organizations, and other industry associations interested in immigration related issues. According to ETA, it responded to comments specifically related to the methodology of setting the AEWRs in this final rule, but intends to address all of the remaining proposals from the proposed rule in a subsequent, second final rule governing other aspects of the certification of agricultural labor or services to be performed by H-2A workers.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

ETA determined that this final rule contains no information collection requirements under the Act.

Statutory authorization for the rule

ETA promulgated this final rule pursuant to sections 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188 of title 8, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

ETA determined this final rule is an economically significant regulatory action under the Order and stated it was reviewed by the Office of Management and Budget.

Executive Order No. 13132 (Federalism)

ETA determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement under the Order because the rule would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.