



U.S. Wage and Hour Division



U.S. Department of Labor Wage and Hour Division

Agricultural Enforcement: H-2A

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ENFORCEMENT OF CONTRACTUAL
OBLIGATIONS FOR TEMPORARY ALIEN
AGRICULTURAL WORKERS ADMITTED
UNDER SECTION 218 OF THE
IMMIGRATION AND NATIONALITY ACT



Wage and Hour Scope



- Contractual Obligations include wages, benefits, and working conditions
 - Housing
 - Transportation
 - $\frac{3}{4}$ Guarantee



Wage and Hour Scope



Workers covered include:

- H-2A visa holders
- Qualified U.S. workers



Wage and Hour Scope



- Offer of employment to qualified U.S. workers
 - Begins no more than 75 calendar days and no fewer than 60 calendar days from date of need
 - Ends 30 days after the first date the employer requires H-2A services or the last date of the employer's need
- Employers who violate this provision are subject to a recommendation for debarment



Wage and Hour Scope



- **Corresponding employment** includes U.S. workers newly hired in the same occupations and during the period of time set forth in the job order for which the H-2A workers were sought

- **Laid off/displaced U.S. workers**
 - Within 60 days before or after the date of need
 - Only for lawful, job-related reasons
 - Employers violating this provision are subject to penalties and recommendation for revocation or debarment

- **Discrimination prohibited**



Rates of Pay



● Highest of any of these applicable rates:

- AEWWR
- Prevailing Wage
- Federal Minimum Wage
- State Minimum Wage

● Rate is obtained from ETA NPC



Housing



- Provided at no charge to those employees who are not reasonably able to return to their permanent residence at the end of the work day
- Inspected and approved by SWA before occupancy
 - If not inspected, housing must still meet applicable safety standards prior to occupancy
- Maintained during occupancy to meet the appropriate OSHA or ETA standard
 - Rental accommodations must meet applicable local standards



Transportation



- Provided daily to/from camp/fields at no charge to workers in employer-provided housing
- Must comply with all applicable Federal, State, or local laws and regulations
 - USDOT safety standards, including the Federal Motor Carrier Safety Regulation, apply to commercial motor vehicles
- When more protective standards do not apply, safety standards found in MSPA serve as a minimum



Transportation and Subsistence Costs



● Inbound

- If not advanced or provided by the employer, must be paid by the employer once the worker completes 50 percent of the work contract period (H-2A requirement)

● Outbound

- If the worker completes the work contract period, must be provided or paid for by the employer



Labor Contractors: H-2ALCs



- Person who does not otherwise qualify as a fixed-site employer or an agricultural association (or an employee of a fixed-site employer or agricultural association)
- Engages in recruiting, soliciting, hiring, employing, furnishing, housing, or transporting
- Similar to, but distinguishable from, FLC



Labor Contractors: H-2ALCs

Bonding Requirements



- \$5,000 for less than 25 employees
 - \$10,000 for 25 to 49 employees
 - \$20,000 for more than 50 employees
- ▶ See 29 CFR 501.8 for more information



Labor Contractors: H-2ALCs

Additional Assurances and Obligations



- Maintain place of business (physical location) in the U.S. and a means by which it may be contacted for employment
- Provide FLC Certificate of Registration (if required) and identify FLC activities authorized to perform
- List name and location of each fixed-site employer to which the H-2ALC expects to provide H-2A workers, beginning/ending dates, and description of the crops and activities



Labor Contractors: H-2ALCs

Additional Assurances and Obligations



- Conduct separate positive recruitment for each area of intended employment
- Provide workers' compensation insurance under State law or otherwise
- Attest that housing and transportation complies with applicable standards
 - If employer-provided or secured, the H-2ALC must obtain a written statement that such housing and/or transportation complies with applicable standards



$\frac{3}{4}$ Guarantee



- Employers must guarantee to offer the worker employment for a total number of hours equal to at least $\frac{3}{4}$ of the workdays in the contract period
- Guarantee period:
 - Begins on the first workday after the worker arrives at the place of employment (or the contractual first date of need, whichever is later)
 - Ends on the date the contract expires (including contract extensions)
- Failure to meet this provision would require employer to supplement workers' pay to meet the $\frac{3}{4}$ guarantee



$\frac{3}{4}$ Guarantee



- Employers must maintain accurate records of hours offered
- Does not apply to H-2A workers displaced due to referrals of U.S. workers after the employer's date of need



Records



- Wage statements must include:
 - Total earnings for the pay period
 - Hours offered
 - Hours actually worked
 - Hourly rate and/or piece rate of pay (including units produced daily for piece rate)
 - All deductions made and the reasons for doing so

- Must be retained for no less than three years after the completion of the work contract

- Must be made available for inspection and transcription by an authorized representative of the Secretary



Termination



- Termination for cause, failure to report for employment at the beginning of the contract period, or voluntary abandonment (failure to show up for work for five consecutive days)
- Must notify DHS and DOL not later than two working days from termination or abandonment
- Employers are prohibited from hiring H-2A workers if the employer laid off U.S. workers 60 days before or after the date of need



Civil Money Penalties (CMPs)



● \$1,000 penalty for most violations remains unchanged



● \$5,000 penalty for willful failure to meet a covered condition of the work contract



● \$5,000 penalty for willful discrimination



Civil Money Penalties (CMPs)



- \$25,000 for death or serious injury relating to housing or transportation
- \$50,000 for death or serious injury if repeat or willful
- \$100,000 if due to employer failure to remedy violative conditions



Debarment and Revocation



- WHD recommendation to ETA
 - Substantially violated material terms or conditions
- ETA will now have authority to revoke certification
 - WHD can also make a revocation recommendation to ETA



Changes to 29 CFR 780



- Christmas trees under FLSA “agriculture”
 - ▶ Trees produced through the **application of extensive agricultural or horticultural techniques** to be harvested and sold for **seasonal ornamental use** as Christmas trees are considered to be **agricultural or horticultural commodities**.



Changes to 29 CFR 780



- Trees to be used as Christmas trees which are **gathered in the wild**, such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are **not agricultural or horticultural commodities** for purposes of sec. 3(f).



Changes to 29 CFR 788



- FLSA 13(b)(28) provides an exemption from **an exemption from minimum wage and overtime** to * * * any employee employed in planting or tending trees, cruising, surveying, or felling timber, or **in preparing** or transporting logs or **other forestry products** to the mill, processing plant, railroad, or other transportation terminal, **if the number of employees** employed by his employer **in such forestry or lumbering operations does not exceed eight.**



Changes to 29 CFR 788



- 788.10 Preparing other forestry products
 - Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques.