



## U.S. Department of Labor Wage and Hour Division

### *H-2B Program Enforcement*



## WHD Enforcement *Source of Authority*

The Department of Homeland Security (DHS) requires that employers receive H-2B temporary labor certification from the Department of Labor (DOL). DHS also delegated H-2B program enforcement authority to DOL. DOL's Wage and Hour Division (WHD) enforces compliance with the conditions of an H-2B petition and DOL-approved temporary labor certification.



## WHD Enforcement *Responsibility*



- Whether U.S. workers were offered employment.
- Whether U.S. workers were laid off or displaced.
- Payment of required wages and 3/4 guarantee.
- Other obligations of the job order and certification.

3



## WHD Enforcement *Authority*



Conduct investigations, and when appropriate:

- Impose civil money penalties.
- Provide make-whole relief, such as back wages for U.S. or H-2B workers, or reinstatement of a U.S. worker wrongfully laid off or rejected for employment.
- Debar from future labor certifications.

4



## WHD Enforcement Scope



Workers covered under the H-2B regulations:

- H-2B visa holders.
- Workers in corresponding employment.
- U.S. workers improperly laid off or not hired.

5



## Corresponding Employment



- The employment of workers who are **not** H-2B workers who perform:
  - substantially the same work as **in the job order** or
  - substantially the same work **performed by the H-2B workers**
    - Certain exceptions apply.
- To qualify as corresponding employment, the work must be performed during the period of the job order, including any ETA-approved extensions.

6



## Corresponding Employment *Exceptions to the Definition*



Exceptions are made for certain incumbent workers who perform the work described in the previous slide and who:

- Were continuously employed during the **prior 52 weeks**; or worked or were paid for at least 35 hours in at least 48 of the previous 52 weeks, and averaged at least 35 hours per week over the prior 52 weeks, provided their terms and working conditions are not substantially reduced during the job order; or
- Are covered by a **collective bargaining agreement** or individual employment contract guaranteeing 35 hours of work per workweek and continued employment through the period of employment covered by the job order, except for dismissal for cause .

7



## Job Opportunity



- The job must be a bona-fide, full-time temporary position, with full-time defined as **35 or more hours per week**.
- Workweek is defined as a regularly recurring period of 168 hours (7 consecutive 24-hour days)
- There must be no strike or lockout at any of the employer's worksites in the same geographic area.

8



## Offer of Employment to U.S. Workers



### Preferential treatment of H-2B workers is prohibited.

- Employers must offer U.S. workers terms and working conditions at least as favorable as those offered or provided to H-2B workers.
- Employers must not impose any restrictions or obligations on U.S. workers that will not also be imposed on H-2B workers.

9



## Offer of Employment to U.S. Workers



- **Positive Recruitment:** Independently conduct DOL-specified recruitment activities and cooperate with the State Workforce Agency by accepting referrals of eligible U.S. workers.
- **Hiring period:** Provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 21 days prior to the date of need.
- **Rehiring:** Contact former employees from the previous year in the same occupation (unless they abandoned the job or were dismissed for cause) and offer them the job.

10



## Layoff and Displacement of U.S. Workers



- **No improper layoffs** from 120 days before the date of need through the end of the job order.
- If such a layoff has occurred, the employer must first offer the job opportunity to those laid-off U.S. workers before hiring any H-2B workers.
- Applies to any similarly employed U.S. worker in the same occupation and geographic area specified in the job order.
- During the job order period, permissible only if all H-2B workers are laid off before any U.S. worker in corresponding employment.

11



## Payment of Required Wages



- The offered wage must equal or exceed the highest of:
  - Prevailing wage obtained from ETA, or
  - Federal, State, or local minimum wage.
- Wages must be paid **free-and-clear**.
- Employers may pay based on **commissions, bonuses, piece rates, or other incentives**, as long as the employer guarantees that wages equal the offered wage rate calculated in every workweek, and has accurately advertised the pay rates in all required recruiting.

12





## Payment of Required Wages, cont.



- Employers may pay based on **commissions, bonuses, piece rates, or other incentives**, as long as the employer guarantees that wages equal the offered wage rate calculated in every workweek, and has accurately advertised the pay rates in all required recruiting.
- Employers must pay **every 2 weeks or according to prevailing practice** in the area of intended employment; whichever is **more frequent**.

