

AG ISSUES UPDATE

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USApple Updates

USApple Weighs in on Proposed Changes to H-2A Program

In the last week, USApple has submitted 3 sets of comments to:

- The Department of Labor (DOL)
- The Department of Homeland Security (DHS)
- Occupational Safety and Health Administration (OSHA)

The DOL and DHS comments push back on proposed changes to the H-2A program. Both proposals would increase the expense and general red tape associated with the program. In addition, the DOL proposal would create additional access for labor unions to contact both H-2A and domestic workers. Most concerning, both would also give increased authority to the DOL, DHS and State Agencies to delay applications and even debar growers from the program for minor or unintended infractions. USApple is engaging with key Congressional offices, telling them how harmful these proposals would be if implemented.

In addition, USApple submitted comments on an OSHA proposal. This one is not agriculture specific, but would allow a third party, including a labor union representative, to accompany OSHA inspectors at the request of an employee. The broad business community is opposed to this change which seems to serve no purpose except to advance the unions.

USApple staff engaged apple leaders as we developed our comments on all of these proposals to ensure they reflect the apple perspective and specific impact on the industry.

USApple Storage Report

Key Take-Aways

As detailed in the November 2023 issue of USApple's exclusive AppleTracker national storage report, ***total apples in U.S. storages at the start of this season topped 190 million bushels*** (42 pounds per bushel). This figure exceeds the previous November high set in 2014 when storages were reported to be 188 million bushels.

While the total number of apples in U.S. storages are greater this season, the number destined for the fresh market is not. Fresh holdings on November 1 were reported to be 140 million bushels versus the 144-million-bushel mark set a decade ago.

Processing holdings are significantly higher this year than in the 2014/15 season at 51 million bushels versus 44 million bushels – an increase of 14% over the ten years.

On a year-over-year basis, total storages are up 32% – fresh apples are up by 36% and processing apples are up by 23%.

Storages by State

Washington's total storages were 38% above last season's figures and 20% above five-year average November holdings. These additional apples total almost 42 million bushels accounting for 90% of the national year-over-year gains.

As of November 1, Washington's fresh holdings were 120 million bushels versus 85 million bushels at the same point last season. Processing holdings were almost 33 million bushels, a 27% increase over last year.

In **New York**, total storages appeared to be up 44% from last year growing from 10.3 million bushels to 14.9 million bushels. However, it should be noted that, prior to the start of this season, an audit was conducted of the state's storage facilities and several "new" storages were added to the sample.

These previously-unaccounted-for storages reported holdings of around 2 million bushels. Removing these from this year's totals lowers the year-over-year growth rate to 25%. Of the newly reported 2 million bushels, 800,000 bushels were fresh and the remaining 1.2 million were processing apples. New York's annual growth of 4.6 million bushels accounted for 10% of the national gains.

Michigan's November holdings were down from last year to 12.3 million bushels from 13.2 million bushels – a decrease of 6%, but still well above the five-year average of 9.8 million bushels.

Pennsylvania, Virginia and Oregon were all roughly in line with last year's November 1 storage levels.

Storages by Variety

On a varietal basis, **Honeycrisp** storages were up 62% from last November to more than 30.2 million bushels surpassing **Gala** as the most abundant variety in U.S. holdings. The 11.6-million-bushel year-over-year increase accounted for 25% of the total production growth.

Interestingly, more conventional varieties were also showing signs of growth. **Red Delicious** holdings increased from 18.5 million bushels last year to 26.4 million bushels this November – an 8-million-bushel year-over-year gain. **Granny Smith** storages were up from 14 million bushels last November to 29.2 million bushels – a 61% year-on-year increase.

In terms of reported varieties, **Braeburn** was removed from the survey this season due to increasingly lower storage levels. At the beginning of last season, there were only 263,000 bushels of Braeburn in U.S. storages down from the five-year average of 734,000 bushels.

It has been replaced by **Envy**[®], a managed variety with almost 4.2 million bushels in U.S. storages as of November 1.

For that reason, the Other Varieties category decreased from 15.5 million bushels to 13 million bushels year over year. However, if we add the **Envy**[®] figures back to the Other Varieties total, the category increases to 17.2 million bushels – a 10% year over year increase.

Implications for Production

Over the last five years, USAppleTracker November storage volumes ranged between 58% and 65% of final USDA production figures. Alternatively stated, on average, 39% of U.S. apples “move” prior to the November 1 storage datapoint. This figure may be slightly high given that USDA counts “unsold” fruit in their totals, but that would only account for a few percentage points.

