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Farm Labor:
The Adverse Effect Wage Rate (AEWR)

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Summary

American agricultural employers have long utilized foreign workers on a temporary basis, regarding them as an important labor resource. At the same time, the relatively low wages and acceptance of often difficult working conditions by such workers have caused them to be viewed as an economic threat to domestic American workers.

To mitigate any "adverse effect" for the domestic workforce, a system of wage floors has been developed that applies, variously, both to alien and citizen workers — the *adverse effect wage rate* (AEWR). Under this system, a *guest worker* must be paid either the AEWR, the state or federal minimum wage, or the locally prevailing wage for his or her occupation, whichever is higher.

An H-2A worker is identified under 8 U.S.C. at 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act as a nonimmigrant alien seeking temporary employment in the United States. Wages paid to H-2A and related workers are but one aspect of broader immigration questions. In this report, however, the issue is limited to domestic economic concerns. Use of guest workers has evolved from a relatively simple exchange of labor along the frontier between Mexico and the United States, responding to the requirements of local employers, into a far more complicated structure that has expanded nationwide and involves many thousands of workers.

During World War I, Mexican workers were brought into the country to replace draftees. Later, during the Great Depression, those remaining in the States were subject to sporadic repatriation proceedings. During World War II, there was again perceived to be a need for guest workers; and, with the cessation of hostilities, there was also an effort to reduce the flow of aliens to the United States. Since the mid-1960s, several new programs involving guest workers have been instituted. In addition, numerous undocumented workers have entered (or re-entered) the country. Collectively, these guest workers, some have suggested, have come to compete with domestic (U.S.) workers — even where those domestic workers could be available for employment were conditions more favorable. Thus, the AEWR has been designed, in part, to deal with a putative surplus of alien workers but also to address any adverse impact upon domestic American workers.

This report is written from the perspective of labor policy, not of immigration policy. For discussion of immigration issues, see the Current Legislative Issues on the Congressional Research Service website [http://www.crs.gov].

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American agricultural employers have long utilized foreign workers on a temporary basis, regarding them as an important labor resource. At the same time, the relatively low wages of such workers and their acceptance of often difficult working conditions have caused them to be viewed as an economic threat to American workers.

To mitigate any "adverse effect" for the domestic workforce, a system of wage floors has been developed that applies, variously, both to alien and to citizen workers. These systems have come to include (1) the *adverse effect wage rate* (AEWR), (2) both state and/or federal minimum wage rates, and (3) the locally prevailing wage rate — whichever is higher.

The AEWR deals specifically with agricultural workers (i.e., H-2A workers). It involves persons "having a residence in a foreign country *which he has no intention of abandoning*" and who are "coming temporarily to the United States to perform agricultural labor" of "a temporary or seasonal nature." (Italics added.) It is predicated upon the assumption that "... unemployed persons capable of performing such service or labor cannot be found" in the United States.[1] An AEWR has been developed for each state except Alaska (see **Table 1**), and is announced early each year prior to the growing/production season.

Introduction

Where countries with widely different economies exist side-by-side, the more prosperous is likely to draw to itself workers from its lower-wage neighbors. Though wages of American agricultural workers are low in comparison with wage rates in the U.S. economy, they are relatively high by the standards of neighboring less developed countries. Thus, a continuing supply of workers has been available for employment in the United States at wage rates and under conditions that American workers, arguably, would not accept.

Low-wage labor has entered the United States from a variety of countries and under diverse circumstances. Indeed, importation of low-wage labor has been a long-standing tradition — with persons arriving in this country, moving into the fields and/or factories, gaining skills and becoming acclimated to American culture, and

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[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and (b). See also CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

becoming citizens.[2] Here, our concern is largely with workers who have entered aspects of agricultural production: primarily citizens of Mexico but, as well, of several other countries.

Two migratory thrusts are at issue. On the one hand, there are workers who, attracted by relatively higher wages in the United States (or by other aspects of American society), have come to the States as immigrants seeking permanent employment and, normally, citizenship. Conversely, there has been a body of workers who, responding to U.S. public policy (and to the exigencies of the economy), have been encouraged to come north — not to seek citizenship but to provide employers with a continuing source of low-wage labor, and who, at the end of a work period, are expected to return to their country of origin. These latter individuals, speaking generally, are *guest workers*, and are affected by the AEWR.[3]

Mexican Guest Worker Utilization: An Overview

Through the past century, trends in immigration from Mexico north to the United States have reflected the motion of a pendulum. Sometimes, they have favored the Mexican worker; but, as often, they have favored employers and have had a mixed impact upon Mexicans and Americans.

