

# Regulatory Agenda Chat with ETA

**Thursday July 14, 2011**

1:21

Moderator:

You can submit your questions at any time, but the chat will begin at 1:30pm. This will be a text only chat, so no video or audio will be included.

1:30

Jane Oates:

Good afternoon, this is Jane Oates, Assistant Secretary of Labor for Employment and Training. Welcome to the ETA regulatory agenda Web chat. The purpose of this web chat is to highlight ETA regulatory priorities, and get your input. We have several items currently on the agenda that are designed to advance the Secretary's goal of good jobs for everyone and to help provide access to employment and training opportunities. I would like to remind everyone that while we are pleased to have this opportunity to answer your questions, today's chat is not part of ETA's rulemaking process. I want to remind you that comments and suggestions received during this Web chat will not become part of any rulemaking record.

1:30

Comment From Mike Kennedy

Is the DOL trying to shut down the H2b program?

1:30

Jane Oates:

No. The Department is trying to improve the H2B program in light of the Secretary's goals to increase workers' incomes and narrow wage and income inequalities by protecting the wages and working conditions of both domestic and foreign workers.

1:33

Comment From Guest

What do you expect the "prevailing" wage to be in Colorado Springs?

1:33

Comment From Paul

How do Washington based government employees know what the "prevailing" wage should be?

1:33

Jane Oates:

Paul, Guest, thanks for your questions regarding the H-2B prevailing wages. These issues are relevant to the movement of the effective date of the H-2B prevailing wage rule. The public comment period for this has closed. We are completing the process of analyzing comments as we move toward the publication of the final rule. We expect the final rule to publish by August 2011.

1:34

Comment From Jarrod

How is the mean wage being calculated? It appears to show as a level 3 wage and not as the average between a Level 1 wage and a Level 4 wage, which would seem to be the actual "mean?"

1:34

Jane Oates:

You can find information on the calculation of the mean wage in further detail in the preamble of the H2B Prevailing Wage Final Rule that was published on January 19, 2011.

1:36

Comment From Paul

What is the reason to change this valuable program? Without H2B seasonal labor is virtually impossible to find, train, and use for the landscape business!

1:36

Jane Oates:

Paul, thanks for your question, ETA and the Wage & Hour Division published H-2B regulations in December 2008 that were effective in January 2009. The Department decided to review the regulation in light of the Secretary's goals to increase workers' incomes and narrow wage and

income inequalities by protecting the wages and working conditions of both domestic and foreign workers. The Department published an NPRM on March 18, 2011 that proposed changes that would enhance transparency and more adequately protect U.S. and H-2B workers. Comments were accepted until May 17, 2011. The Department is currently considering the comments received in connection with the H-2B comprehensive NPRM for final rulemaking.

1:38

Comment From Arnulfo

Why does the H2B mean prevailing wage already show in the online wage library when the rule has not come into effect at this time?

1:38

Jane Oates:

Even though the H2B prevailing wage rule is not in effect at this time, the OES is published on an annual basis, usually on or about July 1st. The BLS is responsible for publishing OES wages and they do so on an annual basis independent of the H2B program.

1:40

Comment From Arnulfo

Since the new H2B "mean wage" is classified as a level 3 wage, will employers be allowed to require experience?

1:40

Jane Oates:

Please refer to the preamble of the H2B Prevailing Wage Final Rule for more information on the calculation of the mean wage.

1:43

Comment From Sheila

What measures are being taken to train job seekers in finding work. Workers that have been working for several years find themselves looking for another job. What measures are in place being taken to assist them?

1:43

Jane Oates:

Thank you, Sheila, for your question. Job training and workforce development are key to the Department of Labor's mission to help workers find good jobs. For more information on the measures that help workers find jobs and help employers find talented workers, visit [www.careeronestop.org](http://www.careeronestop.org). The focus of this Web chat is on regulatory priorities, but we appreciate your interest.

1:44

Comment From Josh

Understanding that OCT 2012 is the start of the H2B Fiscal Year. Are employers going to be required to increase their employees wages who crossed on a 2011 petition which is good through Dec 2011. This happens to fall in the middle of a contractual year.