In August at the annual Outlook conference, USApple released its official estimate for the coming season’s production – 256.3 million bushels. As a reminder, this November’s storage value was 190.7 million bushels. These figures seem to indicate that only 26% of U.S. apples “moved” prior to November 1, 2023.

If one were to assume that the pre-November movement rate this season was closer to the five-year average of 39%, the **implied production would exceed 300 million bushels**. Likely the true number lies somewhere between that figure and the 256-million-bushel August estimate.

Coalition Letter About China’s Permanent Normal Trade Relations (PNTR) Status

A coalition of agricultural commodity organizations including USApple wrote a letter to the U.S. Select Committee on the Chinese Communist Party, asking them to consider the negative impacts to farmers as they consider recommending that Congress repeal China’s Permanent Normal Trade Relations (PNTR) status. The letter says:

- “We respectfully urge this important committee not to recommend revoking China’s PNTR status. The negative consequences for American farmers, ranchers and food producers would be profound and the economic impact on American workers and rural communities would be felt for years.”
- “China is now the largest buyer of U.S. food and agricultural products, purchasing 19% of our exports. These exports are critical to America’s farmers and rural communities.”

Thought Leadership: What Apple H-2A Employers Need to Know for 2024

By Daniel Ross, In-House Senior H-2A Attorney, Seso Labor

H-2A employers in the apple industry are expected to face a difficult regulatory landscape in 2024. Here are a few developments apple employers should be keeping an eye on as they head into 2024:

The “New AEWR” Rule Remains in Effect

U.S. Department of Labor (DOL) implemented a final rule revising the Adverse Effect Wage Rates (AEWR) methodology, effective for all job orders filed on or after 3/30/2023, which drastically increased wages on a number of H-2A job orders.

This new AEWR methodology remains in effect at this time, though it is being challenged in multiple federal courts across the country, most notably in an effort led by Attorney Chris Schulte, a Seso advisor, on behalf of the National Council of Agricultural Employers. While we remain optimistic that an injunction granting relief from this ill-conceived rule may be on the horizon, at this time employers must continue to account for the effects of the rule when drafting job orders.

Apple industry employers must take care to isolate job duties that will trigger higher wages to their own job orders. This will help to avoid an unsustainable and unreasonable wage being applied across all H-2A workers on the contract. However, employers should also thoroughly familiarize themselves with the O*NET system and see if their needs fall within the job descriptions listed under the employer-friendly Standard Occupational Classification (SOC) codes of 45-2092.00 Farmworkers and Laborers, Crop, Nursery, and Greenhouse or 45-2091.00 Agricultural Equipment Operators.

Prevailing Wage Surveys Uniquely Affect the Apple Industry

H-2A apple employers have long dealt with the frustrating and unpredictable increase in the AEWR every year. As discussed above, 2023 brought new concerns with higher wages now being applied based on job duties and SOC codes. However, there is an even more obscure (and potentially dangerous) trap awaiting employers when it comes to H-2A wage obligations, with the unique potential to acutely affect the apple industry. It is the unexpected publication of a binding wage survey in the area of H-2A employment.

The H-2A regulation at 20 CFR 655.120(a) requires the employer to pay the highest of:

1. The AEWR;
2. **A prevailing wage rate, if the Office of Foreign Labor Certification (OFLC) Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;**
3. The agreed-upon collective bargaining wage;

4. The Federal minimum wage; or
5. The State minimum wage.

When wage surveys are published on OFLC's website, that prevailing wage rate becomes effective immediately for the commodity/activity in the area of employment identified by the wage survey and remains valid for one year from the date of posting.

DOL's website "encourages employers to check the prevailing wage information posted in the Agricultural Online Wage Library. periodically after receiving temporary labor certification, to determine the current prevailing wage rate applicable to the employer's job opportunity."

DOL and individual State Workforce Agencies (SWA) have often failed to act in concert with the publication of new wage surveys, creating confusion and doubts about retroactive liability. Apple employers in New York were just faced with this exact scenario, where a wage survey was suddenly published and employers, without notice, were suddenly informed weeks later that they retroactively owed back wages for a survey they were unaware of, to wit.

Overtime Changes

Several states with a heavy apple growing presence have implemented, or are in the process of implementing, overtime requirements for agricultural labor. A quick survey of major apple grower states indicates a trend towards removing the traditional Fair Labor Standards Act (FLSA) agricultural exemption, and employers should plan accordingly.

