A Brief Analysis of the United States Department of Labor's Payroll and Other Transition Costs Methodology and Estimate for the February 28, 2023 AEWR Methodology Rule

Abstract

The DOL published a Final Rule on February 28, 2023, outlining changes to the way the AEWR is calculated. In the Final Rule, the DOL provides an estimate of the amount of excess wages (or "transfers" from employers to employees) that might occur due to the implementation of the new rule. Their estimates suggest that over a 10-year period, there would be approximately $375 million in transfers. The DOL's transfer estimate understates the true 10-year transfer by roughly 5% because they reduce the value of their 2023 wage impact estimate by 50 percent. The DOL's analysis also excludes H-2A disclosure data from the 2021 calendar year that was available in the Q1 FY2022 data at the time the rule was published, causing the transfer estimate to be understated even further. Additionally, the DOL did not provide an estimate of the transfer impacts that would result from US workers in corresponding employment (i.e., US workers that are employed by H-2A workers). In this brief study, I analyze the methodology the DOL used and estimate the transfer amounts under the case where (i) the 10-year transfer estimate represents a true 10 year impact instead of a 9.5 year impact, (ii) the Q1 FY2022 data would have been included in the DOL's analysis and (iii) if workers in corresponding employment would have been considered. My results indicate that the DOL's 10-year transfer estimate may have understated the actual amount by $107 million as a result of these three factors. To the extent that some H-2A workers perform job duties under 2 or more SOC codes and their SOC codes would have to be updated by employers to reflect the SOC code that pays a higher AEWR under the new rule, the DOL estimate would also understate the transfer.

Transfer Analysis

The DOL's methodology under the February 28, 2023, rule provides an estimate of the amount of additional wages (referred to as "transfers" in the Federal Register) that H-2A employers would have to pay H-2A employees under the new rule. The Final Rule states that the DOL estimate is based on a set of calculations that use H-2A disclosure data from the fiscal years 2020 and 2021 to (i) calculate the total wages under a baseline scenario where the 2010 AEWR rule remained in effect (i.e., that there is one AEWR for every state that is determined by the FLS) and (ii) under the new rule (i.e., that there would be one AEWR set by the FLS for every state for the SOC codes 45-2041, 45-2091, 45-2092, 45-2093, 53-7064, and 45-2099 and that the OEWS wage would apply for all other SOC codes).[1] This FY2020 and FY2021 two-year average impact is then applied to a 10-year period (2023 – 2032) with a 6.3% growth rate with the impact for 2023 being cut in half (see footnote 117).

While the DOL claims to provide an estimate of the impact over a 10-year period, the calculation actually reflects a 9.5-year period estimate, so their claim is misleading. On page 12795, they indicate that their 2023 wage impact (the first year in their 10-year transfer estimate) is divided by 2 as a result of the fact that the OEWS data would not be available until July 2023 and thus the new rule would not fully go into effect until that data was available. As a result, the DOL's transfer estimate does not reflect an estimate of the total transfer amount that would have resulted over a 10-year period of time during which the new rule would have already taken effect but instead covers 95% of a 10-year period. Thus, at a first glance, the DOL's 10-year estimate of $375.07 million should be adjusted to $394.91 million to represent a true 10-year transfer value ($375.07 ÷ .95 = $394.81)

The DOL's methodology uses the FY2020 and FY2021 data, which covers the reporting period from October 1, 2019 to September 30, 2021, and calculates an average transfer estimate based on the stated work dates from January 1, 2020 to December 31, 2021. In footnote 116, they indicate that at the time of publishing, there was H-2A data available as recent as the first quarter of FY2022, but they did not use it, which means that they excluded all of the data from the Q1 FY2022 reporting period that had H-2A jobs certified to work between October 1, 2021 and December 31, 2021. In the FY2022 disclosure data file, there were 27,644 H-2A jobs certified to work between October 1, 2021 and December 31, 2021 that were excluded from the DOL's calculation. In fact, the Final Rule states in footnote 116 that "...a full [calendar year] of work is not captured in the FY 2020 and FY2021 certification data for [calendar year] 2019 and [calendar year] 2022." This approach may cause their estimate for calendar 2021 to understate the actual transfer value because it omits the jobs that were certified to work during the fourth quarter of calendar year 2021 that were included in the Q1 FY2022 disclosure data.