In the late 19th and early 20th centuries, movement across the U.S.-Mexican frontier was relatively unrestricted. Mexican nationals joined a resident Mexican-American population in the fields and mines of the Southwest.[4] With World War I, workers from Mexico were recruited to offset the loss of American workers drafted into military service and were engaged for agricultural work, on the railways and in

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[2] There is an extensive literature on the continuing quest of certain American employers for low-wage workers. See, for example, Roger Daniels, *Asian America: Chinese and Japanese in the United States Since 1850* (Seattle: University of Washington Press, 1988); Michael L. Conniff, *Black Labor on a White Canal: Panama, 1904-1981* (Pittsburgh: University of Pittsburgh Press, 1984); and Edward D. Beechert, *Working in Hawaii: A Labor History* (Honolulu: University of Hawaii Press, 1985). For more recent experience, see Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, (New York: The New Press, 1997); and Edna Bonacich and Richard P. Appelbaum, *Behind the Label: Inequality in the Los Angeles Apparel Industry* (Berkeley: University of California Press, 2000).

[3] U.S. agricultural workers can be divided into two groups: American workers and foreign workers. Herein, *American* workers are either U.S. citizens or permanent residents, and are distinguishable from *foreign* (alien, non-immigrant) workers who are in the country on a temporary basis. Further, some *foreign* workers may be here "legally" — others, "illegally."

[4] See, among other sources, Mark Reisler, *By The Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1940* (Westport: Greenwood Press, 1976); and Roberto R. Calderon, *Mexican Coal Mining Labor in Texas and Coahuila, 1880-1930* (College Station: Texas A & M University Press, 2000). On labor by native Americans, see portions of Evelyn Hu-DeHart, *Yaqui Resistance and Survival: The Struggle for Land and Autonomy, 1821-1910* (Madison: University of Wisconsin Press, 1984).

general industry as well.[5] After the war, a secondary problem arose: how to get the Mexican worker to go back to Mexico. This issue was aggravated by the Great Depression.[6] Then, World War II broke out and America turned once more to Mexico for low-skilled/low-wage labor. The result, in various forms, was the *bracero* program.[7]

By war's end, in 1945, agricultural employers had become accustomed to employing Mexican labor that was characterized at the time as docile, nonunion, temporary, and payable at low rates and, at the same time, as able and highly motivated. Through the process, a large body of Mexican workers had become acculturated to the American world of work. Having learned at least fragmentary English, they were able to function within the American system without the institutional support of the formal *bracero* program. In short, some might argue, the *bracero* program had been a training school for foreign workers operating outside the normal immigration structure. The *bracero*/guest worker programs, however, were also a source of contention, raising a number of socio-economic questions. Opposition continued to grow until, in 1964, the program was terminated.[8]

Even with termination, however, a body of foreign workers remained in the United States, augmented by Mexican workers who crossed the border without proper authorization.[9] These workers ("undocumented" or "illegal") may, it would seem, find themselves in competition with legal immigrants and native Americans for low-level work within agriculture and, increasingly, for other types of work as well. This raised several dilemmas. How might the demand of employers for low-wage labor be satisfied without imperiling the economic livelihood of resident/domestic American workers? And, as the ex-*bracero* community became a political force within the United States, how might these sometimes conflicting objectives be achieved without offending this new body of Americans?

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[5] Otey M. Scruggs, "The First Mexican Farm Labor Program," *Arizona and the West*, winter 1960, pp. 319-326.

[6] For the inter-war years and repatriation, see Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929-1939* (Tucson: University of Arizona Press, 1979 edition); and Francisco E. Balderrama and Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (Albuquerque: University of New Mexico Press, 1995).

[7] Concerning the bracero program during World War II and its implications, see Otey M. Scruggs, *Braceros, "Wetbacks," and the Farm Labor Problem: Mexican Agricultural Labor in the United States, 1942-1954* (New York: Garland Publishing, 1988); and Richard B. Craig, *The Bracero Program: Interest Groups and Foreign Policy* (Austin: University of Texas Press, 1971).

[8] See Craig, *op. cit.*, and Ellis W. Hawley, "The Politics of the Mexican Labor Issue, 1950-1965," *Agricultural History*, July 1966, pp.157-176.

[9] Stephen H. Sosnick, in *Hired Hands: Seasonal Farm Workers in the United States* (Santa Barbara: McNally & Loftin, West, 1978, p. 9), noted that during its peak year (1957), some "450,000 braceros did seasonal farm work in the United States. Since the bracero program ended, their place has been taken by about 30,000 legal commuters from Mexico and by a large number — perhaps 200,000 — of illegal commuters and illegal residents, *many of whom are former braceros.*" (Italics added.)

Coping with "Adverse Effect"

Public concern over the impact of foreign workers has come to be addressed in immigration law. The Immigration and Nationality Act of 1952, as amended, provides for admission to the United States of a person (a) "having a residence in a foreign country which he has no intention of abandoning," (b) "who is coming temporarily to the United States to perform agricultural labor," (c) where the work is of "a temporary or seasonal nature," and (d) only "... if unemployed persons capable of performing such service or labor cannot be found in this country."[10] The act directs that a petition for admission of such persons (H-2A workers) "may not be approved by the Attorney General unless the petitioner [the prospective employer] has applied to the Secretary of Labor" for certification that

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
>
> (B) the employment of the alien in such labor or services *will not* adversely affect the wages and working conditions of workers in the United States similarly employed.[11] (Italics added.)

If the requirements of paragraphs (A) and (B) are to be effective, they impose a heavy policy burden and responsibility upon the Secretary of Labor.[12]

Qualified and Willing

Paragraph (A) focuses upon the availability of workers. Are there domestic American workers who are "able" and "qualified" to satisfy the normally low or semi-skilled requirements of temporary agricultural labor? Did Congress mean to have the Secretary assess the skill and ability of each potential domestic agricultural laborer? If not, then these qualifications are reduced largely to a single standard: willingness to be employed. Even that measure can be complex. Must the potential worker be "willing" to work at whatever wage an employer may be willing to offer and under whatever conditions may exist — even if adverse?

Almost by definition, the H-2A worker is willing to accept a lower wage and conditions of labor generally more adverse than would be acceptable to most American workers. Thus (following documentable recruitment efforts), a prospective employer can affirm that American workers are unavailable and that the employer is

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[10] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and (b).

[11] 8 U.S.C. §§ 1188(a)(1)(A) and (B).

[12] The conditions under which H-2A workers may be employed are set forth in detail in 20 C.F.R. Part 655. The AEWR is only one small aspect of the H-2A program. For a discussion of the program and of current issues, see CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, by Ruth Wasem and Geoffrey Collver (out of print but available upon request from the author). See, also, Howard N. Dillon, "Foreign Agricultural Workers and the Prevention of Adverse Effect," *Labor Law Journal*, December 1966, pp. 739-748.

only offering to the H-2A worker employment that American workers *do not want and will not accept*. In many other labor markets, movement toward higher wages and improved conditions could be expected to attract American workers.[13]

Will Not Affect Domestic Employment

As part of his responsibility under paragraph (A), the Secretary of Labor has developed a three-tiered wage rate requirement. The regulations state:

> If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest...[14]

The AEWR is set forth by the Department of Labor (DOL), based upon data gathered by the Department of Agriculture (DOA). DOA conducts a quarterly survey of the wages of field and livestock workers throughout the United States. The AEWR, then, is a weighted average of the DOA findings, calculated on a regional basis. It is adjusted, each year, taking into account prior experience with the change of the "average hourly wage rates for field and livestock workers (combined) based on the DOA Quarterly Wage Survey."[15] The rate (see **Table 1**) is set for each state (except Alaska for which no rate has been fixed). The AEWR has no *direct* effect where an employer does not seek to engage H-2A workers. However, if he does engage H-2A workers and subsequently locates and hires American workers, then he is required to pay each group not less than the AEWR.

Paragraph (B) presents a more complex issue: demonstrating that employment of H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed." Many view the AEWR structure as effectively setting a cap on the earnings of certain agricultural workers because agricultural employers may advertise for workers at the AEWR rate. If domestic workers are not available at the specified rate, the employer is allowed to employ

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[13] Sosnick, *op. cit*., p. 387, states: "For most types of work done in the United States, the only way employers can overcome a shortage of job-seekers is to make the jobs more attractive. For seasonal farm work, however, employers are permitted to bring in workers from foreign countries."

