

Fact Sheet #78J: Employer Obligations Under the Temporary H-2B Visa Cap Increase for the Period April 1, 2022 to September 30, 2022

This fact sheet provides information about employer obligations under the recently published temporary final rule “Exercise of Time-Limited Authority to Increase the Numerical Limitation for Second Half of FY 2022 for H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers” (“Rule”).

This Rule increases the number of H-2B visas available in the second half of fiscal year 2022 (April 1, 2022 - September 30, 2022) by 35,000 for employers meeting certain criteria. Employers seeking to access these additional visas should review the Rule and follow established Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) procedures. This Fact Sheet explains the obligations of an employer once it has submitted an I-129 petition and Form ETA-9142B-CAA-6 to USCIS.

Employers employing H-2B visa workers under a petition approved under this Rule must comply with all current H-2B visa program requirements as well as the additional obligations listed below. General H-2B visa program requirements are summarized in [Fact Sheet 78](#). This Fact Sheet does not discuss employer obligations under previous rules increasing H-2B visas in FYs 2017-2019, 2021, or the first half of FY 2022.

Who Must Comply with this Rule?

Employers must comply with the requirements listed in this fact sheet if:

- The employer submitted an I-129 petition between May 18, 2022 and September 30, 2022;
- The I-129 petition was for a period of need beginning in the second half of fiscal year 2022 (April 1, 2022 – September 30, 2022); and
- The I-129 petition was subject to the H-2B visa cap (generally meaning that the petition was for the employment of H-2B workers who had not previously been counted against the H-2B visa cap for fiscal year 2022, other than fish roe processors or workers performing labor or services in the Commonwealth of Northern Mariana Islands or Guam). Generally, a petition for H-2B workers to extend their stay, change employers, or change the terms and conditions of employment will not be subject to the H-2B visa cap. For more information on the H-2B visa cap and exemptions, please visit the [U.S. Citizenship and Immigration’s website here](#)).

Supplemental Recruitment

Certain employers subject to this Rule will need to conduct supplemental recruitment of U.S. workers. Specifically, those employers that submit the I-129 petition and Form ETA-9142B-CAA-6 to USCIS 30 or more days after their certified date of need must conduct additional recruitment steps.

Employers required to conduct supplemental recruitment must **place a new job order with the State Workforce Agency (SWA) no later than the next business day after submitting the I-129 petition to USCIS**. The job order must remain posted for at least 15 days. The Department of Labor maintains a comprehensive directory of contact information for each SWA at <https://www.dol.gov/agencies/eta/foreign-labor/contact>. During the time that the job order is active, employers required to conduct supplemental recruitment must also take the following steps:

- **If the occupation or industry is traditionally or customarily unionized, contact the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).** Employers must provide a copy of the job order and request assistance in recruiting qualified

U.S. workers for the job opportunity. To determine which occupations are traditionally or customarily unionized, and to obtain information about how to contact the AFL-CIO, employers should search the resources available on the OFLC website, under the “Customarily Unionized H-2B Occupations” tab on the left-hand side of the OFLC homepage:
<https://www.dol.gov/agencies/eta/foreign-labor>.

- **Contact, by email or other electronic means, the nearest comprehensive American Job Center (AJC) servicing the area of employment, request staff assistance in advertising and recruiting qualified U.S. workers, and provide the AJC with job order information.** Employers may locate the nearest local AJC at <https://www.careeronestop.org/> and by selecting the “Find Local Help” feature on the main homepage. This feature will navigate the employer to a search function called “Find an American Job Center” where the city, state, or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the website will return a listing of the name(s) of the AJC(s) serving that geographic area as well as a contact option(s) and an indication as to whether the AJC is a “comprehensive” or “affiliate” center. Employers must contact the nearest “comprehensive” AJC serving the area of intended employment where work will commence or, where a “comprehensive” AJC is not available, the nearest “affiliate” AJC.
- **Contact, by mail or other effective means, all former U.S. workers, including workers who were furloughed or laid-off, during the period beginning January 1, 2020, until the date the I-129 petition was submitted, who were employed in the occupation at the place of employment.** Employers must disclose the terms of the job order to these workers and solicit their return to the job. The contact and any disclosures must be made in a language understood by the worker.
- **Provide the job order to the bargaining representative of employees in the occupation and area of intended employment. If there is no bargaining representative, post the availability of the job opportunity for at least 15 days in at least two conspicuous locations at the place of employment.**

Obligation to Hire U.S. Applicants

Employers required to conduct supplemental recruitment must hire any qualified and available U.S. worker who applies or who is referred for the job opportunity until the date on which the last H-2B worker departs for the place of employment, or 30 days after the last date the job order is posted. Rejections of U.S. workers may only be for lawful, job-related reasons. Job offers may not impose on U.S. workers any qualifications, requirements, restrictions, or obligations that will not be imposed on the employer’s H-2B workers. All qualifications and requirements must be disclosed in the job order.

Compliance with All Employment-Related Laws, Including Laws Related to COVID-19 and Vaccination

All employers subject to this Rule must comply with all Federal, State, and local employment-related laws and regulations including, where applicable, health and safety laws related to COVID-19 worker protections, any right to time off or paid time off for COVID-19 vaccination, or reimbursement for travel to and from the nearest available vaccination site.

Notification of Right to Vaccination

All employers must notify H-2B workers approved under this Rule that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites. WHD published a poster in [English](#) and [Spanish](#) for employers’ optional use.

Recordkeeping Obligations

All employers employing H-2B workers under this Rule must keep the documents listed below for a period of 3 years from the date of certification. These documents must be retained in addition to all other H-2B recordkeeping requirements summarized in [Fact Sheet 78i](#). All documentation must be provided to the Departments of Homeland Security or Labor upon request, which includes:

- A copy of Form ETA-9142B-CAA-6
- Evidence that the employer was experiencing irreparable harm or would experience impending irreparable harm without the ability to employ all H-2B workers requested on the H-2B petition
- Documentation of recruitment activities, if required
- Recruitment report

Cooperation with the Departments of Labor and Homeland Security

WHD will be conducting investigations of employers' compliance with all H-2B requirements, including these provisions when applicable. The Department of Labor's Office of Foreign Labor Certification and the Department of Homeland Security's USCIS will be conducting audits of compliance with these employer obligations. Employers must cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by the Department of Labor or the Department of Homeland Security.

All requirements listed above can be found at [87 Fed. Reg. 30334 \(May 18, 2022\)](#).

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division website:

<https://www.dol.gov/agencies/whd> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4US-WAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4US-WAGE
[Contact Us](#)