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U.S. Wage and Hour Division

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MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

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SUBJECT General Guidance on Voluntary Assignments of Wages under the H-2A Program

This memorandum provides guidance to Wage and Hour Division (WHD) staff regarding certain enforcement issues with respect to voluntary assignment of wages under the H-2A program. Questions about this Bulletin should be directed to the Division of Enforcement Policy and Procedures, Branch of Immigration & Farm Labor (DEPP-IMM & FL).

Background

The Department's regulation at 20 CFR 655.122(p) provides that required wage payments must be received free and clear. The amount and purpose of each deduction that will be made from the worker's pay must be disclosed in the job offer. If a deduction is not disclosed in the job offer (and it is not otherwise required by law), then that deduction is not permissible, and the wage requirement will not be met if it reduces the wage below the required rate[1]. Id. In addition, the work contract, which the employer is required to provide to the employee, must, at a minimum, contain all the information required to be disclosed in the job offer, including all deductions not required by law that will be made from the worker's pay. 20 CFR 655.122(q). Further, all deductions that reduce the wage below the required rate must be reasonable. A reasonable deduction does not include a profit or benefit to the employer or to any affiliated person. 20 CFR 655.122(p)(2). In addition, a reasonable deduction cannot be primarily for the benefit or convenience of the employer. Id. As clearly articulated in Field Assistance Bulletin 2009-02, there is no difference between deducting a cost directly from a worker's wages and improperly shifting a cost that should have been borne by the employer to the employee. http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf. The guidelines

[1] The H-2A regulations require the payment of the highest of the offered wage, the Adverse Effect Wage Rate (AEWR), the prevailing hourly rate, the prevailing piece rate, the agreed upon collective bargaining rate, or the Federal or State minimum wage, and requires the employer to offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. See 20 CFR 655.122(a) and (l) and 29 CFR 501.1(c).

provided here further clarify the regulations in 20 CFR part 655 governing when deductions may be made.

Prohibited Deductions

While certain deductions can be made if the required criteria are met, others are never permitted. The regulation at 20 CFR 655.135(j) provides that employers are prohibited from shifting costs of any kind for any activity related to obtaining the H-2A labor certification, such as the employer's attorneys' fees, application fees, or recruitment costs. Further explanation of these prohibited deductions may be found at http://www.dol.gov/whd/FieldBulletins/fab2011_2.pdf. Further, deductions cannot be made for tools and equipment required to perform work, 20 CFR 655.122(f), nor for housing or daily transportation when required to be provided by the employer. 20 CFR 655.122(d), (h)(3).

Voluntary Assignment of Wages

An employer may make reasonable deductions from wages, such as for insurance or union dues, where the employee has voluntarily assigned a sum to another party (such as a creditor, donee, or other third party). This voluntary assignment of wages may not include a profit to the employer or any affiliated person, and may not be primarily for the benefit or convenience of the employer. 20 CFR 655.122(p). The term "affiliated person" includes but is not limited to agents, agricultural associations, petitioners, recruiters, facilitators, placement services, employment services and others who furnish workers, any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship.

The Department considers the job offer essential for providing the workers sufficient information to make informed employment decisions. 75 FR 6906 (Feb. 12, 2010). As such, the job offer must specify all deductions which the employer will make from the worker's paycheck. In order to be a truly voluntary deduction, the employee must have a meaningful opportunity and an independent choice to refuse or decline the deduction, as well as to cease participation at any time (consistent with administrative practicability). 20 CFR 655.122(p), 29 CFR part 531.

Deductions for Personal Savings Programs

A common deduction involves the employee's voluntary request to participate in a personal savings program. An employee's voluntary participation in such a savings program is best evidenced by a signed and dated document in which the employee is provided an option to participate. An agreement between the employer and the employee shall provide the employee with some flexibility in choosing the amount or percentage of the deduction, as well as an option to change the amount or percentage. The employer may choose to offer a limited number of options for amounts or percentages for administrative practicality. Regardless what other options are provided, the agreement must allow the employee to stop the deduction as soon as administratively feasible during the course of employment. In addition, and in order to comply with requirements prohibiting preferential treatment of H-2A workers, 20 CFR 655.122(a), an H-2A employer must offer the same options to workers employed in corresponding employment as

are offered to H-2A workers and must handle deductions and remittances in a manner that does not provide preferential treatment to the H-2A workers.

