

# Congress and the Administration Must Not Cut Farmworkers' Wages in the H-2A Guestworker Program



**Farmworker Justice**

May 2020





## **CONGRESS AND THE ADMINISTRATION MUST NOT CUT FARMWORKERS' WAGES IN THE H-2A GUESTWORKER PROGRAM**

**M**embers of Congress and Trump Administration officials are reportedly considering lowering wage rates for several hundred thousand farmworkers. Hourly wage rates in many states could be reduced to arbitrary minimum wage levels as much as \$4.00 to \$6.00 per hour below labor-market rates. This report analyzes the proposed wage cut and its economic impact on farmworkers.

### **The H-2A Program and the Wage Protections for Farmworkers**

**T**he H-2A agricultural guestworker program allows employers to bring in foreign citizens each year to perform agricultural jobs on temporary work visas.<sup>1</sup> The H-2A program requires the U.S. Department of Labor to review employers' applications to determine whether the employers are experiencing a labor shortage. The law requires employers to recruit workers inside the U.S. by offering wage rates and working conditions that will not "adversely affect" the wages and working conditions of U.S. farmworkers.<sup>2</sup> Required wage rates must be offered and paid to both U.S. workers and to foreign workers.

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<sup>1</sup> The H-2A program and the H-2A visa are named after a subsection of the Immigration and Nationality Act, 8 USC 1101(a)(15)(H)(ii)(a).

<sup>2</sup> 8 U.S.C. 1188(a)(1).

There is a long history of exploitation of vulnerable foreign workers and the depression of wage rates for the U.S. farmworkers who must compete with them. This history led, decades ago, to the establishment of “Adverse Effect Wage Rates” (AEWRs), named after the law’s basic requirement. Generally, foreign citizens from poor countries will accept lower wages than needed by U.S. citizens and permanent resident immigrants. If employers can hire foreign citizens on guestworker visas at below-market rates, then U.S. workers will lose bargaining power, many will be displaced and their wage rates will decline. Thus, the prevailing wage rates for farmworkers can decline if there are not protections against such distortion of the U.S. farm labor market by employers taking advantage of guestworkers’ vulnerability.

The main wage requirement is the employers’ obligation to pay at least AEWRs. The AEWRs, issued by state, apply in most cases as usually they are the highest of the allowable minimum wage rates under the H-2A program.<sup>3</sup> By regulation, the AEWRs are the regional average hourly wage for nonsupervisory field and livestock farmworkers combined, as determined by the Farm Labor Survey of employers conducted by the U.S. Department of Agriculture.<sup>4</sup> Using the USDA survey of employer payrolls from the previous year, the Department of Labor issues an AEWR for each state for each year.<sup>5</sup> In 2020, the AEWRs range from \$11.71 per hour in several southern states to \$15.83 per hour in Washington.<sup>6</sup>

In fiscal year 2019, the U.S. Department of Labor approved 257,667 H-2A jobs.<sup>7</sup> There are an estimated 2.5 million farmworkers in the U.S. The ten states with the largest number of H-2A jobs approved by the DOL are listed below. They accounted for almost 70% of all H-2A jobs.

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<sup>3</sup> 20 CFR § 655.122(l) Under the regulation, the employer must offer the highest of the AEWR, the collectively bargained wage rate, the state or federal minimum wage or the local “prevailing wage” for the particular task. In some local areas, the AEWR is not the highest wage rate.

<sup>4</sup> 20 CFR § 655.103(b).

<sup>5</sup> Some USDA survey regions contain two or more states resulting in DOL issuing identical AEWRs for some states.

<sup>6</sup> H-2A Program Adverse Effect Wage Rates for 2020, <https://www.foreignlaborcert.doleta.gov/adverse.cfm>.

<sup>7</sup> Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, *H-2A Temporary Agricultural Labor Certification Program Selected Statistics, FY2019*. [https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A\\_Selected\\_Statistics\\_FY2019\\_Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q4.pdf). In FY2016, DOL approved 165,741 H-2A jobs. Office of Foreign Labor Certification, *Annual Report, 2016*, at 4 and 42. [https://www.foreignlaborcert.doleta.gov/pdf/OFLC\\_Annual\\_Report\\_FY2016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf)

<b>State</b>	<b>Number of H-2A Positions Approved by US DOL in FY2019</b>
Florida	33,598
Georgia	29,480
Washington	26,226
California	23,321
North Carolina	21,605
Louisiana	10,816
Michigan	9,096
Kentucky	8,315
New York	8,104
South Carolina	6,082

### **The Proposal to Lower H-2A Program Wage Rates**

Recently, an NPR story reported that the Administration plans to lower the Adverse Effect Wage Rates by adopting a new methodology that differs from the formula in the current H-2A regulations.<sup>8</sup> Through a Freedom of Information Act request, Farmworker Justice obtained documents showing that the Administration has been considering several formulas.<sup>9</sup> In the meantime, Rep. Yoho (R-FL) introduced a bill, the Labor Certainty for Food Security Act, HR6083, which, if passed, adopts one of those formulas.

