

HB 2226 to require duplicate data collection in the popular H-2A jobs program

By Pam Lewison, Director, Center for Agriculture

January 2024

Key Findings

1. **HB 2226/SB 5996 would cost Washington’s taxpayers at least \$70,000 in survey incentives.**
2. **The minimum wage for H-2A workers, the Adverse Effect Wage Rate, is intentionally set higher than the state’s minimum wage to discourage employers from relying on the visa program.**
3. **Many farms in Washington state have abandoned piece rate wage structures because they are required to pay an hourly wage for rest and lunch breaks. Maintaining two wage structures requires additional staffing and accounting.**
4. **All the other data the bills propose to collect are already collected and reported by the Washington State Employment Security Department.**
5. **The H-2A program is critical to the success of Washington state’s agricultural community.**

Introduction

The function and administration of the federal H-2A farmworker visa program is one of the most utilized and least understood employment programs in Washington state. The H-2A program provides visas to foreign-born workers to legally find temporary farm work in the United States for up to 10 months a year. Washington state is among the top five beneficiaries of this popular jobs program.

HB 2226, and its companion SB 5996, propose collecting data on the H-2A worker program and from certain hand harvesters with a focus on a specific portion of the H-2A program: wages. The bill would require the Washington State Employment Security Department (ESD), which is in charge of administering the program on a state-level, to

conduct wage surveys and report the findings to the Legislature and the Agricultural and Seasonal Workforce Services Advisory Committee (ASWSA) annually.

Analysis of HB 2226

There are several problems with the bill. The first problem with the legislation is that it would duplicate work already being done and will cost taxpayers at least tens of thousands of dollars in wasted funding. The bill calls for a \$25 incentive payment to every worker who responds and demands the agency get at least 2,800 responses, costing nearly \$70,000, in addition to the expense of survey conductors and materials.

Supporters of the bill claimed in testimony that the H-2A program depressed harvest wages. “H-2A workers make up one-third of all the harvest workers in Washington and the number of H-2A visas since 2008 has increased by 1,000 percent,” said Rep. Lillian Ortiz-Self. “Bringing in workers from countries that don’t fairly pay their workers can lead to a reduction of wages here. The prevailing wage is what is really being paid for harvest work. And then setting that minimum to apply to H-2A workers so if we don’t have the accurate information, you can see how that’s going to impact that.”

However, H-2A workers are not specifically hired for harvest work and the U.S. Department of Labor is very clear that the presence of an H-2A worker on a farm in the United States “will not adversely affect the wages and working conditions of workers similarly employed in the United States.”¹ This requirement is met in two ways: U.S. employers must prove “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 agricultural

1 Congressional Research Service. Adverse Effect Wage Rate (AEWR) Methodology for Temporary Employment of H-2A Nonimmigrants in the United States. Published May 23, 2023. Accessed Jan. 22, 2024. <https://sgp.fas.org/crs/homesecc/IF12408.pdf>

labor or services for which an employer desires to hire temporary foreign workers.” U.S. employers must also pay an inflated wage, the Adverse Effect Wage Rate (AEWR) to all workers – foreign and local – similarly employed on a farm. The 2024 AEWR for Washington state is \$19.25 an hour; that is three dollars (\$3) an hour more, or 15% higher, than the current state minimum wage.

Andrea Schmitt, an attorney with Columbia Legal Services, testified in support of the bill, saying, “When Congress established the H-2A program, it made the fundamental rule that you can’t use H-2A workers if they’re going to drive down local wages. And Congress is worried about this because wages naturally fall when you bring in a bunch of workers from areas where they don’t have a lot of job opportunities. Those workers will take whatever wage is offered. And what’s supposed to stop this wage depression is something called the prevailing wage system.”

The assertion that prevailing wage rates are what stop “wage depression” is incorrect in the case of the H-2A program. The AEWR is set as a combination of prevailing wages and the Employer Cost Index with a wide range of hourly rates being factored for various farm work assignments.

Schmitt went on to say, “The system is supposed to find out how people really make money in the normal job market, not only how much but how. In other words, are they paid by the piece or are they paid by the hour? And that is for certain kinds of jobs, for example, for harvest.”

Prior to the *Demetrio v Sakuma Brothers* court decision, piece rate was the prevailing wage method used by farms around Washington state, specifically farms growing fresh produce. However, after the *Sakuma* decision, agricultural employers were required to distill piece rates into an hourly wage and apply that hourly wage to rest and lunch breaks.

Arguably, farms with no dedicated payroll staff have chosen to move away from a piece rate pay system specifically to avoid juggling two different wage systems for each employee. Rather than creating a clock-in, clock-out structure specific to breaks and lunch, many employers have opted for an hourly pay structure that allows for employees to clock-in when they

arrive for work and clock-out when the shift concludes.

The argument from bill proponents is that hourly rates of pay depress piece rates, thus making the H-2A program a detriment to local farmworkers. With many farms converting their pay structures to an hourly system, the piece rate argument becomes moot. A state agency cannot order an employer to use one wage system over another.

All the other data the bill proposes to collect – H-2A housing locations, number of certified H-2A workers on a farm, total number of people surveyed, demographic information for farmworkers, total number of unemployment insurance claims made by farmworkers – is already readily available to the public through publications like the annual agricultural workforce reports.²

H-2A housing locations throughout the state are disclosed to the departments of health, labor and industries, and employment security so the residences can be inspected and checked regularly. The number of certified H-2A workers on a farm can be checked through the Employment Security Department, as can the total number of people surveyed and demographic information for survey respondents.

The bill also sets specific respondent numbers that appear to be arbitrary or, at least, the thresholds are not explained. “A phone survey must collect responses from 850 fruit harvesters. Starting in 2024 field surveys must include responses from 1,200 apple harvesters, 200 pear harvesters, and 200 blueberry harvesters. Starting in 2025 the field survey must also include 350 cherry harvesters,” or a total of 2,800 farmworkers.

ESD officials note their current response rate has a confidence interval of 95 percent, meaning it is 95 percent accurate. There are somewhere between 125,000 and 187,000 farmworkers

2 Washington State Employment Security Department. Agricultural Employment and Wages. Accessed Jan. 22, 2024. <https://esd.wa.gov/labormarketinfo/ag-employment-and-wages>

employed in Washington state annually.³ If the average number – 156,000 – is calculated at a 95 percent confidence interval, the survey needs just 384 respondents to be statistically significant.⁴ Even if the bill required a 99 percent confidence interval, the survey would need just 661 respondents to be statistically significant. A far cry from the mandated 2,800 responses.

Conclusion

The H-2A farmworker visa program is critical to the success of Washington state's agricultural community. Bills like HB 2226/SB 5996 do little to foster that success. The legislation outlines a duplication of work already being done and increases the overall cost to taxpayers. The wage survey conducted by the ESD is not federally mandated but, rather, the data is collected voluntarily. If proponents of the bills want to know more about how the H-2A program is affecting wages and farmworker employment, they need only to delve into the existing data.

Pam Lewison is the Director of the Center for Agriculture.

Nothing here should be construed as an attempt to aid or hinder the passage of any legislation before any legislative body.

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- 3 State of Washington Department of Community, Trade, and Economic Development. Farmworker Housing in Washington State: Safe, Decent, and Affordable. March 2005. Accessed Jan. 22, 2024. <https://www.commerce.wa.gov/wp-content/uploads/2018/06/HTF-Reports-Farm-Worker-Housing-Report.pdf>
 - 4 Qualtrics. Sample Size Calculator. Accessed Jan. 22, 2024. <https://www.qualtrics.com/blog/calculating-sample-size/>