

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Logging employment is operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites.

(5) *Employment as defined and specified in §§ 655.300 through 655.304.* For the purpose of paragraph (c) of this section, agricultural labor or services includes animal shearing, commercial bee-

keeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

[87 FR 61791, Oct. 12, 2022, as amended at 88 FR 12801, Feb. 28, 2023]

#### PRE-FILING PROCEDURES

#### § 655.120 Offered wage rate.

(a) *Employer obligation.* Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(1), an employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of:

- (1) The AEWR;
- (2) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;
- (3) The agreed-upon collective bargaining wage;
- (4) The Federal minimum wage; or
- (5) The State minimum wage.

#### (b) AEWR determinations.

(1) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the

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occupations shall be the statewide annual average hourly gross wage in the State as reported by the Occupational Employment and Wage Statistics (OEWS) survey; or

(C) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEW for the occupations shall be the national annual average hourly gross wage as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEW for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State is not reported by the OEWS survey, the AEW for each occupation shall be the national annual average hourly gross wage for that occupation as reported by the OEWS survey.

(iii) The AEW methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after March 30, 2023, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134. For purposes of paragraphs (b)(1)(i) and (ii) of this section, the term *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

(2) The OFLC Administrator will publish a notice in the FEDERAL REGISTER, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEW.

(3) If an updated AEW for the occupational classification and geographic area is published in the FEDERAL REGISTER during the work contract, and the updated AEW is higher than the highest of the previous AEW, a prevailing wage for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least the updated AEW upon the effective date of

the updated AEW published in the FEDERAL REGISTER.

(4) If an updated AEW for the occupational classification and geographic area is published in the FEDERAL REGISTER during the work contract, and the updated AEW is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(5) If the job duties on the job order cannot be encompassed within a single occupational classification, the applicable AEW shall be the highest AEW for all applicable occupations.

(c) *Prevailing wage determinations.*

(1) The OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity if all of the following requirements are met:

(i) The SWA submits to the Department a wage survey for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and a Form ETA-232 providing the methodology of the survey;

(ii) The survey was independently conducted by the State, including any State agency, State college, or State university;

(iii) The survey covers work performed in a single crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity;

(iv) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area surveyed or contacted a randomized sample of such employers, except where the estimated universe of employers is less than five. Where the estimated universe of employers is less than five, the surveyor contacted all employers in the estimated universe;

(v) The survey reports the average wage of U.S. workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area using the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey;

(vi) The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State;

(vii) Where the estimated universe of U.S. workers is at least 30, the survey includes the wages of at least 30 U.S. workers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of U.S. workers is less than 30, the survey includes the wages of all such U.S. workers;

(viii) Where the estimated universe of employers is at least five, the survey includes wages of U.S. workers employed by at least five employers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of employers is less than five, the survey includes wages of U.S. workers employed by all such employers; and

(ix) Where the estimated universe of employers is at least 4, the wages paid by a single employer represent no more than 25 percent of the sampled wages in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. This paragraph (c)(1)(ix) does not apply where the estimated universe of employers is less than four.

(2) A prevailing wage issued by the OFLC Administrator will remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the work contract, the employer must continue to guarantee at least the expired prevailing wage rate.

(3) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is higher than the highest of the AEW, a previous prevailing wage for the geographic area and crop activity or agricultural activity or, if applicable, a distinct work task or tasks performed in that activ-

ity, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least that higher prevailing wage upon the Department's notice to the employer of the new prevailing wage.

(4) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(d) *Appeals.* (1) If the employer does not include the appropriate offered wage rate on the *Application for Temporary Employment Certification*, the CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate.

(2) If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171.

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#### § 655.121 Job order filing requirements.

(a) *What to file.* (1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a completed job order, Form ETA-790/790A, including all required addenda, to the NPC designated by the OFLC Administrator, and must identify it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. The employer must include in its submission to the NPC a valid Federal Employer Identification Number (FEIN) as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(2) Where the job order is being placed in connection with a future master application to be filed by an agricultural association as a joint employer with its employer-members, the agricultural association may submit a single job order to be placed in the name of the agricultural association on behalf of all employers named on the