DEPARTMENT OF LABOR

Employment and Training Administration

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States: 2009 Adverse Effect Wage Rates, Allowable Charges for Agricultural and Logging Workers' Meals, and Maximum Travel Subsistence Reimbursement

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice of Adverse Effect Wage Rates, allowable charges for meals, and maximum travel subsistence reimbursement for 2009.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this Notice to announce: The 2009 Adverse Effect Wage Rates (AEWRs) for employers seeking to employ temporary or seasonal nonimmigrant foreign workers to perform agricultural labor or services (H–2A workers) or logging (H–2B logging workers); the allowable charges for 2009 that employers seeking H–2A workers, and H–2B logging workers may levy upon their workers when three meals a day are provided by the employer; and the maximum travel subsistence reimbursement which a worker with receipts may claim in 2009. AEWRs are the minimum wage rates the Department has determined must be offered and paid by employers of H–2A workers or H–2B logging workers to U.S. and foreign workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. 20 CFR 655.100(b) and 655.200(b).[1] These rates will apply to applications for H–2A labor certification and H–2B logging certifications filed after June 29, 2009.

DATES: *Effective Date:* June 29, 2009.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, Room C–4312, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202–693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security may not approve an employer's petition for the admission of H–2A nonimmigrant temporary agricultural workers or H–2B nonimmigrant temporary logging workers into the United States unless the petitioner has received from the Department an H–2A or H–2B labor certification, as appropriate. Approved labor certifications attest: (1) There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1101(a)(15)(H)(ii)(b), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5) and (6).

The Department's regulations that will be in effect on and after June 29, 2009 require employers to offer and pay their U.S., H–2A, and H–2B logging workers no less than the appropriate hourly AEWR in effect at the time the work is performed. 20 CFR 655.102(b)(9) and 655.202(b)(9); *see also* 20 CFR 655.107, 20 CFR 655.207.[2]

On February 13, 2008, the Department proposed significant changes to the H–2A program, including using an alternate methodology for calculating the AEWR. 73 FR 8538, February 13, 2008. The December 2008 Rule, incorporating the new AEWR methodology, became effective January 17, 2009. 73 FR 77110, Dec. 18, 2008. As a result of concerns regarding implementation, the Department has suspended the December 2008 Rule in order to provide the Department with an opportunity to review and reconsider the new requirements in light of issues that have arisen since the publication of the December 2008 Rule. The final rule suspending the December 2008 Rule is found elsewhere in this issue of the **Federal Register**. In order to ensure continued functioning of the H–2A program during the period of suspension, the Department has reinstated the previous regulations that were in effect prior to January 17, 2009. *Id.* Accordingly, the calculation of the AEWR, and the obligation to pay it, will revert to that prior regulation for applications filed after the effective date of the Final Suspension of the December 2008 H–2A Final Rule.

A. Adverse Effect Wage Rates for 2009

AEWRs are the minimum wage rates which must be offered and paid to U.S. and foreign workers by employers of H–2A workers or H–2B logging workers. 20 CFR 655.100(b) and 655.200(b). Employers of H–2A workers must pay the highest of (i) the AEWR in effect at the time the work is performed; (ii) the applicable prevailing wage; or (iii) the statutory Federal or State minimum wage, as specified in the regulations. 20 CFR 655.102(b)(9) Currently, because U.S. Department of Agriculture (USDA) regional surveys are not available for logging occupations, employers of H–2B logging workers must pay at least the prevailing wage in the area of intended employment, which is deemed to be the AEWR. 20 CFR 655.202(b)(9); 20 CFR 655.207(a).

Therefore, except as otherwise provided in 20 CFR part 655, subpart B, the region-wide AEWR for all agricultural employment (except those occupations deemed inappropriate under the special circumstance provisions of 20 CFR 655.93) for which temporary H–2A certification is being sought is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA. 20 CFR 655.107(a). USDA does not provide data on Alaska; H–2A employers in that state must accordingly pay the highest of the following three wage sources; the applicable prevailing wage, the statutory Federal or State minimum wage.

The regulation at 20 CFR 655.107(a) requires the Administrator of the Office of Foreign Labor Certification to publish USDA field and livestock worker (combined) wage data as AEWRs in a **Federal Register** Notice. Accordingly, the 2009 AEWRs for agricultural work performed by U.S. and H–2A workers on or after the effective date of this Notice are set forth in the table below:

TABLE—2009 ADVERSE EFFECT WAGE RATES

State	2009 AEWRs
Alabama	$8.77
Arizona	9.82

[1] The references to 20 CFR 100 *et seq.* are to the H–2A and logging regulations in place prior to January 17, 2009. As discussed in section A, these regulations have been reinstated in the Final Suspension Rule published on May 29, 2009 which suspends the Final Rule published December 18, 2008, 73 FR 77110 (the ''December 2008 Rule''). These regulations are being used by the Department to avoid a regulatory vacuum in light of the suspension of the December 2008 Rule for a period of 9 months, and give rise to the need for this Notice.