13




## Three-Fourths Guarantee




- Guarantee to offer the worker employment for a total number of hours equal to **at least  $\frac{3}{4}$  of the workdays on the job order** in each 12-week period (or 6-week period, for job orders lasting less than 120 days).
- Each workday must consist of a **full number of hours** of work time as specified **in the job order**.
- Guarantee must **begin the first day of the job order or the first workday after the worker arrives**, whichever is later.

14




**U.S. Wage and Hour Division**

## Three-Fourths Guarantee



- Employers must maintain accurate records of hours offered and hours actually worked.
- Failure to offer three-fourths of the hours in any 12- or 6-week period would require the employer to supplement the worker's pay to meet the three-fourths guarantee.


15



**U.S. Wage and Hour Division**

## Three-Fourths Guarantee

### *An Illustration*



An employer's certified 9142 indicates:

- 40-hour workweek
- five 8-hour days
- 36 weeks total.

The three-fourths guarantee requires the employer offer:

- 360 hours of work in each of the three 12-week periods.
- $360 = 40 \text{ hours/week} * 12 \text{ weeks} * 75\%$

If the hours offered don't meet this threshold in any of the 12-week periods, the employer must supplement the worker's pay.

16





## Three-Fourths Guarantee *An Illustration (cont)*



An employer's certified 9142 indicates:

- 40-hour workweek
- five 8-hour days
- 36 weeks total.



The three-fourths guarantee could still be met, even if:

- Rain makes work impossible for a full week every month.  
 $360 = 40 \text{ hours/week} * 9 \text{ weeks}$
- One day every week is lost to an unforeseeable contract cancellation.  
 $384 = 32 \text{ hours/week} * 12 \text{ weeks}$
- A hurricane causes business to shut down for two weeks.  
 $400 = 40 \text{ hours/week} * 10 \text{ weeks}$



17



## Three-Fourths Guarantee *An Illustration (cont)*



If a worker works 10 hours on one of those workdays, the employer may count the extra two hours as hours offered towards meeting the guarantee.



If the employer offers a regular workday but the worker declines to work, the employer may count up to eight hours towards meeting the guarantee.



If the employer offers 10 hours on a workday but the worker declines to work more than the regular schedule, the employer may not count the extra two hours towards the guarantee.

18



## Transportation & Visa Fees



- **Inbound: Provide or pay for** transportation and daily subsistence (lodging, as necessary, and meals) to the place of employment **or reimburse** workers once 50% of the job order has elapsed.
  - Note: FLSA requirement for Federal Minimum Wage and reimbursement in first workweek.
- **Outbound: Provide or pay for** return transportation and subsistence if the worker completes the job order period or is dismissed early.
- Employer is always liable for **visa fees** & related expenses in or before the first workweek.

19



## Other H-2B Program Obligations *Place of Intended Employment*



- The employer must not place an H-2B worker outside the area of intended employment listed on the job order.
- The employer is also prohibited from placing H-2B workers outside the certified occupations.

20



## Other H-2B Program Obligations *No Retaliation*



- Employer must not intimidate, threaten, discharge, or discriminate against any person who has exercised their rights under the regulations, including filing a complaint, testifying, consulting with an attorney, workers' center, etc.
- No person may be asked to waive or modify their statutory or regulatory rights under the H-2B program.

21



## Other H-2B Program Obligations *Deductions*



- Employers must make all deductions required by law.
- Other deductions must be disclosed in the job order – **undisclosed deductions are impermissible.**
- The amount of any other deduction must be reasonable
- Deductions for expenses that are for the primary benefit of the employer may not bring an employee's wages below the H-2B required wage rate.

22



## Other H-2B Program Obligations *Tools and Equipment*



- The employer must provide workers all tools, supplies, and equipment required to perform the assigned duties at no cost to the worker.

23



## Other H-2B Program Obligations *Prohibited Fees*



- The employer, its agent and its attorneys must not seek or receive payments from workers related to the certification, including agent or attorney fees and recruitment costs.
- The employer must contractually forbid any agent or recruiter from seeking or receiving payments from prospective workers.

24



## Other H-2B Program Obligations *Disclosure*



- The employer must provide a **copy of the job order** to each H-2B and corresponding worker.
- Timing of job order disclosure:
  - H-2B workers who are abroad must receive the job order no later than when they apply for the visa.
  - H-2B workers already in the U.S. must receive the job order no later than when the job offer is made.
  - Corresponding workers must receive the job order no later than the first day of employment.
- Job order must be provided in a language understood by the worker.