Under this methodology, H-2A program employers could pay the highest of (1) the state minimum wage, (2) a wage rate 15% above the federal minimum wage, which at \$7.25 per hour would mean \$8.34 per hour; or (3) the wage that the employer is paying to other workers in the same job.<sup>10</sup>

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<sup>8</sup> Franco Ordoñez, “White House Seeks To Lower Farmworker Pay To Help Agriculture Industry,” National Public Radio, April 10, 2020, <https://www.npr.org/2020/04/10/832076074/white-house-seeks-to-lower-farmworker-pay-to-help-agriculture-industry>.

<sup>9</sup> Document from the U.S. Department of Agriculture and U.S. Department of Labor available upon request.

<sup>10</sup> HR6083, section 303. See also the summary of the bill by Rep. Yoho that appears on his official Congressional website, “Overview of the Labor Certainty for Food Security Act.” [https://yoho.house.gov/sites/yoho.house.gov/files/LCFS\\_Act%20Overview1%20final.pdf](https://yoho.house.gov/sites/yoho.house.gov/files/LCFS_Act%20Overview1%20final.pdf). This formula for wages would apply to the H-2A program (see p. 5) and to a new H-2C agricultural guestworker

The table below shows the massive wage losses that farmworkers would suffer if the Trump Administration adopts that methodology in upcoming changes in the H-2A regulation or if Congress passes the Yoho bill.

Under the methodology in the Yoho Bill and the proposal being considered by the Trump Administration, H-2A workers and the U.S. workers at H-2A employers could suffer a wage cut anywhere up to \$6.18 per hour, and on average would lose \$4.11 per hour if applied to 2020.

Farmworker Justice examined the H-2A program data from the US DOL for FY 2019 in 21 states, including the ten states with the largest number of H-2A workers and other major agricultural production states. The table below summarizes the hourly, weekly and seasonal wage losses that farmworkers at H-2A employers would have suffered if the Yoho bill's methodology were applied.<sup>11</sup> Workers on average would have lost \$3,508.24 for the working season.

Georgia's employers are major users of the H-2A program, having received approval for over 29,000 H-2A jobs in 2019. Georgia's AEW in 2019 was \$11.13 per hour. Under the proposed change, the 2019 wage rate would have been \$8.34 per hour, a cut of \$2.79 per hour. Farmworkers would have lost \$103 per week, and lost \$1,895 for the season.<sup>12</sup>

In Washington State, the H-2A employers obtained approval to hire over 26,000 H-2A guestworkers. The AEW in 2019 was \$15.03. The proposed wage formula would have set it at \$12.00 per hour, the state minimum wage. At that lower rate, workers would have earned an average of \$2,764 less per season. Instead of earning \$13,714 on average for the 24-week season, they would have earned \$10,949.<sup>13</sup>

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program the bill would establish for year-round jobs (see p. 2). The "actual wage" in the third option merely seems to allow an employer to pay whatever wage it decides to pay.

<sup>11</sup> The methodology for the table's information is in endnotes i-v.

<sup>12</sup> According to the Georgia employers' submissions approved by the Department of Labor in FY2019, the H-2A workers (and any U.S. workers that were hired) on average were assigned to work 37.1 hours per week and 18.3 weeks.

<sup>13</sup> According to the Washington employers' submission approved by the Department of Labor in FY2019, the H-2A workers (and any U.S. workers that were hired) on average were assigned to work 38.5 hours per week and 23.7 weeks.



