

POLICY NOTE

Agricultural labor: Assessing the problems and providing solutions to H-2A, overtime and wage rules

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Key Findings

1. While only two percent of the U.S. population is engaged in agriculture, the sector accounts for 22 million jobs, either directly or indirectly, across the country.
2. Overtime exemptions for farm labor do not mean farm and ranch employees are not compensated for their additional work hours. They may receive non-monetized, additional benefits for their work.
3. The H-2A temporary agricultural worker visa program is costly for employers, with pre-employment fees estimated at \$1,500 per employee.
4. Domestic workers benefit from the presence of H-2A workers on the farms where they are employed because all employees must be paid at the wage of the H-2A worker, which is a higher rate than the 2019 minimum wage in Washington state (\$15.03/hr versus \$12/hr).
5. White-collar schedules are out of line with the seasonal and cyclical nature of most agricultural occupations.

Introduction

American farming is essential to providing daily nutrition to millions of people across the country and around the world. It is also the source of employment for people far beyond direct food production.

Agriculture-based employment ranges from on-farm labor to processing, manufacturing, and sales of goods. Twenty-two million U.S. jobs, or one in 12 jobs in the United States, are dependent on agriculture.¹ Even so, only two percent of Americans are farmers or ranchers as commonly understood (that is, people who work on the land or raise livestock). The broader agricultural sector is a business-rich job creator with opportunities for those willing to work hard.

As the numbers suggest, agricultural labor involves complexities and complications beyond what one might imagine as simple “farm work.” According to the Bureau of Labor Statistics, there were 856,000 domestic, direct agricultural workers in the United States in 2016.² Those workers were employed in areas including crop cultivation, greenhouses, aquaculture, animal breeding, equipment operation, and more.

That same year, 165,741 temporary agricultural H-2A work visas were certified by the government, with 134,000 of these positions being filled.³ Having both domestic and foreign labor sources is critical to creating job opportunities and to the continued success of farms and ranches in the United States.

In addition to finding a willing workforce, farmers and ranchers must navigate wage and overtime rules that are often stricter than those imposed on other employers. The Bureau of Labor Statistics noted the national median pay for agricultural workers in 2018 was \$11.84 per hour.⁴

1 “Educational Resources for Teachers and Students, Agricultural Council of America,” March 24, 2019, at www.agday.org/for-teachers-students.

2 “Occupational Outlook Handbook: Farming, Fishing, and Forestry – Agricultural Workers,” United States Department of Labor, Bureau of Labor Statistics, 2018, last modified September 4, 2019, at www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm.

3 “The H-2A farm guestworker program is expanding rapidly,” by Philip Martin, Economics Policy Institute, April 13, 2017, at www.epi.org/blog/h-2a-farm-guestworker-program-expanding-rapidly.

4 “Occupational Outlook Handbook: Farming, Fishing, and Forestry – Agricultural Workers,” United States Department of Labor, Bureau of Labor Statistics, 2018, last modified September 4, 2019, at www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm.

In 2019, Washington state mandated a minimum wage at \$12.00 per hour, making Washington farm workers that receive the minimum wage higher paid than those working elsewhere around the United States. Furthermore, while farm and ranch workers have operated free of overtime limits for generations, they may soon lose this flexibility, forcing farmers and ranchers to limit rural employment and cut work schedules to fit conventional urban work norms.

Domestic Labor

Union activists claim that agricultural workers in Washington state are underpaid. However, according to an average salary survey from Indeed,⁵ Washington state agricultural workers earned an average of \$13.72 per hour, 28 percent more than the national average. Further, if a farmer or rancher employs a worker with an H-2A visa, which requires a wage of at least \$15.03 an hour in 2019,⁶ all workers in the employ of that farmer or rancher receive the same rate.

On-the-ground evidence suggests there are not enough qualified, willing domestic laborers to fill the positions available at farms and ranches, thus leading to a need for foreign workers. In one instance, a large fruit company in Washington state noted foreign workers hired through the H-2A visa process were the core of its workforce because domestic workers would often report to work for a day or two before leaving to work elsewhere.

The same grower indicated its preference for hiring a domestic workforce to save time and resources that it currently devotes to the H-2A hiring process but could not do so without a detriment to its overall competitiveness in the marketplace and efficiency in harvesting its crops.

The benefits of the H-2A visa program

Established by Congress in 1986 as an addition to the 1952 Immigration and Nationality Act, the H-2A visa program is designed as a legal and predictable way for American ranchers and growers to fill needed jobs and maintain quality food production.