Questions persist about possible farm labor shortages and the impact of foreign workers on wages and the local community. See CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine. Through recent years, non-agricultural firms have followed agriculture's initiative and pressed for more guest workers, banding together as the 'Essential Worker Immigration Coalition' (EWIC). See "Essential Worker Immigration Coalition Resumes Lobbying," National Journal's *Congress Daily*, March 15, 2002; and the Bureau of National Affairs, *Daily Labor Report*, July 28, 2003, p. A6. See, also, the EWIC website at [http://www.ewic.org].

[14] 20 C.F.R. § 655.102(b)(9)(i). The regulations set out separate requirements if the worker is paid on a piece rate basis. See 20 C.F.R. § 655.102(b)(9)(ii).

[15] 20 C.F.R. § 655.207(a), (b) and (c). Concerning the methodology for calculation of the AEWR, see *Federal Register*, June 1, 1987, pp. 20496-20533, and *Federal Register*, July 5, 1989, pp. 28037-28051.

foreign workers who, given the disparity in wage rates between Mexico and the United States, will almost always be available at the AEWR.

The H-2A option provides agricultural employers with an alternative source of labor and, in effect, expands the pool of available workers, potentially increasing competition for available jobs.[16] With that option open to them, agricultural employers may have no need to revise their recruitment and employment policies to make such employment more attractive to American workers.

Further, some may view the availability of foreign agricultural workers as a device through which to deter unionization among domestic agricultural workers. With the ready accessibility of foreign workers, there may be no need to bargain collectively with American workers over issues of wages and hours.[17]

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[16] "There seems to be only one practicable way to slow the influx of illegal aliens," states Sosnick, *op. cit*., p. 440, and that is "... to make it difficult for them to obtain employment in the United States." This assumes that it is public policy for "the influx of illegal aliens" to be slowed. See discussion of "criteria orders" on pp. 404-405.

[17] There has been, through the years, some concern that *guest workers* might be used to break strikes or, otherwise, to be involved in labor disputes. In 1974, Guinn Sinclair, president, National Farm Labor Contractors Association, pointed to an almost "complete lack of legislation" on what "constitutes a labor dispute" in the agricultural sector. "Does a labor dispute exist when the United Farm Workers Union issues a boycott of lettuce and table grapes?" See U.S. Congress, Senate, Subcommittee on Employment, Poverty, and Migratory Labor, Committee on Labor and Public Welfare, *Farm Labor Contractor Registration Act Amendments, 1974*, Fresno, Cal., February 8, 1974, and Washington, D. C., April 9, 1974, pp. 32-33. The Farm Bureau raised similar objections: "...what constitutes a strike, slowdown or labor-management dispute" and when does "such a condition exist at a particular farm." See *ibid*, p. 163.

Table 1. Adverse Effect Wage Rate by State, 1990-2008

(in current dollars per hour)

State[a]	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Alabama	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88	8.07	8.37	8.51	8.53
Arizona	4.61	4.87	5.17	5.37	5.52	5.80	5.87	5.82	6.08	6.42	6.74	6.71	7.12	7.61	7.54	7.63	8.00	8.27	8.70
Arkansas	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38	7.80	7.58	8.01	8.41
California	5.90	5.81	5.90	6.11	6.03	6.24	6.26	6.53	6.87	7.23	7.27	7.56	8.02	8.44	8.50	8.56	9.00	9.20	9.72
Colorado	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36	8.93	8.37	8.64	9.42
Connecticut	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
Delaware	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52	8.48	8.95	9.29	9.70
Florida	5.16	5.38	5.68	5.91	6.02	6.33	6.54	6.36	6.77	7.13	7.25	7.66	7.69	7.78	8.18	8.07	8.56	8.56	8.82
Georgia	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88	8.07	8.37	8.51	8.53
Hawaii	7.70	7.85	7.95	8.11	8.36	8.73	8.60	8.62	8.83	8.97	9.38	9.05	9.25	9.42	9.60	9.75	9.99	10.32	10.86
Idaho	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69	8.20	8.47	8.76	8.74
Illinois	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00	9.20	9.21	9.88	9.90
Indiana	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00	9.20	9.21	9.88	9.90
Iowa	5.03	4.85	5.15	5.65	5.76	5.72	5.90	6.22	6.86	7.17	7.76	7.84	8.33	8.91	9.28	8.95	9.49	9.95	10.44
Kansas	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83	9.00	9.23	9.55	9.90
Kentucky	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63	8.17	8.24	8.65	9.13
Louisiana	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38	7.80	7.58	8.01	8.41
Maine	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
Maryland	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52	8.48	8.95	9.29	9.70
Massachusetts	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
Michigan	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11	9.18	9.43	9.65	10.01
Minnesota	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11	9.18	9.43	9.65	10.01
Mississippi	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38	7.80	7.58	8.01	8.41
Missouri	5.03	4.85	5.15	5.85	5.76	5.72	5.90	6.22	6.86	7.17	7.76	7.84	8.33	8.91	9.28	8.95	9.49	9.95	10.44
Montana	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69	8.20	8.47	8.76	8.74