25



## Other H-2B Program Obligations *Notification*



- Notify ETA in writing within two days if a worker separates prior to the end date of employment certified in the Application. In addition, notify DHS if the separation is of an H-2B worker.
- Abandonment: Failure to report for work for five consecutive working days without the consent of the employer.

26



## Other H-2B Program Obligations Notice of Worker Rights



- Posters which set out the rights and protections of H-2B workers and workers in corresponding employment must be posted at each worksite.
- Poster may be obtained from the DOL.
- Must be posted in English; must also be posted in another language as necessary and made available.
- Must be posted in a location where employees can readily see it.

27



## Other H-2B Program Obligations Notice of Worker Rights



# EMPLOYEE RIGHTS UNDER THE H-2B PROGRAM

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

The Immigration and Nationality Act (INA) allows for the employment of temporary, non-immigrant workers in nonagricultural labor or services (H-2B WORKERS). Department of Homeland Security (DHS) regulations allow for the employment of **H-2B WORKERS** only if the wages and working conditions of U.S. workers would not be adversely affected.

Two types of workers have rights under this program:

- **H-2B WORKERS** and
- **OTHER WORKERS** performing substantially the same work included in the H-2B job order or substantially the same work as that performed by the H-2B workers, except for certain long-term existing employees and certain employees under a collective bargaining agreement or individual employment contract.

### DISCLOSURE

- To receive accurate, **WRITTEN INFORMATION** about the wages, hours, working conditions, and benefits of the employment being offered
- To receive this information before getting a visa (in the case of H-2B workers outside the U.S.) but no later than the first day of work (for other workers)
- To receive this information in a language understood by the worker

### WAGES

- To be **PAID** at least every two weeks at the rate indicated in the job order for all hours worked
- To be informed in writing of all **DEDUCTIONS** (not otherwise required by law) that will be made from the worker's paycheck
- To receive an itemized, written **STATEMENT OF EARNINGS** (pay stub) for each pay period
- To be guaranteed employment or payment for at least **THREE-FOURTHS (75%)** of the hours specified in the job order over a 90-day period for \$100,000 or more per year





## Other H-2B Program Obligations



- Furnish an **earnings statement** to each worker on or before each payday (which must be the more frequent of: every two weeks or the prevailing frequency).
- Retain required documents for 3 years.
- Cooperate with WHD investigators.

29



## Remedies *Back Wages*



- For H-2B and corresponding workers, recovery of unpaid wages (including improper deductions and prohibited payments).
- For U.S. workers improperly laid off or rejected for employment, make-whole relief.

30



## Remedies *Civil Money Penalties (CMPs)*



- The maximum CMP allowed under the INA is \$10,000 per violation.
- Where appropriate, CMPs are set equal to the amount of back wages assessed.
- CMPs may be adjusted according to seven regulatory factors.

31



## Remedies *Debarment*



- Applicable to employers, agents, and attorneys.
- WHD has the independent authority to debar from 1 to 5 years.
- WHD has concurrent debarment jurisdiction with OFLC.
  - WHD and OFLC will coordinate a single debarment proceeding for specific violation(s) cited

32



## Other Remedies



- Make-whole relief for any person who has suffered discrimination.
- Instatement or reinstatement for any U.S. worker who has been improperly rejected, laid off, or displaced.

33



## Employer Appeal Rights



- Following a WHD H-2B determination, employers may request a hearing with an Administrative Law Judge and, subsequently, appeal to the Administrative Review Board.

34



## Additional Information



- Outreach materials, including fact sheets, workers' rights cards, FAQs, and posters, are available on the WHD website at <http://www.wagehour.dol.gov>
- WHD will continue to issue additional outreach material as more H-2B questions arise.
- Toll-free information and help line is available 8am-5pm in your time zone at **1-866-4US-WAGE** (1-866-487-9243)

35



## Disclaimer



**This presentation is intended as general information only and does not carry the force of legal opinion.**

**The Department of Labor is providing this information as a public service. This information and related materials are presented to give the public access to information on Department of Labor programs. You should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publications of the materials and the modification of these pages. Therefore, we make no express or implied guarantees. The *Federal Register* and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention.**

36



**Thank You**

