

Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural
Employment H-2B Program, Part 2

Important Note: The following Frequently Asked Questions have been updated as of April 25, 2013.

Question: I am an employer who has been participating in the H-2B program for a number of years. I understand the Department has published a new wage regulation for the H-2B program. Does the new wage apply to me?

Answer: The new Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2 (Wage Methodology IFR), published April 24, 2013, and effective on the same date, revises the methodology the Department of Labor uses to calculate certain prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with an H-2B Application for Temporary Employment Certification. The Wage Methodology IFR eliminates the use of four-tier wage rates based on the Bureau of Labor Statistics' Occupational Employment Statistics (OES) survey and replaces them with the OES arithmetic mean.

The Wage Methodology IFR continues to set the prevailing wage based on the applicable Collective Bargaining Agreement wage rates, or, at the employers request, the Service Contract Act or Davis-Bacon Act wage determinations, or appropriate private wage surveys. The Wage Methodology IFR applies to all requests for prevailing wage determinations and applications for temporary employment certification adjudicated or processed on or after April 24, 2013, and H-2B work being performed on or after the effective date of the Wage Methodology IFR. It also applies to employers who have already received a temporary employment certification and currently employ and pay H-2B workers based on the tiered OES survey. Employers currently employing and paying H-2B workers based on the tiered OES survey will be responsible for providing wages that comply with the new Wage Methodology IFR for all work performed on and after the date an employer receives a supplemental determination from the Department.

Question: I have an H-2B prevailing wage request pending at the National Prevailing Wage Center (NPWC) since late March 2013. Will I now receive my wage determination?

Answer: Yes. H-2B program prevailing wage requests will be processed on a first-in, first-out basis from the NPWC after April 24, 2013, the effective date of the Wage Methodology IFR.

Question: I have an Application for Temporary Employment Certification for H-2B workers pending at the Chicago National Processing Center (CNPC) since late March 2013. Will I now receive a final determination on my application?

Answer: Yes. Pending Applications for Temporary Employment Certification for H-2B workers at the CNPC will be processed on a first-in, first-out basis and accompanied by a new prevailing wage consistent with the Wage Methodology IFR.

Question: I have already received my H-2B temporary labor certification and currently employ H-2B workers at my worksite. Will I be affected by this new rule? If so, why do I now have to pay a new wage that is different from the one listed on my certified H-2B application?

Answer: Yes, if you currently employ H-2B workers and pay them a wage based on the tiered OES survey, you and your current workers are affected by the new wage rule. Employers who have H-2B workers performing work that is based on the tiered OES survey on or after April 24, 2013, will receive a new prevailing wage determination in accordance with the Wage Methodology IFR. **These employers are required to offer and pay this new wage for any work performed on and after the date the employer receives the supplemental determination from the Department of Labor.**

By signing the Appendix B.1 of the H-2B Application for Temporary Employment Certification, each employer who has a certified H-2B application assumed the obligation to offer and pay to its H-2B workers and U.S. workers recruited in connection with the H-2B application, a wage that equals or exceeds the highest of the most recent prevailing wage issued by the Department of Labor to the employer for the time period the work is performed, or the applicable Federal, State, or local minimum wage if higher. Additionally, in order to come into compliance with the court's order in Comite de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis, --- F. Supp. 2d ---, 2013 WL 1163426 (E.D. Pa. 2013), the Department must ensure that employers pay the legally valid wage established under the new wage rule, including those employers who currently employ H-2B workers.

Question: I just received a supplemental prevailing wage determination from the Department. Can I file an appeal?

Answer: Yes. An employer may request redetermination of the supplemental prevailing wage determination within 30 days from the date of the supplemental determination. The request for redetermination must clearly identify the prevailing wage determination for which review is sought and the grounds for redetermination. Employers may not seek redetermination on issues related to the identification of the proper occupational classification since that issue should have been raised when the original prevailing wage determination was issued.

Question: Why isn't the Department continuing to use four-level OES wage rates when issuing prevailing wage determinations?

Answer: The district court in Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, ___ F. Supp. 2d ___, 2013 WL 1163426 (E.D. Pa. 2013), held that the provision of the 2008 wage rule, which used four-level OES wage rates, was invalid. The court vacated that provision of that rule and issued a permanent injunction prohibiting the Department from using four levels when issuing a prevailing wage determination based on the OES survey.

The court stated that, because prevailing wage determinations issued based upon the four-level OES wage rates result in adverse effect upon the wages and working conditions of U.S. workers, it is outside the Department of Labor's authority to issue labor certifications based upon such prevailing wages. Accordingly, under the Wage Methodology IFR, the Department of Labor is using the OES mean wage rate when issuing prevailing wage determinations, in order to avoid adverse effect on U.S. workers. Using the OES mean rate for the Wage Methodology IFR rule allows the Department of Labor to operationalize the new rule at once and to issue prevailing wage determinations without delay, which allows for a smoothest transition following the court's order vacating the four-level OES wage in the 2008 final rule.

Question: Why are DOL and DHS jointing issuing this rule?

Answer: DOL and DHS believe that DOL possesses independent legislative rulemaking authority for the H-2B program. However, due to inconsistent court rulings on DOL's authority to issue independent legislative rules, DOL and DHS are promulgating this joint regulation revising the prevailing wage methodology in the H-2B program in order to respond to the CATA court order, as well as to dispel any questions regarding the respective roles of the two agencies and the validity of DOL's regulations as an appropriate way to implement the consultation mandate required by the INA for the H-2B program.