

Wage and Hour Division

H-2B Temporary Nonimmigrant Worker Visa Program Enforcement



U.S. Department of Labor
Wage and Hour Division



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Wage and Hour's Enforcement

WHD enforces laws governing wages, hours, working conditions, leave, and child labor, including:

- *Fair Labor Standards Act (FLSA)*
- *Family and Medical Leave Act (FMLA)*
- *Service Contract Act (SCA) and Davis-Bacon and Related Acts (DBRA)*
- *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*
- *OSHA Field Sanitation Standards*
- *Immigration and Nationality Act (INA) (H-1B, H-2B, H-2A)*



This Presentation

This presentation will:

- Summarize H-2B program compliance principles under the 2015 Interim Final Rule (2015 Rule);
- Identify common violations; and
- Review the investigatory process.

This presentation will not:

- Discuss responsibilities of other agencies; or
- Summarize any H-2B rules prior to the 2015 Rule.



Buy American Hire American Executive Order

It shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the U.S. of workers from abroad, including section 212(a)(5) of the INA.

The Department of Labor is committed to:

- Rigorously administering and enforcing the laws relating to the admission of workers into the U.S. under the visa programs;
- Continuing to engage stakeholders on how the programs may be improved to provide better protection; and
- Making referrals of criminal fraud to the DOL Office of the Inspector General

DOL Press Release:

<https://www.dol.gov/newsroom/releases/eta/eta20170404-0>

<https://www.dol.gov/newsroom/releases/opa/opa20170606>



The H-2B Visa Program

- The Immigration and Nationality Act (INA) provides for the admission of nonimmigrants in the H-2B visa classification to perform temporary non-agricultural labor or services in the United States. 8 U.S.C. § 1101(a)(15)(H)(ii)(b).
- The Department of Homeland Security (DHS) delegated H-2B enforcement responsibility to WHD on **January 18, 2009** for all Applications for Temporary Employment Certifications filed on or after that date.
- Regulations: 20 CFR part 655, 29 CFR part 503



WHD's H-2B Enforcement Responsibility

- Whether the employer conducted the required recruitment for U.S. workers.
- Whether U.S. workers were offered employment.
- Whether U.S. workers were improperly laid off or displaced.
- Review of job order and certification obligations, including wages and working conditions, for H-2B workers and protected-U.S. workers.



Employer Obligations to U.S. Workers



U.S. Worker Recruitment Requirements

The employer must:

- Submit a job order to the State Workforce Agency (SWA), which must remain open until 21 days before the employer's first date of need;
- Place a newspaper advertisement on two separate days, one of which must be a Sunday;
- Contact its former U.S. employees;
- Maintain a recruitment report.



U.S. Worker Hiring Requirements

- The employer must hire qualified U.S. applicants, and may not refuse to hire the U.S. applicants for discriminatory reasons.
- Employers must not impose any restrictions or obligations on U.S. workers that will not also be imposed on H-2B workers.
 - Each job qualification and requirement must be listed in the job order



Prohibition of Preferential Treatment

- An employer must offer U.S. workers terms and working conditions at least as favorable as those offered or provided to H-2B workers.



Prohibition of U.S. Worker Layoff or Displacement

- The employer may not layoff its U.S. employees in the period beginning 120 days before the date of need through the end of the certification.
 - If such a layoff has occurred in the period beginning 120 days before the first date of need, the employer must contact those former workers and solicit their return to the job.
 - If a lawful, job-related layoff is necessary after H-2B workers have arrived, the employer must layoff all H-2B workers before laying off U.S. workers.



Additional Assurances and Obligations



Payment of Required Wages

- The offered wage must equal or exceed the highest of the:
 - Prevailing wage obtained from ETA, or
 - federal, state, or local minimum wage.
- The employer must pay the offered wage during the entire period of employment.
- Wages must be paid free-and-clear.
- The employer must pay at least every two weeks, or the prevailing frequency in the geographical area.



Travel Time and Hours Worked

- Ordinary home-to-work travel is not work time
- Travel between job sites during the normal work day is work time
 - If an employee is required to report to a meeting place to receive instructions, perform other work there, or to pick up equipment or tools, the travel from the designated meeting place to the work places is part of the day's work and must be counted as hours worked.
- If the employee is required to return to the employer's office or job site, the travel time back to the office is counted as hours worked.



Tools, Equipment, and Deductions

- Employers must make all deductions required by law.
- Deductions not required by law must be disclosed in the job order and must be reasonable.
- Deductions for expenses that are for the primary benefit of the employer are not reasonable and therefore may not bring an employee's wages below the H-2B required wage rate.
- The employer must provide workers all tools, supplies, and equipment required to perform the assigned duties at no cost to the worker.



Disclosure

- The employer must provide a copy of the job order to the H-2B workers.
 - 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.
- Job order must be provided in a language understood by the worker.



Transportation and Visa Fees

Inbound transportation:

- The employer must provide *or* pay for transportation and daily subsistence to the place of employment *or* reimburse workers when 50% of the job order has elapsed.

Outbound transportation:

- The employer must provide *or* pay for return transportation and subsistence if the worker completes the job order period or is dismissed early with or without cause.

Visa fees:

- Employer is always liable for visa fees & related expenses in or before the first workweek.



Place of Intended Employment & Job Classification

- 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 occupation listed on the job order.



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 whom the employer engages directly or indirectly in international recruiting from seeking or receiving payments from prospective workers.



Other H-2B Program Obligations

- The job must be a bona-fide, full-time temporary position, with full time defined as 35 or more hours per week
- There must be no strike or lockout at any of the employer's worksites in the same geographic area
- Display workers' rights poster
- Provide an earnings statement to each worker on or before each payday.
- Retain required documents for 3 years.



Other H-2B Program Obligations

- Cooperate with WHD investigators.
- Notify ETA and DHS in writing within two days if a worker separates prior to the end date of employment certified in the Application.
- Not intimidate, threaten, discharge, or discriminate against any person who has exercised their rights under the H-2B program.
- Comply with other applicable laws.
 - FLSA overtime



Investigations

- Meeting(s) with the employer
- Tour of the establishment
- Records review
- Confidential interviews with employees
- Determination Letters (if applicable)



Sanctions and Remedies

- Recover unpaid wages
- Seek make whole relief, reinstatement, or reinstatement for laid off or improperly rejected U.S. workers
- Assess civil money penalties
- Debar the employer, attorney, and/or agent for up to 5 years
- Recommend to ETA that current certification be revoked



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>

Toll-free information and help line is available 8am-5pm in your time zone at
1-866-4US-WAGE (1-866-487-9243)