1:44

Jane Oates:

The Department recently proposed to amend the effective date of the H2B prevailing wage final rule to be on or around October 1, 2011. While the Department is currently considering comments on this rule, employers will be required to pay new wage rates to H2B workers and U.S. workers recruited in connection with the H2B certification for all work performed on or after the effective date.

1:45

Comment From Theresa

My business relies on the h2b program. We do not get any where near the local applicants we need to full our seasonal positions. Why has the DOL changed the way the wages will work, virtually making the program financially impossible? Who was consulted in making this decision, anyone in the industries affected?

1:45

Jane Oates:

On August 30, 2010, the US District Court for the Eastern District of Pennsylvania issued a ruling in the CATA litigation that required the Department to re-examine the way prevailing wages were promulgated in the H-2B program. It subsequently issued an NPRM and a Final Rule that went through a complete rulemaking process, including a briefing session with employers sponsored by the Small Business Administration, culminating in a Final Rule that published on

January 19, 2011. On June 15, 2011, the court invalidated the January 1, 2012 effective date of the H-2B Wage Rule. It further ordered the Department to announce a new effective date for the rule within 45 days from June 15. The basis for the court's ruling was twofold: (1) that the almost one-year delay in the effective date was not a "logical outgrowth" of the proposed rule, and therefore violated the Administrative Procedure Act; and (2) that the Department violated the Immigration and Nationality Act in considering hardship to employers when deciding to delay the effective date. The Department is attempting to comply with the Court's order by issuing a Notice of Proposed Rulemaking (NPRM) to provide for a new effective date. The Department published the NPRM on June 28, 2011 in the Federal Register, and the public comment period closed on July 8. The Department is considering the comments and preparing the final rule, which we expect to publish around August 1.

1:45

Comment From Josh

Is there any way to get a full transcript of all comments submitted during this chat?

1:45

Moderator:

After this session is over there will be an archive of this chat.

1:47

Comment From Jose Nichols

After the USDOL office captures the "universe of certifications", will the Agency provide written instructions (guidance) to these employers on how and when to implement the new wage rules.

1:48

Comment From Josh

In reference to the mean wage calculation how is it that the department calculated a 30-40% increase in wages in many cases?

1:48

Jane Oates:

The department provides an explanation of how it calculated the wage increase in the H-2B prevailing wage final rule, which was published on January 19, 2011.

1:48

Jane Oates:

Jose - we're working on your question... we'll be back to you shortly

1:49

Comment From Ginny Muilenburg

How does the Dept. of Labor allowed to go beyond what they stated as only a 20-30% wage hike when most of the wages are between 31-129% wage hike?

1:49

Comment From Josh

Can the department please explain how the mean wage calculation of the H2B program exceed in many cases both the Davis Bacon wage rate and or the living wage rate

1:49

Comment From Guest

But that doesn't really answer the question. Why is the level 3 being used INSTEAD of the actual mean?

1:49

Jane Oates:

Thanks Josh & Ginny for your question. I'm sorry, but the wage rule already has been completed and is not part of the current regulatory agenda.

1:51

Comment From Josh

Can you please explain how the DOL determined that the rule making decision does not currently and will not have an impact on the US economy of more than one hundred million dollars.

1:51

Jane Oates:

Josh, I'm sorry, but the wage rule already has been completed and is not part of the current regulatory agenda.

1:53

Comment From Paul

Has anyone at DOL spent any time with any business that uses seasonal labor? Training, a laborer for a 6-7 month job?

1:53

Jane Oates:

Thank you for your question. When the Department undertakes a rulemaking, we seek public input both through consultations and through a formal notice and comment process published in the Federal Register. This provides an opportunity for any business and other interested parties to express their ideas and concerns.

1:54

Comment From Bob

When is the Final Rule projected to come out regarding the new H-2B regulations?

1:54

Jane Oates:

Thanks, Bob for your question. We expect the final rule to be public on or around August 1, 2011.

1:56

Comment From Michelle

Many employers have had difficulty in finding employees to work in certain positions because Americans do not want to do housekeeping positions, for example. We also struggle with qualified candidates for servers. We pay well for both of these positions. I am not worried about the prevailing wage as we fit into that. I am worried about the job being kept open and committing to an international person for the position and then we have someone come forward to take a position someone else has already planned on.

1:56

Jane Oates:

Michelle, thank you for your concerns. The Secretary's goals are to increase workers' income and protect the wages and working conditions of both domestic and foreign workers. America's businesses can contact the One-Stop Career Centers in their locality for assistance in locating qualified workers for these and other jobs. Go to <http://careeronestop.org/> for more information.

1:57

Comment From Robyn Dunlap

How can we make it a current agenda.

1:57

Jane Oates:

Robyn, please elaborate on your question.

1:57

Comment From Mike Kennedy

We are a couple in our mid-60's and this business is the source of our security in old age. Losing this business would be disastrous for us and without H-2B workers we would have to close our doors. These are the following reasons why we need H-2B's. 1. The affluent have bought up a good bit of this area and few working people can afford to live here (i bought a house for my workers). The ones who do live here go for the few year round jobs. There are working people living about 30-45 minutes from here; but there are plenty of big box stores like Home Depot to provide work and with high gas prices nobody wants to drive this far for a job and I don't blame them. 2. There are some jobs that Americans do not want to do anymore. One of which is housekeeping. A way to test this theory is to put an ad in the local paper for a "cool" job (like working the boats, boutiques, or front desk) at \$9 an hour. In the same issue of the paper put in an ad for housekeeping at \$12 an hour then compare the results. 3. We have tried hiring students both American and foreign but they have to go back to school in the middle of our season. Participating in the program is extremely time-consuming and expensive, yet we seasonal employers still utilize it because we have no other choice.

1:57

Moderator::

Thank you very much for your question but unfortunately it is beyond the scope of this webchat.

We encourage you to visit our website at [www.doleta.gov](http://www.doleta.gov) to find more information about employment and training issues beyond our regulatory agenda.

1:58

Comment From Wesley

How are employers going to change the offered wage pursuant to the proposed change in effective date of the wage rule when the employer is paying a wage covered by a current certification and the initial ETA 9142 filed for that certification states that under penalty of perjury the employer agrees to pay that offered wage during the entire period of the certification?

1:58

Comment From Wesley Mathis

How are employers with current H-2B certifications going to change the offered wage pursuant to the proposed change in effective date of the wage rule when the employer is paying a wage covered by a current certification and the initial ETA 9142 filed for that certification states that under penalty of perjury the employer agrees to pay that offered wage during the entire period of the certification?

1:58

Comment From Bob

Will the employer be required to increase his/her wage when the Prevailing Wage Final Rule is published, if they have already been certified at a different, possibly lower wage?

1:58

Jane Oates:

Wesley, Bob, those are excellent questions. They will be addressed in the final rule for the H-2B Prevailing Wage Effective Date.

1:58

Comment From Bob

The final rule for the H-2B regulations, not the Prevailing Wage Rule. When can we expect to see it?

1:58

Jane Oates, ETA:

Thank you for your question. We hope to publish the final rule in December.

1:59

Comment From Paul

What does DOL expect the new wage guidelines to do to the cost of good and services?

1:59

Moderator::

Thank you very much for your question but unfortunately it is beyond the scope of this webchat. We encourage you to visit our website at [www.doleta.gov](http://www.doleta.gov) to find more information about employment and training issues beyond our regulatory agenda.

2:00

Comment From Guest

Will the DOL take into consideration the experience and education levels of the H2B visa requirements or will the prevailing wage be the same regardless of the employer requirements of no experience or education level?

2:00

Jane Oates:

The prevailing wage as set under the H2B Prevailing Wage Final Rule will be the highest of the wages set under an agreed upon collective bargaining agreement, the Davis Bacon or Service Contract Act wages, and the OES mean. Employers will be required to pay workers the highest of the prevailing wage, the federal minimum wage, the state minimum wage, and the local minimum wage.

2:00

Comment From Paul

Were notices for these changes mailed , e-mailed, or otherwise sent to the H2b employers?

2:00

Jane Oates:

Thanks for your question, Paul. The final rule amending the effective date of the H2-B prevailing wage rule will contain more information about how employers will obtain the new wage rates.

2:03

Comment From Paul

Are you saying that the rules are already in place, so there is no reason to discuss this any more?