- Michigan - Agricultural workers remain exempt from state overtime law. (Mich. Comp. Laws Ann. § 408.934a(4)(e))
- New York - Farm laborers currently receive time-and-a-half for all hours worked over 60 in any workweek. New York will eventually lower that threshold to 40. The phase-in process begins on 1/1/2024, lowering the hours to 56. The hours will be reduced by 4 every other year until reaching 40 in 2032. (N.Y. LAB. LAW § 163-a)
- Oregon - In March 2022, Oregon imposed new overtime pay requirements for agricultural workers beginning on January 1, 2023. Beginning January 1, 2023, employers must pay overtime to agricultural workers for hours worked beyond 55 hours in a workweek, and beginning January 1, 2025, employers must pay overtime to agricultural workers for hours worked beyond 48 hours in a workweek. (H.B. 4002, Ore. Laws 115 (2022))
- Washington - Overtime applicable at 1.5 times the regular rate of pay for all hours worked over 48 during any workweek. Beginning Jan. 1, 2024, overtime obligation applicable for all hours worked over 40 during any workweek. (Wash. Rev. Code Ann. § 49.46.130.

Penn State Ag and Shale Law Updates

Agricultural Labor: USDA Publishes Farm Labor Report, Data for 2024 H-2A Adverse Effect Wage Rates

On November 22, 2023, the U.S. Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS) published the latest, semi-annual November 2023 Farm Labor Report, published in May and November each year. According to NASS, the "data is published in wage rates by type of worker and number of workers and hours worked by region and U.S., as well as wage rates and hired workers by economic class of farm or type of farm." The data contained in the Farm Labor Report will be used to determine the 2024 Adverse Effect Wage Rate (AEWR) for the H-2A temporary agricultural worker program. Additionally, American Farm Bureau Federation (AFBF) published an analysis of the report, calculating the 2024 AEWRs, which AFBF states, "don't become official until they are released by the Department of Labor in the Federal Register, usually around mid-December," although AFBF notes that, "the rates published in the Federal Register are typically unchanged from what is published in the Farm Labor Report." According to AFBF, in 2024, "every state will have an AEWR in excess of \$14 per hour." *See also the Center's H-2A Program Issue Tracker.*

Morning Ag Clips

USDA Invests Nearly \$28M to Support Beginning Farmers and Ranchers

WASHINGTON — The U.S. Department of Agriculture Deputy Secretary Xochitl Torres Small today announced an investment of \$27.9 million across 45 organizations that teach and train beginning farmers and ranchers, including programs for U.S. veterans who are entering into agricultural careers and starting new farming businesses.

"The next generation of farmers and ranchers hold the promise for future American agriculture and rural prosperity," said USDA Deputy Secretary Xochitl Torres Small. "Under the Biden-Harris Administration, USDA is providing our newest producers with the support they need to succeed and the educational resources to guide their operations on the path toward long-term sustainability and profitability."

This investment is part of the National Institute of Food and Agriculture's (NIFA) Beginning Farmer and Rancher Development Program (BFRDP), which supports a wide range of professional development activities and topics, such as managing capital, acquiring and managing land, and learning effective business and farming practices.

"This investment reflects USDA's commitment to helping new farmers and ranchers realize their dreams," said USDA Chief Scientist and Under Secretary for Research, Education and Economics Dr. Chavonda Jacobs-Young. "As the average age of our U.S. producers continues to increase, USDA is accelerating efforts to provide meaningful support to a rising cadre of farmers and ranchers—including military veterans interested in starting new careers after their service—so they can cultivate the skills needed to be productive, profitable and resilient."

According to USDA National Agricultural Statistics Service's Ag Census data, one-third of the United States' 3.4 million farmers are over the age of 65.

“Ensuring there will be a new generation of beginning farmers and ranchers – regardless of age or production choice – is essential to the continuation of agricultural production in the United States,” said USDA NIFA Director Dr. Manjit Misra. “Beginning farmers and ranchers have unique educational, training, technical assistance and outreach needs. Access to capital, land and knowledge that assists in ensuring profitability and sustainability are vital to farmers and ranchers in their first 10 years of operation.”

NIFA’s BFRDP funds three types of projects:

- Standard Projects to new and established local and regional training, education outreach and technical assistance initiatives that address the unique local and regional needs of beginning farmers and ranchers.
- Educational Team Projects to develop seamless beginning farmer and rancher education programs by conducting evaluation, coordination and enhancement activities for standard projects and other non-funded beginning farmer programs.
- Curriculum and Training Clearinghouse to make educational curricula and training materials available to beginning farmers and ranchers and organizations who directly serve them.