I calculated an estimate of the value of those Q4 2021 job contracts that were in the Q1 FY2022 data but were not considered by applying the national average AEWR of $14.62 (Farm Bureau, 2021) to all of the contracts omitted from their analysis and using the following formula:

$$\boldsymbol{Contract\ Value = Certified\ Jobs \times Weeks\ Worked \times Weekly\ Hours \times \$14.62}$$

[1] If the FLS state data are not available for the applicable SOC codes, a weighted average of the state OEWS wages for these codes would be applied to those codes. If the state OEWS wage data is missing, a weighted average of national OEWS wage would be applied to those codes (see page 12794 of the Federal Register).

This simple approach suggests that the value of those excluded contracts was worth approximately $92 million. Using this same approach, I estimate that the total value of 2021 contracts for the US is approximately $4.433 billion. A simple back of the envelope calculation indicates that their 2021 calendar year estimate could have understated the amount of the transfer by 2% (92/4,433 = 2%), which could have deflated their average calendar year 2020 and 2021 estimates by about 1%. Assuming a true 10-year transfer estimate of $394.81, this would have caused their 10-year estimate to increase by about $4 million to $398.76 million.

The Final Rule also states that "...the Department is not able to [...] meaningfully assess the total number of corresponding workers" and "is unable to reasonably measure the transfers to corresponding workers." However, Castillo, Martin, and Rutledge (2022) provide a method for estimating the number of corresponding workers from the H-2A disclosure data by taking the difference between the total number of workers (H-2A and domestic) that H-2A applicants claimed they needed and the number of H-2A jobs certified. In fiscal year 2020 (respectively, 2021), there were 50,340 (respectively, 74,321) of these workers in corresponding employment. These workers can be assigned to individual applications in the H-2A disclosure data and could have been added to the number of jobs certified in the DOL's transfer analysis to provide an approximation of the transfer value. There was a total of 593,049 H-2A jobs certified during FY2020 and FY2021, so these corresponding workers could have comprised an additional 21% of the total wages paid by H-2A employers [(50,340 + 74,321) ÷593,049 = 21%]. If we consider a true 10-year transfer estimate plus their estimated understated transfer resulting from the exclusion of the Q1 FY 2022 data, adding an additional 21% would have caused their estimate to increase to $482.50 million [$398.76 x 121% = $482.50], a difference of $107.43 million from the DOL's 10-year transfer estimate of $375.07.

Conclusion

The DOL transfer calculation has several shortcomings that cause it to understate the true amount of the transfer. In this brief study, I provide estimates of how much the transfer would likely be if (i) they would have estimated the transfer over a true 10-year period of time during which the new rule had actually taken effect, (ii) they had included H-2A certification data for Q4 of calendar year 2021 that was available in the Q1 FY2022 data at the time the rule was published, and (iii) they had considered the impact on corresponding workers under the definition provided by Castillo, Martin, and Rutledge (2022). My findings suggest that their transfer estimate could be understated by $107 million. To the extent that some SOC codes may need to be updated under the new rule that requires employees with 2 or more SOC codes to earn the AEWR that corresponds to the SOC code with the highest wage value, the transfer amount would be even higher.

References

Castillo, M., Martin, P., and Rutledge, Z. 2022. The H-2A Program in 2020." USDA-ERS Economic Information Bulletin No. 238.

Farm Bureau. 2021. The 2021 AEWR Finally Revealed. https://www.fb.org/market-intel/the-2021-aewr-finally-revealed