2:03

Jane Oates:

Paul, the rules are in varying stages. The H-2B Wage Final Rule was published January 19, 2011 and is final as to its contents. The effective date of that final rule, however, is currently the subject of a Notice of Proposed Rulemaking that published last month; the comment period closed July 8 and we are currently considering comments received. The Proposed Rule that deals with other aspects of the H-2B Program is the subject of a NPRM that published March 18, 2011. That comment period closed May 17 and we are currently considering all comments received in response to the NPRM.

2:03

Comment From Joyce

How much are the State's going to be involved in the H-2B application process?

2:03

Jane Oates:

This issue is under consideration as part of the Final Comprehensive H-2B Rule. The public comment period for this rule has closed. We are completing the process of analyzing comments as we move towards the publication of the final rule. We expect to publish the final rule by the end of December 2011.

2:04

Comment From Josh

understanding that the wage calculations are not part of the regulatory agenda, Can you please tell us where we stand in regards to the proposed rulings that went to comment and are

currently under consideration

2:04

Jane Oates:

Josh, please see our answer to Paul at 2:03 above.

2:04

Comment From Theresa

When you say you use consultants & a formal comment process, it seems pretty clear that all of us who commented prior to May 17th were against the massive increase in prevailing wages. If the rule was passed anyway, who out there is out weighing the comments of those of us in the industries affected to make the rule happen anyway?

2:04

Jane Oates:

Thanks, Theresa. The Department reads and considers ALL comments – weighed equally - received during the comment period.

2:06

Comment From Michelle

Will the final rule be implemented on January 1, 2012?

2:06

Jane Oates:

Michelle, which final rule are you referring to? Please advise.

2:06

Comment From Betty

When the new prevailing wage takes affect on Oct 1, 2011 will employers certified under a previous wage have to abide by the new wage?

2:07

Jane Oates:

Betty – This issue is under consideration as the Department develops the final rule.

2:09

Jane Oates:

Josh, please visit our Web site for business and industry at:

<http://www.doleta.gov/business/WorkforceInformation.cfm>. This site links to the One Stop Career Centers (<http://www.servicelocator.org/>) to help business find qualified workers.

2:10

Comment From Josh

in regards to the program as a whole can the department point me in the right direction of any other immigration, refugee, or employment programs that offer the stable and legal workforce which the H2B program offers to those of us who have been successful long term users of the best seasonal worker program we have

2:10

Comment From Ginny

How did DOL come up with the decision that this accelerated date from Jan. 2012 to Oct. 1, 2011 that this gives vital industries adequate time to prepare for the changes of this magnitude? This will destroy many small businesses.

2:10

Jane Oates:

Ginny, good question. On June 15, 2011, the court invalidated the January 1, 2012 effective date of the H-2B Wage Rule. It further ordered the Department to announce a new effective date for the rule within 45 days from June 15. The basis for the court's ruling was twofold: (1) that the almost one-year delay in the effective date was not a "logical outgrowth" of the proposed rule, and therefore violated the Administrative Procedure Act; and (2) that the Department violated the Immigration and Nationality Act in considering hardship to employers when deciding to delay the effective date. The Department is attempting to comply with the Court's order by issuing a Notice of Proposed Rulemaking (NPRM) to provide for a new effective date. The Department published the NPRM on June 28, 2011 in the Federal Register, and the public comment period closed on July 8. The Department is considering the comments and preparing the final rule, which we expect to publish around August 1.

2:11

Comment From John

How can you force a to change hourly rates for workers already here under a agreed rate you already set.

2:12

Jane Oates:

Thanks, John. The Department proposed in its June 28th NPRM that the new wages will apply to wages paid to H2-B workers and US workers recruited in connection with the certification for all worked performed on or after the effective date of the final rule resulting from the rulemaking. The final rule amending the effective date of the wage rule will provide more information as to employer obligations once in effect.

2:12

Comment From Valerie

We utilize our local onestop center. American workers will not take these seasonal positions. How does ETA feel the "recruit up to 3 days before date of need" meet the goal to protect the foriegn and domestic worker to increase workers' income and protect the wages and working conditions of both domestic and foriegn workers? Just as DOL and ETA must have agendas and plans so that they can prepare and meet the needs of their "clients" so do we as a business. How would this not be costly to the worker and the employer?

2:12

Jane Oates:

Thank you for your question. The issue of recruitment time frames is currently being reviewed by the Department with regards to the H-2B Comprehensive Final Rule. The Department is completing the process of analyzing and considering all comments received through the public comment period as we work to finalize our rule.

2:13

Comment From plf

Mobile amusement employers of H-2B workers often have a need to add worksites to the itinerary that was previously certified by DoL when sponsors approach them about working at new events. These events occur within the certified period of need. Will there be a way for such

an employer to amend an existing H-2B certification to accept contracts at events which occur in new locations which do not extend the currently approved period of need?

2:13

Comment From Jose Nichols

Jane, can you please comment on when a seasonal traveling employer has a change in route, due to weather, cancellation, new opportunity opens up, and the new location does not produce a material change in the prevailing wage, does the employer need to file an amended application / petition for each and every location change? In the past the regional SWA's stated that a change that did not produce a material change in the prevailing wage did not need to be filed, because it would simply result in an increase in paperwork for all involved. Does the DOL ETA / DOL WHD still agree with that logic?

2:13

Jane Oates:

plf, Jose, these are issues that will be addressed in the Final H-2B Rule. We expect publication of a final rule approximately December 2011.

2:16

Comment From Jose Nichols

Jane, please comment, if a seasonal employer qualifies for a FLSA exemption, how do you incorporate that FLSA 13(a)(3) exemption into the calculation of prevailing wage? If the prevailing practice is to pay a weekly salary for ALL workers based upon that FLSA statutory exemption, other than stating in the recruitment materials that the employer is FLSA 13(a)(3) exempt, is there anything else that the employer must do to ensure that the DOL ETA & WHD recognizes that exemption.

2:17

Jane Oates:

Thank you for your question. For assistance with compliance questions please contact your local WHD office. You can find them at <http://www.dol.gov/whd>, or by calling 1-866-4USWAGE.

2:18

Comment From Bob

Do you have an idea if the new regulations will be effective as of April 1, 2012 when the cap is

open? Or could it possibly go into effect sooner?

2:18

Jane Oates:

We are working to complete the new regulations and get them into effect as soon as possible.

2:18

Comment From Debbie

Will the planned update of the EEO in Apprenticeship regulations encompass age discrimination/the ADEA as well as other bases of discrimination? With older unemployed workers being out of work, on average, for more than one year, it is important that they have access to as many retraining opportunities as possible.

2:18

Jane Oates:

Debbie, thank you for your question. The Department is considering changes that would make the Apprenticeship EEO regulations consistent with the companion regulations, 29 CFR part 29, the Labor Standards for Registration of Apprenticeship Programs, that were updated in 2008. DOL is also considering changes that would ensure Apprenticeship regulations reflect the current state of EEO law as it has developed since 1978, including the protections that are now afforded to individuals with disabilities via the Americans with Disabilities Act (ADA) and to older individuals through the ADEA.

2:19

Comment From Josh

So, Ms Oates in reference to how the departments determined that this will not impact the economy more than 100 million dollars and in looking at the H2B employee averages that were cited in the federal registry, How was this economic impact study conducted?

2:19

Jane Oates:

Thanks, Josh. The Department is unsure of the particular rulemaking your question refers to. However, the Department has provided in all of its recent H-2B rulemakings an economic analysis as required by Executive Order.

2:19

Comment From Jesus

H2B Program - The new date for the implementation of the new wage methodology will affect Small Businesses because we won't be prepared to make those changes with such short notice. Why don't you listen to the people?

2:19

Jane Oates:

Thanks, Jesus. The Department takes into consideration all comments received during the comment period.

2:20

Comment From Lori

I understand the goal of USDOL "To foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." How does jeopardizing business by over inflating wages meet that goal? Specifically, should these new regulations and inflated wages cause businesses to shut down – how is USDOL going to step in and help those workers displaced by the changes? (this could be duplicate post - but I haven't seen it answered)

2:20

Jane Oates:

Lori, thank you for your question. The Department seeks to protect both the wages and working conditions of domestic and foreign workers and to insure the employers have the best qualified workers when they need them for as long as they need them. That's why it's important to put these regulations in place and also encourage both workers and businesses to use the most innovative tools for achieving these goals. These tools can be accessed through <http://www.careeronestop.org>.

2:21

Moderator:

This is the last call for questions!

2:22

Comment From Guest

Please see your comment at 1:44 to Josh's question: The Department recently proposed to amend the effective date of the H2B prevailing wage final rule to be on or around October 1, 2011. While the Department is currently considering comments on this rule, employers will be required to pay new wage rates to H2B workers and U.S. workers recruited in connection with the H2B certification for all work performed on or after the effective date. However your response to Betty was that the issue is under consideration as the Department develops the final rule. Which answer is correct?

2:22

Jane Oates:

Guest, thank you for the question. The Department proposed amending the effective date of the H-2B Prevailing Wage Final Rule to October 1, 2011. The Department received comments on its proposal and is currently considering those comments. When the Department publishes a final rule, the effective date will be announced in that final rule. We hope that helps clear up your question.

2:24

Comment From Wesley Mathis

DOL suggests that the OES mean wage will be the highest wage applicable to most H-2B applications; however, there are SCA and DBA wages which are much higher that could be applied to many H-2B occupations. The Department does not seem to have considered these wages in determining the economic impact of the rule. How will the Department determine whether SCA and DBA wages are applicable to a position?

2:24

Jane Oates:

Thanks, Wesley. The Department's H-2B prevailing wage final rule's economic analysis, which was published on January 19, 2011, included consideration of the DBA and SCA wages. Please refer to the Department's prevailing wage guidance for more information as to how the Department determines whether SCA and DBA wages are applicable to a position.

2:25

Comment From Wayne Pierce

Could you please advise us whether the Department is aware of any legal challenges to any of the proposed regulatory challenges other than the CATA v. Solis case?

2:25

Jane Oates:

Thanks, Wayne. All legal actions are a matter of public record.

2:27

Comment From Theresa

Can we have access to all the comments made prior to May 17th on the h2b prevailing wage?

2:27

Jane Oates:

Theresa, yes, all posted comments received within the open comment period can be found at <http://www.regulations.gov>: Docket ID ETA-2010-0004

2:28

Comment From Jarrod

The preamble to the H-2B wage rule indicates that the OES mean wage will be the highest applicable wage in most cases. In fact, in many cases, SCA and DBA wages are significantly higher. How will DOL determine when a SCA or DBA wage applies?

2:28

Jane Oates:

Jarrod -- Please refer to the Department's prevailing wage guidance which explains how the Department will determine when an SCA or DBA wage applies.

2:28

Comment From Jose Nichols

will you have stakeholder meetings about this subject?

2:28

Jane Oates:

Jose, the Department held a series of listening sessions in developing the proposed rule. We also participated in a briefing held by the Small Business Administration after the publication of the NPRM. The Department anticipates holding some form of stakeholder briefings after the publication of the Final Rule.

2:28

Comment From Craig Albright

Will the new prevailing wage rule require employers to pay ALL employees(H2B or domestic) in a particular occupation the new prevailing wage, regardless of skill level?

2:28

Jane Oates:

Under the Wage Final Rule the employer is required to pay at least the prevailing wage established as the highest of the wages established under an agreed upon collective bargaining agreement, wage rate established under the Davis Bacon or Service Contract Acts for that occupation in the area of intended employment, or the mean wage rate established by OES. The employer is not precluded from paying more than the prevailing wage.

2:31

Comment From Robyn

We have a small landscaping business since 1989. We have been getting H2B's for over 12 years. This new wage hike will make our costs push us out of business. Why can't we pay them the same pay we have been paying them? We can not raise prices of mowing to make up what a department demands me to make my payroll. Not my costs? If I loose them, I loose my american workers too if I go out of business.

2:31

Jane Oates:

Robyn, thank you for your questions. The Secretary's goals for the H-2B regulation are to increase workers' incomes and narrow wage and income inequalities by protecting both the wages and working conditions of domestic and foreign workers and to insure the employers have the best qualified workers when they need them for as long as they need them. It is important assure that the prevailing wage methodology helps avoid adverse effects of the wages

on U.S. workers.

2:31

Jane Oates:

I want to thank you for participating in today's Web chat. Your ideas and suggestions are important to us as we continue in our rulemaking process. We encourage you to provide input through <http://www.regulations.gov/> once our proposed rules have been published in the Federal Register (<http://www.gpoaccess.gov/fr/>). Your comments are helpful to us as we work to improve our employment and training programs. For more information on DOL regulatory priorities, visit <http://www.dol.gov/regulations/>

2:32