<b>State</b>	<b>Year</b>	<b>Proposed lower hourly wage rate<sup>i</sup></b>	<b>Official H-2A Adverse Wage Rate<sup>ii</sup></b>	<b>Hourly wage cut<sup>iii</sup></b>	<b>Weekly wage cut per worker<sup>iv</sup></b>	<b>Seasonal wage cut per worker<sup>v</sup></b>
<i>Georgia</i>	2019	\$ 8.34	\$ 11.13	\$ 2.79	\$ 103.60	\$ 1,895.91
	2020	\$ 8.34	\$ 11.71	\$ 3.37		
<i>Florida</i>	2019	\$ 8.46	\$ 11.24	\$ 2.78	\$ 101.47	\$ 2,374.40
	2020	\$ 8.56	\$ 11.71	\$ 3.15		
<i>North Carolina</i>	2019	\$ 8.34	\$ 12.25	\$ 3.91	\$ 151.32	\$ 3,858.58
	2020	\$ 8.34	\$ 12.67	\$ 4.33		
<i>Washington</i>	2019	\$ 12.00	\$ 15.03	\$ 3.03	\$ 116.66	\$ 2,764.72
	2020	\$ 13.50	\$ 15.83	\$ 2.33		
<i>California</i>	2019	\$ 12.00	\$ 13.92	\$ 1.92	\$ 73.34	\$ 1,884.94
	2020	\$ 13.00	\$ 14.77	\$ 1.77		
<i>Louisiana</i>	2019	\$ 8.34	\$ 11.33	\$ 2.99	\$ 116.31	\$ 3,245.08
	2020	\$ 8.34	\$ 11.83	\$ 3.49		
<i>Michigan</i>	2019	\$ 9.45	\$ 13.54	\$ 4.09	\$ 153.38	\$ 3,266.89
	2020	\$ 9.65	\$ 11.40	\$ 1.75		
<i>Kentucky</i>	2019	\$ 8.34	\$ 11.63	\$ 3.29	\$ 131.60	\$ 3,842.72
	2020	\$ 8.34	\$ 12.40	\$ 4.06		
<i>New York</i>	2019	\$ 11.10	\$ 13.25	\$ 2.15	\$ 86.43	\$ 1,780.46
	2020	\$ 11.80	\$ 14.29	\$ 2.49		
<i>South Carolina</i>	2019	\$ 8.34	\$ 11.13	\$ 2.79	\$ 109.65	\$ 2,039.43
	2020	\$ 8.34	\$ 11.71	\$ 3.37		
<i>Arizona</i>	2019	\$ 11.00	\$ 12.00	\$ 1.00	\$ 37.00	\$ 891.70
	2020	\$ 12.00	\$ 12.91	\$ 0.91		
<i>Hawaii</i>	2019	\$ 10.10	\$ 14.73	\$ 4.63	\$ 174.09	\$ 4,682.97
	2020	\$ 10.10	\$ 14.90	\$ 4.80		
<i>Texas</i>	2019	\$ 8.34	\$ 12.23	\$ 3.89	\$ 163.77	\$ 5,699.16
	2020	\$ 8.34	\$ 12.67	\$ 4.33		
<i>Idaho</i>	2019	\$ 8.34	\$ 13.45	\$ 5.11	\$ 236.08	\$ 6,964.42
	2020	\$ 8.34	\$ 13.62	\$ 5.28		

State	Year	Proposed lower hourly wage rate <sup>i</sup>	Official H-2A Adverse Wage Rate <sup>ii</sup>	Hourly wage cut <sup>iii</sup>	Weekly wage cut per worker <sup>iv</sup>	Seasonal wage cut per worker <sup>v</sup>
Iowa	2019	\$ 8.34	\$ 13.34	\$ 5.00	\$ 209.50	\$ 3,519.60
	2020	\$ 8.34	\$ 14.58	\$ 6.24		
Nebraska	2019	\$ 9.00	\$ 14.38	\$ 5.38	\$ 225.42	\$ 5,410.13
	2020	\$ 9.00	\$ 14.99	\$ 5.99		
Illinois	2019	\$ 8.34	\$ 13.26	\$ 4.92	\$ 190.90	\$ 2,844.35
	2020	\$ 9.25	\$ 14.52	\$ 5.27		
Minnesota	2019	\$ 9.86	\$ 13.54	\$ 3.68	\$ 163.02	\$ 4,417.95
	2020	\$ 10.00	\$ 14.40	\$ 4.40		
Kansas	2019	\$ 8.34	\$ 14.38	\$ 6.04	\$ 272.40	\$ 9,043.81
	2020	\$ 8.34	\$ 14.99	\$ 6.65		
Wisconsin	2019	\$ 8.34	\$ 13.54	\$ 5.20	\$ 208.00	\$ 4,326.40
	2020	\$ 8.34	\$ 14.40	\$ 6.06		
Indiana	2019	\$ 8.34	\$ 13.26	\$ 4.92	\$ 182.53	\$ 2,427.68
	2020	\$ 8.34	\$ 14.52	\$ 6.18		

## Conclusion

The H-2A agricultural guestworker program by law is required to prevent the hiring of guestworkers from undermining the wage rates of U.S. farmworkers. The Administration is considering, and Rep. Yoho and others are urging, changing the methodology that determines AEWRs for each state. The proposed methodology would not be based on a measure of the farm labor market, but rather on the arbitrarily-determined federal minimum wage (plus 15%) or the state minimum wage.

