

2015 Final Rule

Range Herding or Production of Livestock in the United States

Background

Under the H-2A temporary agricultural worker program, employers who are unable to hire sufficient domestic workers may bring nonimmigrant foreign workers to the U.S. for temporary or seasonal agricultural work. The employer must file an application stating that a sufficient number of domestic workers are not available and the employment of these workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S. Employers using the H-2A program must meet a number of specific conditions relating to recruitment, wages, housing, meals and transportation.

The new rules effect jobs related to the herding of sheep, goats and other livestock on the range because some standard H-2A rule requirements – adopted in 2010 – do not readily apply to unique occupations that place workers in remote locations where they are on call 24 hours per day, seven days a week. The Final Rule will create administrative efficiencies for both employers and the Department of Labor, promote greater consistency in the review of H-2A applications, provide workers employed in the United States with improved benefits and protections, and provide greater clarity for employers with respect to compliance with program requirements.

Highlights of the Final Rule

Eligibility

- ❖ Identifies specific eligibility criteria for jobs covered by these procedures and ensures that non-range duties and activities are handled under the normal H-2A procedures and standards.
- ❖ Covers work that is . . .
 - typically performed on call 24 hours per day, 7 days per week;
 - on the range for the majority of workdays (more than 50 percent);
 - generally requires the use of range housing (including remote, non-mobile), where the worksites are not near enough to the worker's residence or ranch to permit the worker to reasonably return to a fixed housing location; and
 - consists entirely of duties and activities that are, or are closely and directly related to, herding and livestock production.

Definition of Range

- ❖ The "Range" is any area located away from the ranch headquarters where the herder is required to constantly attend to the livestock, evaluated based on the totality of the circumstances using a factors test resulting from the Fair Labor Standards Act's definition of range. Factors include: involving uncultivated land; involving wide expanses of land; located in remote, isolated areas; and typically requiring range housing to enable the herder to constantly attend to the herd.

Employer Filing Requirements

- ❖ Streamlines the process by allowing employers to file H-2A applications directly with the Chicago National Processing Center (NPC), rather than with the State Workforce Agency (SWA).
- ❖ Agricultural associations of employers, who file as joint employers with one or more of their members in more than two contiguous states, are permitted to file a single “master application” and job order covering the workforce needs of each association member.

Wage Requirements

- ❖ Employers must pay a wage, which equals or exceeds the highest of the monthly Adverse Effect Wage Rate (AEWR), collective bargaining agreement, or minimum wage set by court or law (e.g., Federal, State or local minimum wage), at least **twice monthly** during the entire certified period of employment.
- ❖ The methodology for setting the monthly AEWR for all range occupations using the current Federal minimum wage (\$7.25/hour) as the basis for an initial national monthly wage rate, calculated based on a 48-hour workweek for 4.33 weeks. This initial AEWR for range occupations will be adjusted annually based on the Employment Cost Index for wages and salaries (ECI).
- ❖ The new AEWR will be phased in over **two years**: 80 percent from the effective date of the rule through calendar year 2016, 90 percent in calendar year 2017, with full implementation beginning in the year 2018.

Range Housing and Working Conditions for Employees

- ❖ Housing: Codifies specific standards for range housing used for range workers, clarifying the circumstances in which heating equipment is required and that “range housing” includes remote, but not mobile, housing. Provides for State Workforce Agency (SWA) inspection at least every three years, as well as permitting SWAs to inspect more frequently.
- ❖ Employer provided items: Clarifies that the employer must disclose in the job order and provide range workers with all tools, supplies, and equipment necessary, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. Additionally, the rule continues the requirement that employers provide workers with an effective means of communicating with persons capable of responding to the worker’s needs in case of an emergency.
- ❖ Meals and water: Requires employers to provide adequate food, free of charge, and adequate potable water to range workers. Quantifies the minimum amount of potable water the employer must provide (4.5 gallons per day for drinking and cooking purposes). Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker.