

# CRS Report for Congress

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## The Adverse Effect Wage Rate (AEWR)

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### Summary

American agricultural employers have long utilized foreign workers on a temporary basis, regarding them as an important manpower resource. Often employed at low wages and under adverse conditions, such alien workers, some argue, may compete unfairly with U.S. workers. To mitigate any “adverse effect” for the domestic workforce, a system of wage floors was developed that applies, variously, both to alien and citizen workers — the *adverse effect wage rate* (AEWR). This report *introduces* the AEWR and the concerns out of which it grew. *It is written from the perspective of labor policy, not of immigration policy.* For further discussion of immigration and farm labor issues, see CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, and CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*. This report will be updated periodically as new information becomes available.

### An Introduction to the AEWR

Where countries with widely different economies exist side-by-side, the more prosperous is likely to draw to itself workers from its lower-wage neighbors. Though wages of American agricultural workers are low in comparison with wage rates in the general economy, they are relatively high by the standards of neighboring less developed countries. Thus, a continuing supply of workers has been available for employment in the United States at wage rates and under conditions that American workers, arguably, neither would accept nor, for economic reasons, could accept.

### Mexican Guest Worker Utilization: A Brief Historical Overview

Low-wage labor has entered the United States from a variety of countries and under diverse circumstances. Indeed, importation of low-wage labor has been a long-standing

tradition.<sup>1</sup> Here, our concern is with workers from Mexico — a primary focus of U.S. agricultural labor policy. We are dealing with two migratory thrusts. On the one hand, there are workers who, attracted by relatively higher wages in the United States (or by other aspects of American society), have come north as immigrants seeking permanent employment. Conversely, there has been a body of workers who, responding to public policy, have been encouraged to come north — not to seek citizenship but to provide employers with a continuing source of low-wage labor and, at the end of a work period, to return to their country of origin. These latter are the “guest workers” or “braceros.”<sup>2</sup>

In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, movement across the U.S.-Mexican frontier was relatively unrestricted. Mexican nationals joined a resident Mexican-American population in the fields and mines of the Southwest. With World War I, workers from Mexico were recruited to offset the loss of American workers drafted into military service. After the war, a secondary problem arose: how to get the Mexican workers to go back to Mexico — an issue aggravated by the Great Depression. Then, suddenly, World War II broke out and America turned once more to Mexico for low-skilled/low-wage labor. The result, in various forms, was the *bracero* program.

By war’s end in 1945, agricultural employers had become accustomed to employing Mexican labor that was characterized at the time as docile, non-union, temporary, and payable at low rates while, at the same time, being able and highly motivated. Through the process, a large body of Mexican workers had become acculturated to the American world of work. Having learned at least fragmentary English, they were now able to function within the American system without the institutional support of the formal *bracero* program. In short, some might argue, the *bracero* program had been a training school for foreign workers operating outside the normal immigration structure. The *bracero*/guest worker programs, however, were also a source of contention, raising a number of socio-economic questions. Opposition continued to grow until, in 1964, the program was terminated.

Even with termination, however, a body of foreign workers remained in the United States — a force that was augmented by Mexican workers who crossed the border without proper authorization. As American agricultural workers (many of Mexican heritage) sought to improve their economic status through organization, they were confronted by this alien workforce. Several dilemmas were posed. How might the demand of agribusiness (and of certain other employers) for low-wage workers be satisfied within

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<sup>1</sup> There is an extensive literature on the continuing quest of certain American employers for low-wage workers. See for example: Roger Daniels, *Asian America: Chinese and Japanese in the United States Since 1850*, Seattle, University of Washington Press, 1988; Michael L. Conniff, *Black Labor on a White Canal: Panama, 1904-1981*, Pittsburgh, University of Pittsburgh Press, 1984; and Edward D. Beechert, *Working in Hawaii: A Labor History*, Honolulu, University of Hawaii Press, 1985. For more recent experience, see Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, New York, The New Press, 1997; and Edna Bonachich, and Richard P. Appelbaum, *Behind the Label: Inequality in the Los Angeles Apparel Industry*, Berkeley, University of California Press, 2000.

<sup>2</sup> Here, U.S. agricultural workers will be divided into two groups: American workers and foreign workers. American workers are either U.S. citizens or permanent residents, and are distinguishable from foreign (alien, non-immigrant) workers who are in the country on a temporary basis. Further, some *foreign* workers may be here “legally” — others, “illegally.”

the context of American labor-management policy and without imperiling the economic livelihood of resident/domestic American labor? And, as the *ex-bracero* community became a political force within the United States, how might these sometimes conflicting objectives be achieved without offending this new body of Americans?<sup>3</sup>

## Coping with “Adverse Effect”

By mid-century, these concerns came to be addressed in immigration law. The Immigration and Nationality Act of 1952, as amended, provides for admission to the United States of a person “having a residence in a foreign country which he has no intention of abandoning” and “who is coming temporarily to the United States to perform agricultural labor” of “a temporary or seasonal nature” “if unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>4</sup> Later, the Act directs that a petition for admission of such persons (H-2A workers) “may not be approved by the Attorney General unless the petitioner [the prospective employer] has applied to the Secretary of Labor” for certification that:

(A) 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 labor or services involved in the petition, and

(B) the employment of the alien in such labor or services *will not* adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>5</sup>

If the requirements of paragraphs (A) and (B) are to be effective, they impose a heavy intellectual/policy burden upon the Secretary of Labor.<sup>6</sup>

Paragraph (A) focuses upon availability. Are there domestic American workers who are “able” and “qualified” to satisfy the normally low or semi-skilled requirements of temporary agricultural labor? Did Congress mean to have the Secretary assess the skill and ability of each potential domestic agricultural laborer? If not, then these qualifications are reduced largely to a single standard: willingness to be employed. Even

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<sup>3</sup> Joseph F. Park, in his study, *The History of Mexican Labor in Arizona during the Territorial Period* (M.A. Thesis, University of Arizona, 1961), deals with early cross-frontier labor migration and its impacts. More generally, see Mark Reisler, *By The Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1940* (Westport: Greenwood Press, 1976); Otey M. Scruggs, *Braceros, “Wetbacks,” and the Farm Labor Problem: Mexican Agricultural Labor in the United States, 1942-1954* (New York: Garland Publishing, Inc., 1988); Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929-1939* (Tucson: The University of Arizona Press, 1974); Francisco E. Balderrama, and Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (Albuquerque: The University of New Mexico Press, 1995); and Richard B. Craig, *The Bracero Program: Interest Groups and Foreign Policy* (Austin: University of Texas Press, 1971).

<sup>4</sup> 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (b).

<sup>5</sup> 8 U.S.C. 1188(a)(1)(A) and (B). Italics added.

<sup>6</sup> The conditions under which H-2A workers may be employed are set forth in detail in 20 C.F.R. 655. The AEWR is only one small aspect of the H-2A program. For a discussion of the program and of current issues, see CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, by Ruth Wasem and Geoffrey Collver.

that measure can be complex. Must the potential worker be “willing” to work at whatever wage an employer may be willing to offer and under whatever conditions may exist — even if adverse?

Almost by definition, the H-2A worker is willing to accept a lower wage and conditions more adverse than would be acceptable to most American workers. Thus (following documentable recruitment efforts), a prospective employer can affirm that American workers are unavailable and that he is only offering the H-2A worker employment that American workers “don’t want and won’t accept.” In other labor markets, however, some may argue, movement toward higher wages and improved conditions could be expected to attract American workers.<sup>7</sup>

As part of his responsibility under paragraph (A), the Secretary of Labor has developed a three-tiered wage rate requirement. The regulations state:

If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest ...<sup>8</sup>

The AEW is set forth by the Department of Labor (DOL), based upon data gathered by the Department of Agriculture (DOA). DOA conducts a quarterly survey of the wages of field and livestock workers throughout the United States. The AEW, then, is a weighted average of the DOA findings, calculated on a regional basis. It is adjusted, each year, taking into account prior experience with the change of the “average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly Wage Survey.”<sup>9</sup> The rate (see **Table 1**) is set for each state (except Alaska for which no rate has been fixed). The AEW has no *direct* effect where an employer does not seek to engage H-2A workers. However, if he does engage H-2A workers and subsequently locates and hires American workers, then he is required to pay each group not less than the AEW.

Paragraph (B) presents a more complex issue: i.e., demonstrating that employment of H-2A workers “will not adversely affect the wages and working conditions of workers in the United States similarly employed.” The AEW structure effectively sets *a cap* on the earnings of agricultural workers. If domestic workers are not available at the specified rate, then the employer is allowed to employ foreign workers who, given the disparity in wage rates between Mexico and the United States, will almost always be available at the AEW. The H-2A option provides agricultural employers with an alternative source of labor and, in effect, expands the pool of available workers — enhancing competition for available jobs. With that option open to them, agribusiness employers may have no need to rationalize their recruitment and employment policies to make such employment more

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<sup>7</sup> Questions persist about possible farm labor shortages and the impact of foreign workers. See CRS Report RL30395, *Farm Labor Shortages and Immigration Policy*, by Linda Levine.

<sup>8</sup> 20 C.F.R. 655.102(b)(9)(i). The regulations set out separate requirements if the worker is paid on a piece rate basis. See C.F.R. 655.102(b)(9)(ii).

<sup>9</sup> 20 C.F.R. 655.207(a), (b) and (c). Concerning the methodology for calculation of the AEW, see: *Federal Register*, June 1, 1987, pp. 20496-20533, and *Federal Register*, July 5, 1989, pp. 28037-28051.

attractive to American workers. Further, some may view the availability of foreign agricultural workers as a device through which to deter trade unionization of domestic agricultural workers and to preclude the necessity of bargaining with domestic U.S. workers with respect to wages and conditions of employment.

In competitive terms, some may argue, the H-2A/AEWR system would seem almost to guarantee that “the wages and working conditions” of similarly employed American workers *would be* adversely affected. Yet, at least since the World War I era, some U.S. agricultural employers have spoken in terms of labor shortages and have urged importation of additional workers from abroad to meet what they have argued is an unfilled demand for workers.