State[a]	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Nebraska	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83	9.00	9.23	9.55	9.90
Nevada	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36	8.93	8.37	8.64	9.42
New Hampshire	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
New Jersey	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52	8.48	8.95	9.29	9.70
New Mexico	4.61	4.87	5.17	5.37	5.52	5.80	5.87	5.82	6.08	6.42	6.74	6.71	7.12	7.61	7.54	7.63	8.00	8.27	8.70
New York	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
North Carolina	4.33	4.50	4.97	5.07	5.38	5.50	5.80	5.79	6.16	6.54	6.98	7.06	7.53	7.75	8.06	8.24	8.51	9.02	8.85
North Dakota	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7/49	7.81	8.24	8.53	8.83	9.00	9.23	9.55	9.90
Ohio	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00	9.20	9.21	9.88	9.90
Oklahoma	4.65	4.61	4.87	5.01	4.98	5.32	5.50	5.48	5.92	6.25	6.49	6.98	7.28	7.29	7.73	7.89	8.32	8.66	9.02
Oregon	5.42	5.69	5.94	6.31	6.51	6.41	6.82	6.87	7.08	7.34	7.64	8.14	8.60	8.71	8.73	9.03	9.01	9.77	9.94
Pennsylvania	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52	8.48	8.95	9.29	9.70
Rhode Island	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
South Carolina	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88	8.07	8.37	8.51	8.53
South Dakota	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83	9.00	9.23	9.55	9.90
Tennessee	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63	8.17	8.24	8.65	9.13
Texas	4.65	4.61	4.87	5.01	4.98	5.32	5.50	5.48	5.92	6.25	6.49	6.98	7.28	7.29	7.73	7.89	8.32	8.66	9.02
Utah	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36	8.93	8.37	8.64	9.42
Vermont	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01	9.05	9.16	9.50	9.70
Virginia	4.33	4.50	4.97	5.07	5.38	5.50	5.80	5.79	6.16	6.54	6.98	7.06	7.53	7.75	8.06	8.24	8.51	9.02	8.85
Washington	5.42	5.69	5.94	6.31	6.51	6.41	6.82	6.87	7.08	7.34	7.64	8.14	8.60	8.71	8.73	9.03	9.01	9.77	9.94
West Virginia	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63	8.17	8.24	8.65	9.13
Wisconsin	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11	9.18	9.43	9.65	10.01
Wyoming	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69	8.20	8.47	8.76	8.74

Source: Compiled from data provided by the U.S. Department of Labor, Employment and Training Administration. See *Federal Register*, Feb. 26, 2003, pp. 8929-8930; Mar. 19, 2003, p. 13331; Mar. 3, 2004, pp. 10063-10065; Mar. 2, 2005, pp. 10152-10153; Mar. 16, 2006, pp. 13633-13635; Feb. 21, 2007, pp. 7909-7911; and Feb. 26, 2008, pp. 10288-10290.

a. The U.S. Department of Agriculture (or of Labor) does not calculate an AEWR for Alaska.

State and Federal Minimum Wage Rates

From an employee perspective, payment under the AEWR would seem to be preferred, given its relatively higher rate. But where the AEWR does not apply, other systems of compensation for H-2A and related domestic (or citizen) workers come into play: namely, the minimum wage, either the federal or the state minimum, whichever is higher, or the prevailing wage in the area.

For the several states and the federal government, the minima are statutory and set in a reasonably clear manner. However, establishment of the rate to be applied may be more complicated than would at first appear. In general, where there is an overlap, the higher standard (that most nearly in the interest of the worker) will normally prevail. But certain other qualifiers may need to be taken into account.