The program provides reliable, legal employment for foreign nationals coming to the United States and enables them to provide a better life for their families in their home countries. Opponents of H-2A workers say the program takes jobs away from workers in the United States and makes it harder for unions to force employers and workers into a collective bargaining process.

The H-2A program is expensive for employers. A 2014 survey of citrus fruit growers in Florida concluded the pre-employment cost per H-2A visa worker was \$2,000.⁷

5 "Farm Worker Salaries in Washington State," Indeed, July 15, 2019, at www.indeed.com/salaries/Farm-Worker-Salaries,-Washington-State.

6 "Adverse Effect Wage Rates – Year 2019," United States Department of Labor Employment and Training Administration, at www.foreignlaborcert.doleta.gov/adverse.cfm.

7 "Pre-Employment costs associated with H-2A agricultural workers and the effects of the '60-minute rule,'" by Derek Farnsworth, Fritz M. Roka, and Skyler Simnitt, *International Food and Agribusiness Management Review*, Volume 20 Issue 3, 2017, DOI: 10.22434/IFAMR2016.0033.

Anecdotally, Washington state growers estimate H-2A visa costs per worker to be between \$1,500 and \$2,000. The H-2A visa program also imposes a number of rules and restrictions upon employers who use the program.

The U.S. Department of Labor's Wage and Hour Division enforces the employer-contractual obligations, including the required recruitment of U.S. workers before applying for H-2A visa employees, the observance of the adverse effect wage rate (AEWR) as the minimum hourly rate paid per employee, a guarantee of wages for three-fourths of an employment contract, housing provided to the employee at no cost, and several more conditions. These obligations are part of the cost employers incur for participating in the H-2A visa program.⁸

Despite the added expense, regulations, and other requirements of the H-2A program, more employers are using the program as a viable and legal means of hiring qualified agricultural workers. Utilization of the program continues to grow annually. According to the U.S. State Department, participation in the H-2A visa program grew 218 percent between 2007 and 2017.⁹ In 2017, there were approximately 200,000 H-2A visas issued by the U.S. Department of Labor.

Anecdotal evidence in Washington state confirms a similar trend, with one fruit grower reporting that one-third of his human resources department was devoted specifically to the recruitment and hiring of H-2A employees.

The program is popular with workers. The same fruit grower reports that all of his previous H-2A visa program workers returned for the 2019 growing and harvest season.

Opponents of H-2A workers say the program makes forming a union harder. Agricultural workers are not covered under the National Labor Relations Act,¹⁰ but H-2A visa program workers are covered by Department of Labor regulations. For example, farmers and ranchers cannot participate in the H-2A program if they have fired a U.S.-based worker without cause in the previous 60 days.¹¹

Wages, overtime exemptions

Margins in farming are small and every penny counts. The USDA Economic Research Service notes that 70 percent of all farms in the United States operate in the "critical zone," meaning a farm's operating profit margin comprises less than 10 percent of the farm's gross cash income.¹²

8 "Fact Sheet #26: Section H-2A of the Immigration and Nationality Act," United States Department of Labor, Wage and Hour Division, February 2010, www.dol.gov/whd/regs/compliance/whdfs26.pdf.

9 "Unlimited Cheap Farm Labor: Evaluating H-2A Disclosure Data," Center for Immigration Studies, August 6, 2018, at cis.org/Report/Unlimited-Cheap-Farm-Labor-Evaluating-H2A-Disclosure-Data.

10 "Which employees are protected under NLRB?", National Labor Relations Board, at www.nlrb.gov/resources/faq/nlrb/which-employees-are-protected-under-nlra.

11 "Fact Sheet #26: Section H-2A of the Immigration and Nationality Act," United States Department of Labor, Wage and Hour Division, February 2010, at www.dol.gov/whd/regs/compliance/whdfs26.pdf.

12 "Profit margin increases with farm size," by Robert A. Hoppe, Amber Waves, February 2, 2015, U.S. Department of Agriculture.

That means farmers and ranchers choose to undervalue their own work and retirement needs in favor of valuing that of their employees.

As was previously noted, the average wage of agricultural workers in Washington state is \$13.72 per hour. However, what cannot be quantified are non-monetary benefits.

Farm employers often provide their employees with work vehicles they are allowed to use year-round at no cost, the flexibility to attend school or extracurricular functions for their children, time for medical visits or to tend to other personal needs, and the opportunity to spend time with their families on as many holidays as can be observed, even during busy times of year. While these extra benefits are not monetized, they are benefits workers would likely not receive in other jobs.