Wages must be paid when owed. If the employee voluntarily requests that a savings deduction be remitted to another party, including an affiliated party for transmission to the designated recipient, the employer must remit the deducted amount to that party no later than the payday on which the amount is due. Neither the employer nor any person acting in the employer's behalf or interest or any other affiliated person may derive any benefit or profit from the transaction or profit directly or indirectly from any market or exchange rates used in the transaction. 29 CFR 531.35, 531.40. Any accrued interest must be provided to the employee.

An H-2A employer must keep accurate records of an employee's earnings, including the worker's earnings per pay period "and the amount of and reasons for any and all deductions taken from the worker's wages." 20 CFR 655.122(j)(1). If the employer transmits the deduction to an affiliated party for transmission to the recipient designated by the employee, the employer must be able to demonstrate that its affiliate promptly transmitted the money to the designated recipient on behalf of the employee.

Deductions for Health Insurance Plans

Another common deduction made at the employee's voluntary request is for a health insurance plan for injuries or illnesses arising outside of employment. In addition to the above described requirements for deductions, and even if the plan is not being offered to a wide variety of workers (a "universal" plan), the employer has an obligation under the H-2A program to comply with the prohibition against preferential treatment of H-2A workers and to ensure that at least equal benefits are offered or provided to U.S. workers. Where, for example, the employer contributes to the plan for its H-2A workers, equal contributions are required for corresponding domestic workers. Similarly, where no contributions are made but the employer makes premium deductions at the H-2A worker's request, the employer must offer and make deductions for corresponding domestic workers who request them.

Regardless of whether the health insurance plan is offered by a person or entity who is affiliated with the employer, the employer has a responsibility to ensure that neither the employer nor any other affiliated person profits from the plan.

Compliance with Applicable Laws

20 CFR 655.135(e) requires the employer to comply with all applicable Federal, State, and local laws and regulations as they relate to the H-2A employment.

For example, wage deductions for health insurance coverage or savings programs may constitute employee contributions to an employer sponsored group health plan or retirement savings plan subject to the reporting, disclosure, fiduciary, enforcement, and other provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Many states have specific requirements addressing voluntary assignment of wages, including capping the total amount that may be assigned per pay period, requiring specific authorization forms, and establishing the amount of time in which amounts must be deposited. Unless preempted by a federal law, such as ERISA, these and other state law deduction requirements must be accounted for in ensuring that wages are received free and clear.

Enforcement Guidance

Deductions such as these discussed here should be closely scrutinized in enforcement actions to ensure that the agreement was in fact voluntary and not a de facto condition of employment. The guidance set forth in this Bulletin articulates general principles that WHD will apply to similar agreements. The signing of a document by a prospective worker stating that he/she has agreed to pay a fee or have a particular voluntary assignment of wages does not, in and of itself, establish that the fee or the assignment is voluntary. Such documents and the circumstances surrounding the signing of those documents should be closely scrutinized to ascertain the bona fides of the assertion that the agreement was voluntary. Whether a worker chooses not to have wages voluntarily assigned to a program offered by the employer or any affiliated person may not affect the worker's current or future participation in the H-2A program.

In determining whether a deduction for an assignment of wages is truly voluntary and permissible, WHD will consider the requirements listed in this guidance, including that:

- The deduction is initiated at the worker's request;
- The employer or any person acting in the employer's interest or behalf, or any other affiliated person derives no profit from the transaction;
- The wages were paid free and clear;
- The worker has an independent choice to have the deduction or not;
- The worker may designate the amount or cease having the deduction made (within administrative practicalities), and the disposition of any such deduction comports with the requirements above;
- The worker's employment would not be impacted by a decision not to have the deduction made; and
- The employer (or anyone acting on the employer's behalf or any other affiliated person) has not in any manner influenced or coerced the worker in regard to the deduction.

Further, in participating in plans or programs that provide benefits to H-2A workers, employers must comply with the regulatory requirement at 20 CFR 655.122(a) that the employer's job offer to U.S. workers provide no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.

In summary, in order for a deduction to be permissible, it must:

- Be disclosed in the job offer (if not required by law to be deducted);
- Be reasonable;
- Provide no profit to the employer or any affiliated person; and
- Be made in accordance with other H-2A regulatory requirements as well as other applicable Federal and State law requirements.

As explained at 29 CFR 501.16, the Wage and Hour Division has the authority to pursue recovery of improper deductions, such as recruiter fees or other costs improperly deducted or paid in violation of the required assurances under the H-2A program, which forbid such deductions and payments. Additional information on determining whether deductions are reasonable, that payments are received free and clear, and when it is permissible to make deductions for payments to third parties is explained in greater detail at 29 CFR part 531.