[2] For additional information about the AEWR, see the preamble of the Final Rule, 54 FR 28037–28047, Jul. 5, 1989, which explains in great depth the purpose and history of AEWR, the Department's policy in setting AEWR, and the AEWR computation methodology at 20 CFR 655.107(a). *See also* 52 FR 20496, 20502–20505, Jun. 1, 1987. For more information concerning recent regulatory actions giving rise to the publication of this AEWR, see Section A, *infra.*

TABLE—2009 ADVERSE EFFECT WAGE RATES—Continued

State	2009 AEWRs
Arkansas	8.92
California	10.16
Colorado	9.88
Connecticut	10.20
Delaware	9.50
Florida	9.08
Georgia	8.77
Hawaii	11.06
Idaho	9.64
Illinois	10.45
Indiana	10.45
Iowa	10.77
Kansas	10.39
Kentucky	9.41
Louisiana	8.92
Maine	10.20
Maryland	9.50
Massachusetts	10.20
Michigan	10.63
Minnesota	10.63
Mississippi	8.92
Missouri	10.77
Montana	9.64
Nebraska	10.39
Nevada	9.88
New Hampshire	10.20
New Jersey	9.50
New Mexico	9.82
New York	10.20
North Carolina	9.34
North Dakota	10.39
Ohio	10.45
Oklahoma	9.27
Oregon	10.12
Pennsylvania	9.50
Rhode Island	10.20
South Carolina	8.77
South Dakota	10.39
Tennessee	9.41
Texas	9.27
Utah	9.88
Vermont	10.20
Virginia	9.34
Washington	10.12
West Virginia	9.41
Wisconsin	10.63
Wyoming	9.64

For all logging employment, the AEWR shall be the prevailing wage rate in the area of intended employment, and the employer is required to pay at least that rate. 20 CFR 655.207(a).

B. Allowable Meal Charges

Among the minimum benefits and working conditions which the Department requires employers to offer their U.S., H–2A, and H–2B logging workers are three meals a day or free and convenient cooking and kitchen facilities. 20 CFR 655.102(b)(4); 655.202(b)(4). When the employer provides meals, the job offer must state the charge, if any, to the worker for meals.

The Department has published at 20 CFR 655.102(b)(4) and 655.111(a) the methodology for determining the maximum amounts that H–2A agricultural employers may charge their U.S. and foreign workers for meals. The same methodology is applied at 20 CFR 655.202(b)(4) and 655.211(a) to H–2B logging employers. These rules provide for annual adjustments of the previous year's allowable charges based upon Consumer Price Index (CPI) data.

Each year, the maximum charges allowed by 20 CFR 655.102(b)(4) and 655.202(b)(4) are adjusted by the same percentage as the twelve-month percent change in the CPI for all Urban Consumers for Food (CPI–U for Food). The OFLC may permit an employer to charge workers no more than the higher maximum amount set forth in 20 CFR 655.111(a) and 655.211(a), as applicable, for providing them with three meals a day, if justified and sufficiently documented. Each year, the higher maximum amounts permitted by 20 CFR 655.111(a) and 655.211(a) are changed by the same percentage as the 12-month percent change in the CPI–U for Food. The program's regulations require the Department to make the annual adjustments and to publish a Notice in the **Federal Register** each calendar year, announcing annual adjustments in allowable charges that may be made by agricultural and logging employers for providing three meals daily to their U.S. and foreign workers. The 2008 rates were published in the **Federal Register** at 73 FR 10288, Feb. 26, 2008.

The Department has determined the percentage change between December of 2007 and December of 2008 for the CPI–U for Food was 5.6 percent. Accordingly, the maximum allowable charges under 20 CFR 655.102(b)(4), 655.202(b)(4), 655.111, and 655.211 were adjusted using this percentage change, and the new permissible charges for 2009, are as follows: (1) Charges under 20 CFR 655.102(b)(4) and 655.202(b)(4) shall be no more than $10.45 per day, unless OFLC has approved a higher charge pursuant to 20 CFR 655.111 or 655.211; (2) charges under 20 CFR 655.111 and 655.211 shall be no more than $12.96 per day, if the employer justifies the charge and submits to OFLC the documentation required to support the higher charge.

C. Maximum Travel Subsistence Expense

The regulations at 20 CFR 655.102(b)(5) establish that the minimum daily travel subsistence expense, for which a worker is entitled to reimbursement, is equivalent to the employer's daily charge for three meals or, if the employer makes no charge, the amount permitted under 20 CFR 655.102(b)(4). The regulation is silent about the maximum amount to which a qualifying worker is entitled.

The Department established the maximum meals component of the standard Continental United States (CONUS) per diem rate established by the General Services Administration (GSA) and published at 41 CFR Part.301, Appendix A. The CONUS meal component is now $39.00 per day.

Workers who qualify for travel reimbursement are entitled to reimbursement up to the CONUS meal rate for related subsistence when they provide receipts. In determining the appropriate amount of subsistence reimbursement, the employer may use the GSA system under which a traveler qualifies for meal expense reimbursement per 41 CFR 301–11.101(a). Thus, a worker whose travel occurred during two quarters of a day is entitled, with receipts, to a maximum reimbursement of $19.50. If a worker has no receipts, the employer is not obligated to reimburse above the minimum stated at 20 CFR 655.102(b)(4) as specified above.

Signed in Washington, DC this 20th day of May, 2009.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

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