The discussion of overtime in agricultural employment is beginning to emerge in Washington state with the key argument being that it is discriminatory for agricultural employers to be exempt from paying overtime wages to employees who work more than 40 hours a week. There are several job categories in Washington state that are overtime exempt, with agricultural employment being among them.¹³

The cyclical nature of agricultural employment does not lend itself well to the requirement of overtime pay, nor does overtime pay provide the cushion potentially necessary for an agricultural worker in the winter months, when there is significantly less work. The workload does not always require having a full staff, leading to layoffs. If an employee qualifies for unemployment benefits through the winter, his compensation is not likely to meet the rate of pay he collected during the working months of the year.

A farm employee being paid \$15 per hour, working an average of 72 hours a week during peak times of year and 40 hours a week during the next highest work period, would receive an unemployment benefit of approximately \$388 a week, or \$1,552 a month. However, if that same employee is retained at \$15 per hour on a salaried basis, he can earn a steady \$2,400/month regardless of how many hours are worked.

Overtime exemptions allow farmers and ranchers to literally “make hay when the sun shines.” In Washington state, farm and ranch work ramps up in the early spring, pushes through the summer and early autumn, then tapers off through the late fall and winter.

To balance the push of work through most of the year, many employers either give their employees paid time off for the holiday season or put their employees on a salaried wage schedule – paying them the same rate regardless of the number of hours put in. A push toward a more conventional schedule simply does not mesh with the realities of agriculture.

Complicated layers

Agricultural labor is a complex system. There is no part of the system that does not work without the other. The interconnectivity of the agricultural labor system is one of its strengths, but it can be a weakness if portions are changed. If one part of the system is harmed by public policy, another part of the system is sure to follow.

13 “Jobs Not Paid Overtime,” Washington State Department of Labor and Industries, www.lni.wa.gov/WorkplaceRights/Wages/Overtime/Exemptions/default.



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Before entering the public policy world, Pam spent nearly a decade as a journalist in the Northwest and got her feet wet as the coordination clerk for the Odessa Groundwater Replacement Program. She holds a Master of Science from Texas A&M University (Gig 'em!) and a Bachelor of Arts from Washington State University (Go Cougs!).

When she is not in the office, you can find her helping with irrigation and other work on her family farm, shuttling kids to 4-H meetings, or working as the superintendent for the agriculture building at the Grant County Fair.

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Anecdotal evidence and data show there is not enough labor to complete the tasks at hand. The ever-increasing influx of H-2 visa workers suggests there is a need for an increase in the development of a domestic labor force. The continued frustration with the clumsiness of the H-2A visa program application process points to a need for reform. In addition to needing to find more people to do the work, farmers and ranchers also need to find ways to pay their employees despite downturns in the agricultural economy.

Recommendations for improvement

The system is not perfect but it can be improved. First, agricultural labor needs to be elevated to a place of dignity again as a career worth pursuing. To develop a domestic workforce interested in returning to agricultural labor, lawmakers should work to make agricultural work attractive to young, entrepreneurial people with a desire to take risks and create jobs. By removing burdensome obstacles to financing, landownership, and allowing for private mentorship through generational transfers young people may, again, seek out agriculture as a means of business ownership.

Lawmakers should also make the hiring of temporary agricultural workers through the H-2A visa program simpler and more cost effective. Retrofitting the existing program to make H-2A visas easier to obtain would open the door for more effective means of hiring the temporary workforce farmers and ranchers need.

Finally, rather than mandating wage increases and overtime, lawmakers should allow farmers and ranchers to give wage increases based upon the work ethic and performance of their employees, and to make decisions about schedules based upon when labor is most needed. No state agency mandates when or how corporate offices allocate the wages and hours of their professional staff, farms and ranches throughout our state should not be treated differently.

Conclusion

By making agriculture a business worth participating in, creating a new way to hire temporary employees, and by offering compensation based upon performance, farmers and ranchers can begin to manage their labor needs in ways that are standard for white-collar businesses, receiving equal regulatory treatment from the state.

Agricultural labor is convoluted, and it is complicated by the need for people to do a great many difficult tasks. Putting the personal relationship between farmers and workers in the forefront of the debate about agricultural labor will enhance the discussion and the outcomes for improving the agriculture sector, for workers and for rural communities.