**Table 1. Adverse Effect Wage Rate by State, 1990-2004**  
(in current dollars and cents)

State <sup>a</sup>	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Alabama	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88
Arizona	4.61	4.87	5.17	5.37	5.52	5.80	5.87	5.82	6.08	6.42	6.74	6.71	7.12	7.61	7.54
Arkansas	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38
California	5.90	5.81	5.90	6.11	6.03	6.24	6.26	6.53	6.87	7.23	7.27	7.56	8.02	8.44	8.50
Colorado	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36
Connecticut	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
Delaware	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52
Florida	5.16	5.38	5.68	5.91	6.02	6.33	6.54	6.36	6.77	7.13	7.25	7.66	7.69	7.78	8.18
Georgia	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88
Hawaii	7.70	7.85	7.95	8.11	8.36	8.73	8.60	8.62	8.83	8.97	9.38	9.05	9.25	9.42	9.60
Idaho	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69
Illinois	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00
Indiana	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00
Iowa	5.03	4.85	5.15	5.65	5.76	5.72	5.90	6.22	6.86	7.17	7.76	7.84	8.33	8.91	9.28
Kansas	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83
Kentucky	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63
Louisiana	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38
Maine	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
Maryland	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52
Massachusetts	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
Michigan	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11
Minnesota	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11

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State <sup>a</sup>	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Mississippi	4.04	4.40	4.73	4.87	5.26	5.19	5.27	5.70	5.98	6.21	6.50	6.69	6.77	7.13	7.38
Missouri	5.03	4.85	5.15	5.85	5.76	5.72	5.90	6.22	6.86	7.17	7.76	7.84	8.33	8.91	9.28
Montana	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69
Nebraska	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83
Nevada	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36
New Hampshire	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
New Jersey	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52
New Mexico	4.61	4.87	5.17	5.37	5.52	5.80	5.87	5.82	6.08	6.42	6.74	6.71	7.12	7.61	7.54
New York	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
North Carolina	4.33	4.50	4.97	5.07	5.38	5.50	5.80	5.79	6.16	6.54	6.98	7.06	7.53	7.75	8.06
North Dakota	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7/49	7.81	8.24	8.53	8.83
Ohio	4.88	5.05	5.59	5.85	6.02	6.18	6.23	6.66	7.18	7.53	7.62	8.09	8.38	8.65	9.00
Oklahoma	4.65	4.61	4.87	5.01	4.98	5.32	5.50	5.48	5.92	6.25	6.49	6.98	7.28	7.29	7.73
Oregon	5.42	5.69	5.94	6.31	6.51	6.41	6.82	6.87	7.08	7.34	7.64	8.14	8.60	8.71	8.73
Pennsylvania	4.89	4.93	5.39	5.81	5.92	5.81	5.97	6.26	6.33	6.84	7.04	7.37	7.46	7.97	8.52
Rhode Island	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
South Carolina	4.29	4.46	4.91	5.04	5.43	5.66	5.40	5.92	6.30	6.30	6.72	6.83	7.28	7.49	7.88
South Dakota	5.17	5.20	5.36	5.78	6.03	5.99	6.29	6.55	7.01	7.12	7.49	7.81	8.24	8.53	8.83
Tennessee	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63
Texas	4.65	4.61	4.87	5.01	4.98	5.32	5.50	5.48	5.92	6.25	6.49	6.98	7.28	7.29	7.73
Utah	4.51	5.00	5.29	5.44	5.57	5.62	5.64	6.09	6.39	6.73	7.04	7.43	7.62	8.07	8.36
Vermont	4.98	5.21	5.61	5.82	5.97	6.21	6.36	6.71	6.84	7.18	7.68	8.17	7.94	8.53	9.01
Virginia	4.33	4.50	4.97	5.07	5.38	5.50	5.80	5.79	6.16	6.54	6.98	7.06	7.53	7.75	8.06
Washington	5.42	5.69	5.94	6.31	6.51	6.41	6.82	6.87	7.08	7.34	7.64	8.14	8.60	8.71	8.73
West Virginia	4.45	4.56	5.04	5.09	5.29	5.47	5.54	5.68	5.92	6.28	6.39	6.60	7.07	7.20	7.63
Wisconsin	4.45	4.90	5.16	5.38	5.64	5.65	6.19	6.56	6.85	7.34	7.65	8.07	8.57	8.70	9.11
Wyoming	4.49	4.79	4.94	5.25	5.59	5.57	5.76	6.01	6.54	6.48	6.79	7.26	7.43	7.70	7.69

**Source:** Compiled from data provided by the Employment and Training Administration, U.S. Department of Labor. See *Federal Register*, Feb. 26, 2003, pp. 8929-8930; Mar. 19, 2003, p. 13331; and Mar. 3, 2004, pp. 10063-10065.

a. The U.S. Department of Agriculture does not calculate an AEW for Alaska.