Not all workers are covered by the federal minimum wage, though most are. But where the states are concerned, there is a wide range of coverage and exemption. Some states, when setting their minima, have adopted what is, essentially, the federal system, moving higher as the local economy may suggest. Others supplement the federal system, dealing primarily with workers who would not be covered by federal rates. In states where tourism is heavy, states may have opted for coverage of tourist-related industries while largely ignoring workers in other industries. And some states have no state minimum wage structure at all. Most states, however, *do* have some individualized rates, and that may need to be taken into account. Again, however, one may want to recognize that coverage differs from one state to the next — and is often quite different.

Speaking generally, the federal minimum wage under the Fair Labor Standards Act (FLSA) is relatively stable. Although Congress is not required to revisit the act, it has done so at more or less regular intervals and will often project increases in the statutory rate through a series of steps, allowing employers an opportunity to plan for any changes that may occur. Each state, on the other hand, operates at its own initiative and, thus, changes may come at any time.

The AEWR is increased regularly each spring; and, while generally escalating, it presents a relatively consistent pattern of wages — though, again, one that is quite different from the state and federal minimum wage rates and from the locally prevailing wage. For a worker, the result may be confusing as he or she moves from one state to another and, perhaps, from the federal to a state minimum wage. Where the AEWR comes into play, workers both foreign and domestic (citizen or permanent resident workers) can count on a higher (and documentable) basis for payment.[18]

Still, certain generalizations can be made. As things currently stand, the lowest AEWR is now set at $8.41 per hour for certain jurisdictions in the South. The

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[18] In 2007 (H.R. 2206), Congress raised the federal minimum wage in steps as follows: to $5.85 per hour as of July 24, 2007; to $6.55 per hour as of July 24, 2008; and to $7.25 per hour after July 24, 2009. Several of the states have adopted the concept of indexation where the state minima are concerned, raising the rate automatically on the basis of systems of economic variables.

highest rate under the AEWR is $10.86 for Hawaii. The AEWR is higher than the minima (whether state or federal) in all cases. (**Table 2** demonstrates the extent to which the AEWR exceeds the state and federal minima.)

Were one to eliminate the AEWR and rely upon either the state or federal minimum wage rates, the result would be *a reduction* in the wages required to be paid to H-2A and related domestic (or citizen) workers. In some cases, the impact could be a substantial reduction in such earnings.

Table 2. Comparison of the Adverse Effect Wage Rate with State and Federal Minimum Wage Rates

(as of March 2008; in dollars)

State	Adverse Effect Wage Rate (AEWR)	State Minimum Wage Rate	Amount by Which the AEWR Exceeds the State Minimum	Federal Minimum Wage Rate	Amount by Which the AEWR Exceeds the Federal Minimum
Alabama	8.53	—	8.53	5.85	2.68
Arizona	8.70	6.90	1.80	5.85	2.85
Arkansas	8.41	6.25	2.16	5.85	2.56
California	9.72	8.00	1.72	5.85	3.87
Colorado	9.42	7.02	2.40	5.85	3.57
Connecticut	9.70	7.65	2.05	5.85	3.85
Delaware	9.70	7.15	2.55	5.85	3.85
Florida	8.82	6.79	2.03	5.85	2.97
Georgia	8.53	5.15	3.38	5.85	2.68
Hawaii	10.86	7.25	3.61	5.85	5.01
Idaho	8.74	5.85	2.89	5.85	2.89
Illinois	9.90	7.50	2.40	5.85	4.05
Indiana	9.90	5.85	4.05	5.85	4.05
Iowa	10.44	7.25	3.19	5.85	4.59
Kansas	9.90	2.65	7.25	5.85	4.05
Kentucky	9.13	5.85	3.28	5.85	3.28
Louisiana	8.41	—	8.41	5.85	2.56
Maine	9.70	7.00	2.70	5.85	3.85
Maryland	9.70	6.15	3.55	5.85	3.85
Massachusetts	9.70	8.00	1.70	5.85	3.85
Michigan	10.01	7.15	2.86	5.85	4.16
Minnesota	10.01	6.15	3.86	5.85	4.16
Mississippi	8.41	—	8.41	5.85	2.56
Missouri	10.44	6.65	3.79	5.85	4.59

State	Adverse Effect Wage Rate (AEWR)	State Minimum Wage Rate	Amount by Which the AEWR Exceeds the State Minimum	Federal Minimum Wage Rate	Amount by Which the AEWR Exceeds the Federal Minimum
Montana	8.74	6.25	2.49	5.85	2.89
Nebraska	9.90	5.85	4.05	5.85	4.05
Nevada	9.42	6.33	3.09	5.85	3.57
New Hampshire	9.70	6.50	3.20	5.85	3.85
New Jersey	9.70	7.15	2.55	5.85	3.85
New Mexico	8.70	6.50	2.20	5.85	2.85
New York	9.70	7.15	2.55	5.85	3.85
North Carolina	8.85	6.15	2.70	5.85	3.00
North Dakota	9.90	5.85	4.05	5.85	4.05
Ohio	9.90	7.00	2.90	5.85	4.05
Oklahoma	9.02	5.85	3.17	5.85	3.17
Oregon	9.94	7.95	1.99	5.85	4.09
Pennsylvania	9.70	7.15	2.55	5.85	3.85
Rhode Island	9.70	7.40	2.30	5.85	3.85
South Carolina	8.53	—	8.53	5.85	2.68
South Dakota	9.90	5.85	4.05	5.85	4.05
Tennessee	9.13	—	9.13	5.85	3.28
Texas	9.02	5.85	3.17	5.85	3.17
Utah	9.42	5.85	3.57	5.85	3.57
Vermont	9.70	7.68	2.02	5.85	3.85
Virginia	8.85	5.85	3.00	5.85	3.00
Washington	9.94	8.07	1.87	5.85	4.09
West Virginia	9.13	6.55	2.58	5.85	3.28
Wisconsin	10.01	6.50	3.51	5.85	4.16
Wyoming	8.74	5.15	3.59	5.85	2.89

Source: *Federal Register*, vol. 73, no. 38, Feb. 26, 2008, pp. 10288-10290, and the U.S. Department of Labor, *Minimum Wage Laws in the States*, Jan. 1, 2008 [http://www.dol.gov/esa/]. Coverage may vary from one state to the next: reference will need to be made to each state's statute.

The Prevailing Wage

As a standard for agricultural compensation, the prevailing wage may be somewhat more nebulous than either the AEWR or the minima, whether state or federal. It may be either higher or lower than either the AEWR or the applicable minimum rates. It may also be fraught with more complexities.

The prevailing wage applies to the individual task for which a worker has been hired, within the locality of the production process. In the manner of Davis-Bacon wage rate determinations (but applied, here, to agriculture), a prevailing rate will normally take into account local conditions: the nature and character of the crop, the fringe benefits an employer chooses to provide, any collateral responsibilities that may be a part of his or her job description or actual work. For activities in agriculture, there may need to be hundreds of individual prevailing wage rates.[19]

Some prevailing wage rates may already be available — where the prospective employer finds them more practical than the AEWR. Others may need to be calculated by either a state department of employment security or by the Department of Labor. The exigencies of the workplace may render such case-by-case judgments impractical; thus, it has also been suggested that, where an occupation is obscure (or at least not generally recognized within an area), an employer may need to develop his or her own standard so long as it is in keeping with generally accepted criteria.

An individual judgement by an employer may render a wage more consistent with local circumstances and allow a tailoring of compensation to the actual work to be performed. However, there may also be problems. The employee may very well be shut out of the process. Where work is of short duration, the employee may not be especially well acquainted with the circumstances of his or her employment. In addition, where there are language problems (with the worker only marginally literate in the language of the employer), bargaining may simply be set aside. In such cases, the market may establish the wage depending upon the urgency of need, either for employees or for the employer. Under such circumstances, there would seem to be an open invitation for misunderstanding, for an agency challenge, or for lawsuits, whether of a serious sort or frivolous.

It may be that the prevailing wage concept will not mesh neatly with the AEWR or the several minima.

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[19] The Davis-Bacon Act requires that not less than the locally prevailing wage be paid to workers engaged *in construction* to which the federal government is a party. It does not apply to agricultural workers and is used, here, only as an example of the complexities of calculation. In 1998, Carlotta Joyner, Director, Education and Employment Issues, General Accountability Office, observed that in surveying construction wage rates for Davis-Bacon purposes, DOL was required to survey some "3,000 individual counties or groups of counties ... for four different types of construction." Then, within each type, there were diverse construction crafts to be surveyed. Setting a locally prevailing wage for employment in agriculture could be as complex. See testimony of Joyner before the Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, February 5, 1998, p. 13 of her prepared text (GAO/T-HEHS-98-88). See also CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.