Examples of the 45 newly funded projects for FY2023 include:

- Calypso Farm and Ecology Center: This project, Growing Alaskan Farmers: An Agricultural Training Program for Alaska Native People and Their Communities, aims to train a growing population of beginning Indigenous farmers in rural Alaska. This supports the broader vision to foster food sovereignty across Alaska by providing the training and support necessary for Alaskan villages to grow their own food. The project is an Indigenous-led, hands-on, farmer training program.
- Farm Boot Camp: This project will provide in-depth training, technical assistance, and hands-on internship opportunities to transitioning active duty and veteran beginning farmers obtaining the knowledge, skills and tools needed to make informed decisions for their farming operations. The training and materials will be based on the Universal Design for Learning (UDL) framework aimed at addressing the needs of service-related disabilities.
- In Her Shoes, Inc.: This two-state project aims will provide education and support to 90 new and beginner women and Black farmers each year in West Georgia and the Mississippi Delta. The goal of the project is to increase women and Black operated farm businesses through farm business expansion and new market access. The project also will lead to increased fresh food in local communities.
- La Semilla Food Center: This project will advance a regional practice of climate smart agriculture solutions while removing individual and systemic obstacles for socially disadvantaged and colonia farmers of the Chihuahuan Desert Ecoregion and providing them with opportunities to prosper. -Nov. 17th, 2023

USDA Now Accepting Applications for Farm Loans Online

WASHINGTON — The U.S. Department of Agriculture (USDA) has launched an online application for Direct Loan customers. More than 26,000 customers who submit a Direct Loan application each year can now use an online, interactive, guided application that is paperless and provides helpful features

including an electronic signature option, the ability to attach supporting documents such as tax returns, complete a balance sheet and build a farm operating plan. This tool is part of a broader effort by USDA's Farm Service Agency (FSA) to streamline its processes, improve customer service, and expand credit access.

"The Biden-Harris Administration is working hard to make it easier for farmers and ranchers to get the loans they need to keep growing food, fiber, and fuel for our country," said Deputy Secretary Xochitl Torres Small. "Online services are commonplace in commercial lending, and with USDA Farm Service Agency's new online loan application feature, it is now easier for producers to get the financing they need to start, expand, or maintain their farming and ranching operations."

The online farm loan application replicates the support an applicant would receive when completing a loan application in person with an FSA Farm Loan Officer, while continuing to provide customers with one-on-one assistance as needed. This tool and other process improvements allow farmers and ranchers to submit complete loan applications and reduce the number of incomplete and withdrawn applications.

Through a personalized dashboard, borrowers can track the progress of their loan application. It can be accessed on farmers.gov or by completing FSA's Loan Assistance Tool at farmers.gov/loan-assistance-tool. To use the online loan application tool, producers must establish a USDA customer account and a USDA Level 2 eAuthentication ("eAuth") account or a Login.gov account. For the initial stage, the online application tool is only available for producers who will be, or are currently, operating their farm as an individual. FSA is expanding the tools availability to married couples applying jointly and other legal entities in 2024. -Dec. 5th, 2023

FDA Finds "Extremely High" Lead Levels in Cinnamon at Ecuador Plant that made Tainted Fruit Pouches.

WASHINGTON — U.S. food inspectors found "extremely high" levels of lead in cinnamon at a plant in Ecuador that made applesauce pouches tainted with the metal, the Food and Drug Administration said Monday. The recalled pouches have been linked to dozens of illnesses in U.S. kids.

Cinnamon tested from the plant had lead levels more than 2,000 times higher than a maximum level proposed by the FDA, officials said.

The samples came from ground or powdered cinnamon from Negasmart, an Ecuadorian company that supplied the spice to Austrofoods, which made the pouches. The applesauce pouches were sold under three brands — WanaBana, Schnucks and Weis. Officials with Austrofoods did not respond to requests for comment about the investigation.

FDA said lead has not been detected in WanaBana products made without cinnamon and sold in the U.S.

The agency continues to investigate how the cinnamon was contaminated. Jim Jones, who heads the agency's human foods program, said in an interview with Politico last week that the lead contamination appeared to be "an intentional act."

One theory is that the cinnamon may have been contaminated for economic reasons, agency officials said. That could mean an ingredient is added or subtracted from a food to to boost its value. For example, compounds like red brick, red lead salt, lead oxide and lead chromate, which mirror cinnamon's red color, have been added to increase the value of the spice, research shows.