The proposed change would lower wage rates in every state. As the table above shows, many H-2A program employers would be permitted to pay many U.S. farmworkers and foreign guestworkers \$3.00 per hour less than required under the current formula. Farmworkers are already among the lowest-paid workers in the United States. Their average annual family incomes, ranging from \$20,000 to \$24,000,

mean that they already live precariously.<sup>14</sup> A pay cut of \$2,000 or \$3,000 per season can mean the difference between going hungry and paying for food, or risking serious illness and paying for medicine.

There is no valid justification to force farmworkers to accept the statutory minimum wage when the labor market has set the wage rates higher. In fact, the current AEWB methodology suffers from flaws that harm workers, including that the undocumented status of a majority of farmworkers has depressed the wage rates paid to farmworkers. In addition, H-2A guestworkers are in no position legally or practically to demand higher wage rates. In light of this reality, the H-2A wage requirements should be more, not less, protective of workers. The proposed wage cut would harm U.S. workers' and exploit the vulnerability of foreign citizens desperate for work.

The proposed wage cut would be cruel in any circumstances but is especially inappropriate during the COVID-19 pandemic, as federal and state governments have officially designated farmworkers as "essential workers" in a critically important sector, the food and agriculture system.

In fact, the Administration recently has made it easier for agricultural employers to bring in foreign citizens on H-2A visas despite restricting most other government services on immigration because they contend there is an urgent need for more farmworkers. Instead of further marginalizing workers by cutting their pay, the Administration should be ensuring farmworkers are protected against the COVID-19 pandemic and are compensated fairly.

Any proposed wage cuts in the H-2A program should be rejected.

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*Farmworker Justice is a national advocacy, education and litigation organization based in Washington, D.C. Since its founding in 1981, the mission of Farmworker Justice has been to empower farmworkers to improve their wages, working conditions, immigration status, health and access to justice. This report was prepared by Bruce Goldstein, President of Farmworker Justice, and Patricia Morales, an intern at Farmworker Justice. [www.farmworkerjustice.org](http://www.farmworkerjustice.org) 1126 16<sup>th</sup> St., NW, Suite LL-101, Washington, D.C. 20036*

*May 2020*

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<sup>14</sup> U.S. Department of Labor, Findings from the National Agricultural Workers Survey NAWS 105-2016 (2018) at iii. [https://www.doleta.gov/naws/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/naws/research/docs/NAWS_Research_Report_13.pdf)



## ENDNOTES

<sup>i</sup> Proposed lower wage rate is determined by taking the highest of either the state's minimum wage or 115% of federal minimum wage (1.15\* \$7.25 = \$8.34 per hour). For California 2020 wage we used the minimum wage for employers who have more than 26 employees. For Minnesota we used the minimum wage for enterprises with annual receipts of more than \$500,000. For New York we used the minimum wage for the region outside New York City, whose minimum wage is higher.

<sup>ii</sup> Data disclosed by Department of Labor Year 2019:

[https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A Selected Statistics FY2019 Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A%20Selected%20Statistics%20FY2019%20Q4.pdf)

Year 2020: <https://www.foreignlaborcert.doleta.gov/adverse.cfm>

<sup>iii</sup> Hourly wage cut calculated by subtracting the proposed lower wage rate from the official U.S. Department of Labor H-2A Adverse Wage Rate (AEWR).

<sup>iv</sup> Weekly average wage cut determined by finding the weighted average of days of work per worker in each state for each year based on employers' stated start dates and end dates for the employment. The weighted average of weeks in the period of employment is then multiplied by the official H-2A AEWR and by the proposed lower wage. Then the earnings at the proposed lower wage rate are subtracted from earnings at the AEWR to find the average weekly wage cuts per worker and the average seasonal wage cut per worker.

Formula used to find weighted average:  $\frac{\sum_i^n (x_i * w_i)}{\sum_i^n w_i} / 7$

n= entry per employer

i= total number of employer entries

xi=days worked

wi= number of certified workers per employer entry

<sup>v</sup> Seasonal Wage cut is determined by taking the weighted average number of days and weeks of work per worker based on the employer's requested start date through the requested end date of employment. The weighted average number of weeks worked per worker is multiplied by the official H-2A Adverse Wage Rate and by the proposed lower wage rate to arrive at the earnings per season. The seasonal average wage per worker at the lower wage rate is then subtracted from the seasonal average wage using the AEWR to yield the seasonal wage cut.

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