FDA officials said they "cannot take direct action" with Negasmart and are relying on officials in Ecuador for the investigation into the company's actions. Negasmart does not ship product directly to the U.S. and of Negasmart's customers, only Austrofoods shipped foods to the U.S., the agency said.

At least 125 children from 22 states may have been sickened by lead poisoning since late October, the Centers for Disease Control and Prevention said. Using a different reporting method, the Food and Drug Administration counts at least 65 kids ages 6 and younger sickened in 27 states as of Dec. 8.

Tests show children who ate the pouches had blood lead readings up to eight times higher than the reference level that sparks concern, health officials said. Samples of the puree showed lead contamination more than 200 times higher than the FDA allows, officials said.- *Dec. 19th, 2023*

EPA Update on Next Steps for Chlorpyrifos

WASHINGTON — In light of the November 2, 2023, Eighth Circuit Court of Appeals' decision to vacate the U.S. Environmental Protection Agency's (EPA) 2021 final rule effectively prohibiting the use of the pesticide chlorpyrifos on food or feed crops, EPA is issuing an update on its intended next steps.

Background

In April 2021, the Ninth Circuit Court of Appeals ordered EPA to issue a final rule in response to a 2007 petition filed by the Pesticide Action Network North America and the Natural Resources Defense Council. The Ninth Circuit ordered EPA to issue—within 60 days—a that final rule addressing the use of chlorpyrifos in food or feed crops, without taking public comment or engaging in "further fact-finding."

Accordingly, given the deadline and instruction provided by the Ninth Circuit, on August 30, 2021, EPA issued a final rule revoking all chlorpyrifos tolerances (tolerances are federal rules that allow for a maximum level of pesticide residues on food). The revocation of those tolerances meant that any food or animal feed treated with chlorpyrifos after February 28, 2022 (the date the tolerances expired) could be considered adulterated and thus could not be distributed in interstate commerce.

That tolerance revocation rule was challenged by a chlorpyrifos registrant and several grower groups in the Eighth Circuit. On November 2, 2023, the Eighth Circuit issued a ruling vacating EPA's final rule and remanding the matter to EPA for further proceedings. The ruling did not include a timeframe or specific instructions for EPA to take a final action on the use of chlorpyrifos in food or feed crops without public comment.

Next Steps

Upon issuance of the Eighth Circuit's mandate (which has not occurred as of the date of this update), all chlorpyrifos tolerances would automatically be in effect once again. In conformance with the Eighth Circuit's ruling and after issuance of the mandate, EPA intends to issue a notice correcting the Code of Federal Regulations to reflect the court's reinstatement of chlorpyrifos tolerances.

The Eighth Circuit's decision stated that EPA should have considered modification of tolerances in addition to complete revocation and noted that the Agency had "identified 11 specific candidates" of food and feed crop uses whose tolerances could be so modified in a Preliminary Interim Decision EPA issued in 2020. Consequently, the Agency expects to expeditiously propose a new rule to revoke the tolerances associated with all but the 11 uses referenced by the court. These uses may be found in the December 2020 Chlorpyrifos Proposed Interim Decision. Prior to the 2021 tolerance revocation, these uses represented about 55% of the total chlorpyrifos usage (average pounds applied) on agricultural commodities between 2014-2018.

EPA is also engaged in discussions with the registrants to further reduce exposures associated with the 11 uses of chlorpyrifos that were referenced by the Eighth Circuit, a process that will also include taking into account the 2020 draft document and public comments received thereto. This approach would allow use on alfalfa, apple, asparagus, cherry (tart), citrus, cotton, peach, soybean, strawberry, sugar beet, wheat (spring), and wheat (winter) with potential additional restrictions for geographic location, rate of application, farmworker and other vulnerable populations, and vulnerable species and their habitats that may be needed to address safety of the tolerances.

In addition, chlorpyrifos is currently under registration review and the Agency continues to work to implement the National Marine Fisheries Service's 2022 Biological Opinion on chlorpyrifos, diazinon, and malathion. EPA will continue to work to protect farmworkers, endangered species and their habitats, and the nation's most vulnerable populations (including children) through its ongoing registration review and Endangered Species Act processes for chlorpyrifos uses.

At this time, final cancellation orders, including their terms for existing stocks of products subject to those cancellation orders and related return programs for chlorpyrifos products, remain in place, unless and until amended by EPA.

EPA will continue to keep the public updated as it evaluates and takes any actions related to chlorpyrifos pesticide use.

Find more information about chlorpyrifos on the EPA website. -Dec. 20th, 2023